AN ABSTRACT OF THE DISSERTATION OF

Kathleen M. Sloan for the degree of Doctor of Philosophy in Environmental Sciences presented on May 25, 2007.
Title: Enhancing Cultural Resources Management and Improving Tribal Involvement in the NEPA Process Through the Development of a Tribal Environmental Policy Act.

Abstract approved:

_____

Courtland Smith

This dissertation presents an analysis of the historic preservation framework on tribal cultural resources management (CRM). It examines some of the challenges this framework poses to tribal governments working on cultural resources protection efforts within a compliance framework. An examination of five major laws that regulate the practice of CRM identifies some of the potential strengths and weaknesses of each law for meeting tribal CRM goals. A discussion of the background of CRM and tribal involvement in CRM efforts is presented in the context of cultural and environmental resources management. An examination of environmental law, specifically the National Environmental Policy Act (NEPA) is examined for its potential to strengthen tribal involvement in NEPA reviews and compliance efforts that impact tribal lands and resources. A discussion of Tribal Environmental Policy Acts, their origin, history, and potential to assist tribal efforts and improve tribal participation and impact analysis in NEPA reviews is

presented in the context of cultural resources management. Finally, the potential of a TEPA and TEPA development to assist tribal government efforts in review, assessment, and protection of cultural resources is presented as an additional tool for Tribal CRM that looks beyond historic preservation and includes a holistic treatment of environmental resources as cultural resources.

# Enhancing Cultural Resources Management and Improving Tribal Involvement in the NEPA Process Through the Development of a Tribal Environmental Policy Act

by
Kathleen M. Sloan

A DISSERTATION

submitted to

Oregon State University

in partial fulfillment
of the requirements for the
degree of

Doctor of Philosophy

Presented May 25, 2007
Commencement June 2008

Doctor of Philosophy dissertation of Kathleen M. Sloan presented on May 25, 2007.

APPROVED:

_____

Major Professor, representing Environmental Sciences

_____

Director of the Environmental Sciences Graduate Program

_____

Dean of the Graduate School

I understand that my dissertation will become part of the permanent collection of Oregon State University libraries. My signature below authorizes release of my dissertation to any reader upon request.

_____

Kathleen M. Sloan, Author

ACKNOWLEDGEMENTS

I would like to express my heartfelt thanks and gratitude to everyone that has contributed to my education and professional development. To my teachers and mentors who guided and advised me through this academic process, I would not have made it this far without you.

To my friends and colleagues at the Confederated Tribes of the Umatilla Indian Reservation, Cultural Resources Protection Program (CTUIR CRPP), I will be forever grateful for you opening my mind and my heart to what tribal efforts in cultural resources protection are about. My internship was the beginning of my real education and put me on this career path. CTUIR CRPP staff taught me more in a few short months than words can possibly capture or express. To my friends, colleagues, and teachers at the Yurok Tribe, *Wo'hklaw*, you have provided me the room and encouragement to grow both professionally and personally, on many levels. I will never forget the years I have spent with the Yurok People on your beautiful Klamath River and all that your patience, kindness and generosity have taught me. A special thanks to Robert McConnell, my friend and colleague, for the introduction to "the world according to Yurok".

To my son Dante, who is still my prime motivator for all I do in this life, this is for you. To my parents Phil and Sharon and my sisters Laura, Mary, and Sheila, for their encouragement along the way, many thanks. Much Love.

TABLE OF CONTENTS

Acronyms used in the text:

| | |
|---|---|
| ACHP | Advisory Council on Historic Preservation |
| AIRFA | American Indian Religious Freedom Act |
| ARPA | Archaeological Resources Protection Act |
| BIA | Bureau of Indian Affairs |
| CFR | Code of Federal Regulations |
| CIA | Cultural Impact Assessment |
| CRM | Cultural Resources Management |
| DOI | Department of the Interior |
| EA | Environmental Assessment |
| EIS | Environmental Impact Statement |
| EJ | Environmental Justice |
| EO | Executive Order |
| EPA | Environmental Protection Agency |
| FS | Forest Service |
| HIA | Health Impact Assessment |
| IRM | Indigenous Resources Management |
| MOA | Memorandum of Agreement |
| MTEC | Model Tribal Environmental Code |
| NAGPRA | Native American Grave Protection and Repatriation Act |
| NEPA | National Environmental Policy Act |
| NHPA | National Historic Preservation Act |
| NPS | National Park Service |
| OSU | Oregon State University |
| POA | Plan of Action |
| SHPO | State Historic Preservation Office |
| SIA | Social Impact Assessment |
| TCP | Traditional Cultural Property |
| TEC | Tribal Environmental Code |
| TEK | Traditional Ecological Knowledge |
| TEPA | Tribal Environmental Policy Act |
| THPO | Tribal Historic Preservation Office |
| WHO | World Health Organization |

# I. Introduction

The following is a study in Tribal Cultural Resources Management, or Tribal CRM. Tribal CRM is essentially the practice of tribe-specific cultural resources management as carried out for federally recognized tribal governments by tribal governmental employees or consultants under the direction of a tribe's governmental body. The basis of my research is a combination of education and experience as a Tribal CRM professional. In my five years as a Tribal CRM professional I have put into practice experience that includes environmental and cultural resources law, policy, and regulations at the federal, state, local, and tribal levels. I have prepared and submitted professional standard reviews and assessments for compliance with existing federal and state historic preservation, cultural resources, and environmental laws that promote a tribal perspective on both the resource and the appropriate management required by the resource.

I want to be clear that I do not intend to represent or speak for any tribal group, organization, or government. My perspectives are presented for the sake of discussion and for insights into problems and potential solutions presented for consideration. I speak from the perspective of a Tribal CRM practitioner, not a tribal member or representative. My critique of existing frameworks and approaches are based on practical and professional experience of working within this rubric of cultural resources law to attempt to accomplish something relevant to and reflective of tribal goals for cultural resources protection.

Goals for Tribal CRM programs are goals that can only be identified and determined by the tribal community and through the tribal government, and its programs and departments. A Tribal CRM program is usually a vehicle of a tribal government and is subject to the oversight and direction from that government. Tribal CRM professionals are asked to utilize their credentials and skills to both articulate and advocate for tribal resource management goals both for internal tribal projects and programs and outside agency reviews of federal "actions" and "undertakings" that trigger compliance with existing federal laws. My focus is as a practitioner who is required to utilize all applicable environmental laws to attempt to assist the Tribe in cultural resources protection throughout a tribal ancestral territory.

This study is a review of Tribal CRM, its role and purpose, the challenges it faces, and the opportunities it provides for tribal governments to take the lead on the development of a refreshed and renewed approach to CRM; one that promotes natural and cultural resource protection as the preferred alternative. This study contains background information on CRM, its roots in historic preservation, and examines the applicability and inadequacies of the existing rubric of federal historic preservation law that is the foundation of CRM as it is practiced in the United States (US) today. An examination of the potential for a National Environmental Policy Act (NEPA) inspired approach to Tribal CRM, and the assessment of potential impacts of "federal actions" by Tribal CRM programs is considered as an alternative to a problematic approach grounded in the National

Historic Preservation Act (NHPA) and historic preservation framework that currently dominates the practice of CRM, both inside and outside tribal governments. Finally, I propose that the development of tribal environmental policy acts (TEPAs) offer tribal governments the flexibility and enhanced role they might require in order to protect culturally significant and tribal trust resources in all NEPA "actions" with the potential to impact those resources, particularly if those impacts encroach onto tribal lands. This study is intended to provide useful information and an alternative approach, a TEPA approach, to Tribal CRM that may be better suited to tribal government goals and objectives for resources management and promoting tribal sovereignty.

## 1. Tribal Governments and Cultural Resources Management

American Indian tribes have been resource managers of their ancestral lands for thousands of years (Stapp and Burney 2002). Most tribes clearly articulate that they have lived on this continent since time immemorial. Understanding tribal history is crucial to understanding the development and evolution of Tribal CRM. American Indians have struggled with issues of loss of land (ancestral and reservation), loss of self-determination, diminished rights to manage their lands and resources since the first influx of European emigrants into North America. Contemporary Tribal CRM developed, and is evolving, out of necessity and a deep-rooted sense of obligation felt by many tribal governments to

protect culturally significant resources throughout their ancestral territories for the benefit of current and future generations of the tribe. The operative word in Tribal CRM is stewardship, and the emphasis is on protection, not simply preservation or scientific study.

American Indian tribes that have lands held in trust by the federal government have rights that affect management decisions with the potential to impact those tribal rights and trust resources. Concerns of tribal governments and American Indian communities over the protection of culturally significant and traditional resources within their ancestral lands are increasing, particularly on federal and reservation lands as those lands experience increased impacts resulting from development, changes in management strategies and priorities, and resource extraction efforts. Today, many tribal governments have pieced together a complex mosaic of traditional law, tribal law, federal Indian law, and federal cultural and environmental resources law in an attempt to protect lands and resources that they believe to be vital to their cultural survival. Too often, however, this patchwork approach to cultural resources protection and management falls short of actually promoting tribal interests or even protecting those resources for the use and benefit of the tribe, or future generations, but the patchwork is far more effective in meeting tribal goals than one rooted entirely within historic preservation law.

## 2. Essential definitions and terms

The field of CRM is steeped in academic, scientific, legal, agency, and practitioner jargon. This is compounded by the terms, definitions, and legal concepts that are associated with the study of tribal governments, tribal history, and resources management. I am providing some essential terms and definitions that are utilized in this discussion of Tribal CRM to help the reader understand a somewhat arcane and highly specialized area of resources management, specific to tribal governments. These terms also underscore the interdisciplinary nature of Tribal CRM. In order to be an effective Tribal CRM professional, a well-rounded knowledge of tribal history, federal Indian law and policy, and federal, state, and local environmental and cultural resources law, policy, and process are mandatory.

The first challenge in writing on this topic has been selecting a term to refer to the indigenous people who have resided in what is now the US for thousands of years prior to European contact. This in itself is incredibly difficult as a single term cannot accurately represent the diversity of autonomous cultures and political entities that exists pre-Contact and persist today. Adding to the challenge is the fact that the laws that I will be analyzing within this study are not consistent in their terminology. For instance, many laws and court rulings use the term "American Indians" as a catchall term to describe indigenous people in the US. Other laws and rulings use the term "Native American". The desire to label the diversity of people, cultures, and political entities is one that serves the interest of

the federal government and its courts, and in no way accurately captures or reflects the reality, history, or diversity that comprises the indigenous communities that occupied what is now the US. In fact, the one-size fits all label is reflective of the desire of the federal government to treat all tribes the same in terms of dictating to them what they can and cannot do, and for the purposes of carrying out federal obligations to federally recognized tribes, and underscores the lack of understanding and respect that has been dealt to indigenous people since the first explorers and colonists arrived on these shores. Personally, I prefer the term "Indian Nations" but for the sake of clarity and consistency with the laws I will use one term, and I have selected the term "American Indian", fully understanding that this is not a wholly accurate term. The reality is that there are currently 568 federally recognized tribal governments in the US and each of them has its own name, history, and culture that can not be lumped into a single category or definition. The problem is, that under federal law and policy, these Indian Nations are often labeled and treated as a single entity.

A "federally recognized Indian Tribe" is a tribal community that has been formally recognized by the US Department of the Interior. Currently, there are currently 568 federally recognized Indian tribes in the US. The basis of federal recognition can be a treaty, statute, executive or administrative order, Congressional act, or may be established via a relationship of dealing with a tribe as a political and sovereign entity (Canby 1998:4). The status of federal recognition is critically important because it is the basis on which the federal

government determines what rights, assistance, and services the tribal membership is entitled to under the government-to-government relationship and tribal trust responsibility. The most common basis of federal recognition is a treaty between the tribe and the federal government, but it is not the only basis. Tribes can have treaty rights, but not be federally recognized. Federal recognition is not synonymous with being Native America, or even an Indian Tribe. Many Indian Tribes have been working and waiting on the process of becoming federally recognized. What is important to be aware of is that federally recognized tribal governments have increased roles, rights, and responsibilities as governments as a result of their status.

The term "Indian Country" is commonly used, but was defined by Congress in 1948 (18 U.S.C. 1151) as:

> (a) meaning all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

An "Indian reservation" defines lands that are reserved, or held in trust, by the US federal government through the Department of the Interior for the benefit of a specific tribe. Again, this is an example of the federal government's fiduciary

responsibility, as the Trustee of Indian lands and resources. Indian reservations are comprised of many configurations of land ownership that affect a tribal government's ability to regulate activities within the reservation. Reservations often include lands held in trust for the tribe by the federal government ("trust lands"), lands owned by the tribal government in fee-status, tribal member allotments, non-tribal fee land, and even federal agency lands. An Indian reservation's boundaries do not necessarily reflect ownership status of the land, and as a result may not provide clear regulatory authority over those lands within the reservation. An Indian reservation is included in the definition of "Indian Country" (EPA 2007).

The term "ceded lands" refers to ancestral and aboriginal lands that were transferred to the US federal government as a result of a treaty. The dominance of land cession treaties resulted from the 1828 US Supreme Court ruling, *Johnson v. McIntosh* (21 US [8 Wheat] 543), in which Chief Justice Marshall determines that the only legal way to obtain title to Indian lands was to have tribal government cede those lands to the US federal government. Following that ruling, Indian treaties negotiated by federal officials contained explicit language on land cessions. These same treaties often included language on the rights to resources and resource use within those ceded lands. Ceded lands are usually defined in detail within the treaty and establish clear boundaries between tribal lands and non-tribal lands. In these treaties, tribes usually ceded lands in agreement for

compensation, reserved rights of resource use, and the creation of a permanent reservation for the sole use and benefit of the tribe (EPA 2007).

Many federal laws use the terms “Tribal lands” and “Indian lands” used to determine the applicability of these laws on Indian reservations. In general, the term “Tribal lands” means lands within the exterior boundaries of an Indian reservation. The term “Indian lands” is more limited, indicating those lands owned by a tribe, or held in trust for a tribe by the Department of Interior (DOI) and managed by the Bureau of Indian Affairs (BIA). It is important to note that not all lands within a given Indian reservation are owned or held in trust for the tribe, or individual tribal members through trust allotments. In fact, many portions of Indian reservations are owned by non-Indian and non-tribal entities or individuals; a legacy of the 1887 Dawes Act (also known as the Allotment Act) that opened Indian reservations to non-Indian land claims and settlement. Both of these terms are utilized and defined in federal laws, but not necessarily in a consistent way.

There are two types of resource rights resulting from court rulings and treaties. The term “reserved rights” refers to rights to resources, lands, and uses explicitly reserved for the tribe in the language of the treaty. For example, many treaties explicitly provide for the rights of tribes to continue to “hunt, fish, and gather in their usual and accustomed places”, even though those places were outside the boundaries of the reservation created in the treaty. Similarly, “retained rights” refers to the rights determined to remain with the tribe by Supreme Court interpretations of treaties, as rights as the tribes would have understood them at the

time the treaty was signed (EPA 2007). More specifically, tribal rights have been determined to have been retained by American Indians unless specific language in a treaty or other official document ratified by Congress limits such rights (Pevar 1992:191). This is because the Supreme Court has ruled that treaties did not grant rights to American Indian tribes that signed them, but rather either reserved such rights or extinguished them in the specific language of the treaty (Pevar 1992:191). In the absence of such specific language, those rights have been retained.

The terms "federal Indian Law" and "Indian Law" generally refer to a body of federal and Supreme Court case law that defines the federal government's relationship with tribal governments and is primarily concerned with mediating conflicts over governmental and jurisdictional power (Canby 1998:1). As a general rule, federal Indian Law tends to define and refine the rights of tribal governments and the responsibilities of the federal government towards those tribes.

At the heart of federal Indian Law is a set of Supreme Court rulings known as the Marshall Trilogy. The first ruling in the Marshall Trilogy was issued in 1823 in *Johnson v. McIntosh*, 21 US (8 Wheat) 543. The issue at hand was the right of tribal governments to convey or sell the title to land. The 1823 ruling determined that tribes could only convey land to the US federal government, not to individual citizens or states. At the core of the ruling, was a determination that the US federal government was the final authority over Indian lands.

The term "tribal sovereignty" is heard often in all aspects of American Indian culture and government. In the eyes of many tribal governments, tribes

have “inherent sovereignty” but in the eyes of the US federal government the concept of “tribal sovereignty” has been deliberated and defined in a number of Supreme Court rulings, two of them in the Marshall Trilogy. In an 1831 landmark case, *Cherokee Nation v. Georgia*, 30 US (5 Pet.) 1-16, the Supreme Court defines Indian tribes as “denominated domestic dependent nations”…”in a state of pupilage; their relation to the US resembles that of a ward to his guardian”, hence the subsequent court interpretations of the “limited sovereignty” of tribal governments (Canby 1998:14-16). While the suit was filed in an attempt to prevent the seizure of tribal lands by the state of Georgia, the court dismissed the right of the tribe to have its case heard in US federal court. In 1832, again in a case involving the Cherokee Nation, the Supreme Court ruled in, *Worcester v. Georgia* (31 US (6 Pet.) at 515), on the sovereignty and jurisdictional authority of tribal governments over tribal lands (Canby 1998:17). While the ruling did not prevent the forced removal of the Cherokee from their lands under the 1830 Indian Removal Act, the ruling did establish that state laws did not apply on tribal lands, and further refined the government-to-government relationship and recognized the sovereignty of tribal governments.

The three rulings by the US Supreme Court, under the leadership of Chief Justice Marshall in the 1800s, have served as the foundation of federal Indian law and the court interpretations of law, particularly involving the government-to-government relationship between tribes and the US federal government and tribal rights to self-govern and to regulate tribal lands. The Marshall Trilogy and its

impacts are complex because on one hand the rulings affirm tribal sovereignty, but at the same time impose limits on that sovereignty in ways that impacts the ability of tribal governments to exercise their sovereignty over tribal and reservation lands.

The federal government's "trust responsibility" towards Indian tribes was recognized by the US Supreme Court in early rulings on Indian treaties (Pevar 1992:26). The terms "tribal trust" or "trust responsibility" or "Trust Doctrine" refer to the determinations and rulings by the US Supreme Court that define tribal governments as "domestic dependent nations" with "limited sovereignty" under the federal government. In this capacity, the federal government asserted its role as a "trustee" of tribal lands and resources, and rights to those lands and resources, as reserved and retained through treaties. As the trustee, the federal government has the legal responsibility for fulfilling treaty obligations (Pevar 1992: 26). This concept has been refined by the courts in three important ways:

- to include federal statutes, agreements, and executive orders as evidence of a trust obligation,
- the trust obligation can include implied commitments, not simply explicit ones, and
- the trust responsibility places an obligation on the federal government to protect the interests of American Indians, including rights to self-governance, and resources protection (Pevar 1992:26-27).

Tribal “trust resources” are not expressly defined but are implied by these court rulings and can include a wide range of resources that place an obligation of federal trust responsibility for the appropriate management of those resources. In this way the protection of tribal trust resources is a responsibility of the federal government, and for those resources within an Indian reservation or on tribal lands, the responsibility lies with the Bureau of Indian Affairs.

Essential terms and definitions relevant to compliance with federal laws, specifically the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA) are “federal undertaking” and “federal action”, respectively. NHPA applies to all “federal undertakings and is defined in the Act as:

> (1) "Undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including —
>
> (A) those carried out by or on behalf of the agency;
> (B) those carried out with Federal financial assistance;
> (C) those requiring a Federal permit license, or approval; and
> (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

A “federal action” is defined in NEPA’s implementing Code of Regulations (CFR) 40 CFR 1508.18(a) as:

> new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§1506.8, 1508.17).

## 3. Defining Cultural Resources Management

In spite of the common usage of the term, "cultural resources", the proliferation of cultural resource managers, both in federal job descriptions and job titles, and in professional titles outside the federal agency rubric, the term is not defined in any existing federal law or regulation. While many federal, state, local, and tribal laws often imply or mandate the protection of resources considered to be of cultural value, the lack of a formal definition codified in federal law or regulations makes the practice of Cultural Resources Management (CRM) equally ambiguous and subject to varied and often conflicting or competing interpretations. One published definition is:

> the direction or conduct of affairs pertinent to things of possible use in systems of behaviors, values, ideologies, and social arrangements by which humans interpret the universe and deal with their environments. (King 2002:5)

Lifelong practitioner and author, Dr. Thomas King (2004:8), has attributed the conception of CRM as a term coined by archaeologists in response to the passage of the National Environmental Policy Act (NEPA) and a desire to make a viable career out of compliance archaeology under the requirements of NEPA. As a result, King attributes the emphasis on archaeology as the primary form cultural resources assessment for compliance with NEPA to the desire of practicing archaeologists to make CRM synonymous with the practice of compliance archaeology (2004:25). As inherently flawed as that logic may seem to those outside of the profession, this assumption persists today, both in the minds of

practitioners and federal and state agency officials responsible for conducting NEPA mandated environmental assessments that includes compliance with a matrix of federal, state, and local laws. CRM has become synonymous with the Section 106 process, a process established for complying with the National Historic Preservation Act (NHPA), and also with compliance archaeology (King 2004:22).

Ironically, neither NHPA nor NEPA, or any other federal law pertinent to the field of historic preservation, cultural, or environmental resources management, actually mandates archaeology be practiced as a means of compliance. This misperception, and one fostered and promoted by the archaeological and historic preservation communities and professions, is based on a very narrow and somewhat self-serving interpretation of what NEPA actually mandated and what NHPA and the Section 106 process actually require. Equally ironic is the institutionalization of this misinterpretation in federal agency officials and CRM practitioners in the US today. This narrow interpretation and application of federal law in the practice of CRM is one of the key challenges that tribal governments and American Indians must confront when attempting to advocate for the protection, continued use of, or access to resources that they deem to be culturally significant, particularly in dealing with federal agency officials and land managers who have a legal obligation to consult with tribes on the management of tribal trust resources, sacred sites, and traditional use areas within federal lands. Convincing a federal agency official that federal trust responsibilities and

requirements under NEPA are not necessarily synonymous with the practice of compliance archaeology under the mandates of NHPA is often a frustrating and uphill endeavor, particularly if that federal agency official is invested in promoting archaeology on federal lands.

The reality is that the concepts of “cultural resources” and “CRM” often mean very different things to tribes and most practitioners and federal agency officials. Tribal advocates are fully aware of this disconnect in concept, theory, and practice but the non-Indian professional community often seems oblivious of these contradictions, or their real world implications on the management of culturally significant tribal resources, particularly in relation to compliance efforts with NEPA and NHPA. Non-tribal CRM professionals tend to view CRM as a combination of archeology and historic preservation, not an extension of living culture. In contrast, tribal governments view CRM as a form of environmental and cultural stewardship that is driven by tribal history, culture, and values about people, environment, and resources. Tribal CRM is more than CRM as it is practiced by dominant American society; it is holistic in nature and makes directly links between people and the tangible and intangible aspects of their environment. These links are reflective of a worldview in which humans and the natural world are intrinsically woven together and inseparable; a worldview that requires good stewardship in order to maintain the balance between people and their environment in ways that insure the long-term survival and benefit of both.

**4. What is Tribal Cultural Resources Management?**

Many historical and primary sources, speeches to Congress, and treaty councils, even treaty documents, establish and support tribal assertions that they have been, and continue to be, managers of the land and resources on which they depend for economic, cultural, spiritual, and physical survival (Brown, 1970, Jackson 1881, Vanderwerth 1971). These documents often articulate a value of interdependence between humans and their natural environment. One of the critical components of this worldview is that it places significant responsibilities on the humans to protect and manage the natural environment on which they rely for survival. Tribal governments and communities have always had cultural resource managers, as tribal elders and leaders held the living stories, collective knowledge, and ecological understanding of the environment they lived in. Tribal elders, ceremonial and spiritual leaders, practitioners, and tribal-specific traditional ecological and cultural knowledge continue to exercise significant influence over the goals and objectives of their respective tribal governments. The significant roles of these forms of traditional and cultural knowledge are evident in the resource management priorities of many tribal governments.

The term Tribal CRM remains undefined and that is probably appropriate since it implies a unique approach to CRM specific to a given tribe. A general definition is “cultural resources management that is conducted by, or heavily influenced by American Indians (Stapp and Burney 2002:8).

While the term "Tribal CRM" is a fairly recent term, the philosophies guiding these efforts are not (Stapp and Burney 2002). The establishment of many Tribal CRM programs emerged in the 1980s in large part as a response to the rapid progression of the practice of compliance archaeology that began in the 1970s in response to NEPA and NHPA mandates (Stapp and Burney 2002:8). In part as a result of the passage of the Indian Self-Determination and Education Act in 1975 and the American Indian Religious Freedom Act in 1978, tribal rights of consultation and tribal government participation in the management of tribal lands and tribal cultural resources managed by federal agencies experienced a significant shift from exclusion to inclusion of tribal governments in land and resource management decisions at both the tribal and federal levels. In the 1980s and 1990s a series of Presidential Executive Orders and Supreme Court rulings reaffirmed the tribal trust responsibilities and the government-to-government consultation responsibilities of federal agencies towards tribal governments (King 2004:26, Stapp and Burney 2002:8). Not surprisingly, the mandates for increased tribal consultation by federal agencies over management of federal lands and resources revealed a divergence of opinions between what the established CRM profession and many American Indians viewed as not only a "cultural resource" but also in what constitutes "management" of those resources. This was not simply a debate in semantics; it was evidence of a worldview and difference in environmental ethic that has underscored over 500 years of colonization and conflict over environment

and resources. It was a debate that had been stifled for generations, but not forgotten in the minds and hearts of tribal leaders over the years.

It is important to note that the lack of incorporation of American Indian values in the development of the concept and profession of CRM prior to the mid-1970s was not by the choice or desire of American Indians or their tribal governments, but was the harsh reality of a long, history of political disempowerment by the US federal government that both of the Indian Self-Determination and Education Act, and the American Indian Religious Freedom Act sought to address. Prior to the passage of these laws, American Indians had little recourse, let alone access to or influence on decision-making in the federal agency process, particularly in the regulation of archaeology and resource management on federal, or even on their own reservations. The increasing and growing role of American Indians and tribal governments in the management decisions on federal lands is a direct result of changes in law and attitudes towards American Indians by the US federal government and its agencies, often as result of US Supreme Court rulings on these issues.

Tribal concerns over the management of lands and resources within the US have not diminished over time, in spite of a long history of unfortunate events and injustices against American Indians and the systematic denial of their rights to land, resources, self-determination, and sovereignty. What has changed are the attitudes of many Americans, and most importantly, the mandates set by Congress, subsequent Presidents, federal government policies, and federal legislation. It is

due to these changes, the passage of federal laws, the issuance of presidential Executive Orders, and a series of US Supreme Court rulings, that American Indians and tribal governments have an increasing role in federal agency decisions that have the potential to impact culturally significant and tribal trust resources on federal and tribal lands.

Tribal CRM is by its nature, an interdisciplinary effort. No single academic discipline could possibly prepare an individual for the myriad of issues and problems one will encounter while engaged in Tribal CRM efforts. Some of the areas unique to Tribal CRM include:

- American Indian, tribal-specific history;
- cultural and sacred geography;
- the role and significance of elders;
- legal and jurisdictional issues;
- tribal sovereignty;
- political structure of tribal government;
- status of treaties and treaty rights;
- tribal trust and tribal trust resources;
- self governance and self determination;
- traditional cultural and ecological knowledge;
- federal Indian law;
- role and significance of ceremonial and spiritual leaders;
- tribal subsistence and traditional lifeways;

- resource degradation and environmental contamination by non-tribal entities;
- aboriginal, ancestral, and tribal landscapes; and
- relationships with federal agencies and other governments.

These issues and concepts must be understood by Tribal CRM professionals in addition to the theory and methods from the disciplines of environmental sciences, American Indian or Native American studies, law, anthropology, and archaeology as they relate to environmental and cultural resources management. No single discipline can prepare an individual for this type of work. No single school of thought or body of law can be relied upon to guide a professional in these efforts. No comprehensive body of literature devoted to this effort can be easily cited or acquired as a reference. Most of what you need to learn, you learn on the job and out of necessity. What you acquire in time is a unique perspective of two (or more) worldviews and systems of environmental management that are often in conflict, particularly in the areas of law and policy and the way both are interpreted and applied to resources management.

Contemporary efforts in Tribal CRM are often grounded in the terms and conditions agreed to in a legal document signed between representatives of the US government and representatives of a American Indian tribe; the treaty. Such treaties serve as the legal basis for federal recognition and reserved rights to natural and cultural resources and areas, and by implication to an active role in the

management of these resources, throughout ancestral lands. With regards to lands owned and managed by the US federal government and its agencies, treaties are the legal instrument that requires the active inclusion and meaningful consultation for proposed projects and management decisions that have the potential to impact tribal trust resources contained within those lands. The responsibility of the federal government and its agencies to engage in government-to-government consultation with regards to the management of tribal trust resources is a cornerstone of tribal efforts at cultural resources protection and preservation and the continuation of traditional uses of land and resources.

An understanding of the unique history of individual tribes, the status and basis of federal recognition of tribes, the rights and responsibilities that this status carries for both tribal governments and the US federal government and its agencies, and the role of existing federal environmental and cultural resources laws in the practice of Tribal CRM is critical. For in order to understand the issues, concerns, and goals of tribal governments and Tribal CRM professionals one must understand the unique historical events that resulted in a particular tribe's status as a federally recognized tribe. Some treaties specifically identify the rights of that tribe to certain resources and resource areas. Furthermore treaties are often cited in federal and Supreme Court rulings regarding the federal government's responsibility to manage land and protect culturally significant resources within the ancestral lands of a particular tribe. Treaties and the official records of treaty negotiations often record the historical basis, the tribal ethic, and tribal priorities

regarding the control and management of culturally significant resources within the ancestral lands for which the treaty was drafted.

The increasing participation and influence by tribal governments and American Indians in federal, state, and local historic preservation efforts has resulted in the development of Tribal CRM. Tribal CRM is an approach to resources management that combines tribal perspectives about culture, history, resources, land, and their relationships to contemporary tribal cultures and communities. What has emerged as a result of tribal efforts to influence the practice of historic preservation is an increased awareness that existing laws and approaches for historic preservation often fall short of, and even at times obscure, tribal values about the relationship between people and place, and the significance of that relationship to living cultures and tribal communities. Furthermore, this increased tribal influence and participation in the practice of historic preservation has exposed inherent biases in the entire concept and its application; biases that reveal both the short comings and the potential pitfalls for tribes attempting to protect culturally significant resources within this framework of laws, policy, and practice.

**5. Cultural Resources Management and Historic Preservation**

The practice of CRM has been described as, “applied archeological research under a bunch of obscure federal laws.” (King 2002:5). These laws are:

- Antiquities Act (1906)
- National Park Service Organic Act (1916)
- Historic Sites Act (1935)
- Federal Property and Administrative Services Act (1949)
- National Trust for Historic Preservation (1949)
- Archeological and Historic Preservation Act (1960)
- National Historic Preservation Act (1966)
- National Environmental Policy Act (1969)
- National Marine Sanctuaries Act (1972)
- Coastal Zone Management Act (1972)
- Department of Transportation Act (1974)
- Public Buildings Cooperative Use Act (1976)
- American Indian Religious Freedom Act (1978)
- Archeological Resources Protection Act (1979)
- Abandoned Shipwreck Act (1987)
- Native American Graves Protection and Repatriation Act (1990)
- American Battlefield Protection Act (1996)

These are also known as historic preservation laws and it important to note that most were not written for the benefit of or by American Indians or tribal governments, nor were they intended to convey or advocate for American Indian or tribal values about land, place, and culture, or the management to protect

continued uses by American Indians. In most cases, tribal views and values were never solicited or considered, but rather these laws have evolved as a reflection of the values and attitudes of non-Indian American society. The established and contemporary approach to historic preservation by federal land managers and CRM professionals, as seen in the practice of CRM, has been primarily focused the preservation of aspects of American history with an overwhelming emphasis on compliance with the National Historic Preservation Act (NHPA). Furthermore, NHPA compliance is often limited to compliance with Section 106 of the Act. Federal agencies that manage federal lands have additional responsibilities under Section 110 provisions of NHPA, but retain ultimate authority to make final determinations about eligible properties and evaluation under the law.

Section 106 has a primary purpose: to locate, identify assess, evaluate, and make determinations of eligibility on “historic properties” under very narrow definitions:

> "Historic property" or "historic resource" means any pre-historic or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource.

The Section 106 review process is often not performed for the purpose of preservation (although that is the stated goal) but rather the purpose of conducting a proposed “federal undertaking”. The end goal of NHPA is commemoration (nomination to the National Register of Historic Places) and no mandates for preservation are in the law, although such efforts are recommended. The end goal

of Section 106 is identification and evaluation of effects of specific proposed "undertaking. The end goal of Section 110 is for federal agencies to inventory and evaluate all eligible sites on their lands. If eligible, the agency must develop a management plan for the property. It is important to note that nominating a site to, and getting it listed on the National Register do not guarantee or mandate preservation or protection. Rather, it simply makes an up or down decision on whether or not the property is included on a list, the National Register of Historic Places, and possibly commemorated with a plaque. Federal land managers have Section 110 responsibilities to develop management plans for eligible properties, but again are granted great latitude in how those sites are managed and are allowed to put other agency priorities over protection and preservation.

Tribal CRM is changing, practitioner by practitioner, federal agency by federal agency, the way by which the mandates of NEPA, NHPA, and a rubric of other federal laws are interpreted and applied on federal lands, in federal actions, and federal undertakings. As a result, it is changing the way CRM is practiced in mainstream society. The rights of American Indians and tribal governments, both reserved and retained, as stated in treaties and other official federal documents, decrees, and court orders are not being upheld and protected as the US Supreme Court has ruled and affirmed in multiple subsequent rulings; "the Supreme Law of the Land".

## 6. Limitations in Existing Federal Historic Preservation Laws

One of the first obstacles that American Indians and tribal governments must deal with in attempting to utilize the rubric of existing federal environmental and historic preservation law in their efforts to advocate for and protect culturally significant and tribal trust resources, is the very real problem of being asked to work with a body of law that was never drafted, intended, or passed to reflect the values or concerns of American Indians. Rather, the origins of historic preservation in the federal government date back to the creation of the Library of Congress in 1800, followed by the first federal CRM law in 1906, the Antiquities Act, which established a permitting process for the excavation of archaeological resources on federal lands while forbidding such practice without a permit from the Department of the Interior (King 2004:19). Subsequent federal laws with provisions for historic preservation are numerous, but the primary five federal laws most relevant to the practice of CRM and tribal participation are the:

- National Historic Preservation Act (NHPA) of 1966;
- National Environmental Policy Act (NEPA) of 1970;
- American Indian and Religious Freedom Act (AIRFA) of 1978;
- Archaeological Resources Protection Act (ARPA) of 1979;and
- Native American Graves Protection and Repatriation Act (NAGPRA) of 1990 .

A detailed discussion of each of these laws is presented in Chapter IV.

The lack of input allowed or consideration of tribal concerns, values, rights, or the responsibilities of the federal government, its agencies, and officials in the drafting of these laws, in their original form is evident in the five federal laws listed above. And herein lies a fundamental problem faced by tribal governments as they attempt to utilize these laws, and other relevant federal environmental resource and historic preservation laws, in advocating for their own goals in the protection, management, and continued use of these resources. This is a problem that not only affects federal lands; it can and does affect tribal governments and their own ability to influence what occurs on tribal and federal lands. Even more problematic are the obstacles facing American Indians and tribal governments who wish to advocate for the protection and continued use of private, local, or state lands. It has been my experience that tribal governments are often very interested in the management of cultural resources throughout their ancestral lands regardless of the history of dispossession, issues of ownership and access, or reserved rights. The cultural importance of specific types of resources (cemeteries and burial grounds, sacred and ceremonial areas, and traditional resource use areas such as fishing places and gathering areas) remain significant concerns to many tribal governments and American Indians I have encountered and worked with over the years.

Tribal CRM programs have much to contribute to the development and advancement of CRM as the management issues they work on and the methods

they utilize are inherently interdisciplinary and multifaceted as a reflection of tribal values about the environment and cultural significance. These approaches and methods are often not considered or included in historic preservation law or the practice of non-Tribal CRM. It has been my experience that American Indian beliefs about environment and culture are often heavily rooted in a sense of responsibility, interconnectedness, interdependence, and stewardship. It is my impression that these values underscore many tribal government approaches to environmental resources protection and management and goals for the restoration of both environment and culture. In my experiences as a Tribal CRM professional I have seen and heard this priority in word and actions of many American Indians and tribal governments and reflected in the development and priorities of tribal environmental and cultural resources programs across the US.

In my professional experiences I have observed that while many non-Indian practitioners of CRM often view "cultural resources" as synonymous with the NHPA definition of "historic properties" (sites, buildings, objects, structures, or districts over 50 years in age), the Tribal CRM concept tends to focus on those natural and cultural resources that have past, present, and future significance to American Indians and tribal governments. These include natural resources (water, air, land, and those utilized for traditional subsistence), spiritual and sacred resources (both the non-tangible and physical aspects of tribal-specific cultural and sacred geography and ceremonial or religious practice), and physical features or resources contained within the ancestral lands of a specific tribe, or groups of

tribes (cultural sites, ancient sites, archaeological sites, burial grounds, traditional resource use areas, and areas of significance to the history and culture). It is for this reason that the reliance on solely historic preservation law to conduct Tribal CRM efforts is insufficient.

Understandably, a growing concern over the development and dominance of archaeology in CRM, particularly in relation to its practice under the auspices of NEPA and NHPA compliance has led to an increased role by American Indians and tribal governments in how this compliance is conducted. Tribal involvement has influenced both the theory and method as they are applied on federal lands. This is because American Indians and federally recognized tribes have legal rights when it comes federal land management decisions. These rights are a product of the Trust Doctrine and a reflection of the federal responsibility to American Indians and federally recognized tribes.

There is a long history, within the Executive, Judicial, and Legislative branches of the US federal government to treat all tribes and all American Indians as one entity. This is particularly evident in the use, application, and interpretation of federal Supreme Court rulings that effect what is commonly referred to as Indian Country. A ruling that affects one tribe, often affects all tribes; resulting in the body of federal case law commonly referred to as “Federal Indian Law”. This one-size fits all approach is seen as necessary by the federal government, but it is in itself inherently problematic, since each tribe has a unique sovereign and historical and cultural identity. Thus, all approaches to Tribal CRM are inherently

tribal-specific, specific to the unique cultural, historical, legal, and political circumstances, values, and needs of each tribe.

Tribal CRM requires the pro-active participation by American Indians and tribal governments in legal, policy, and management decisions on a wide range of environmental resources that are determined to be culturally significant to those tribes. The level of participation varies widely and is often a reflection of the resources, the resource concerns, and the internal capacity of tribes to engage in the process of advocating for the protection and continued use and future management of culturally significant resources. Some tribes have developed tribal compliance archaeology programs in order to compete for and obtain contracts for conducting compliance archaeology under NHPA and NEPA. Other tribes have opted to stay out of the arena of participating in compliance archaeology and instead emphasize the role of government-to-government consultation and increased efforts in advocating for the protection of tribal trust and culturally significant resources, through the three branches of the federal government; the Legislative, Executive and Judicial branches. Increasingly, many tribes have developed internal capacity in order to advocate for a different approach to CRM, one that utilizes NEPA and NHPA mandates in ways that are consistent with tribal goals and values.

As a result of this confusing matrix of federal, state, and local laws, American Indians and tribal governments who wish to advocate for tribal goals in cultural and natural resources management must become well-versed in all

potentially applicable laws; federal, state, and local. Furthermore they must be able to utilize any and all of these laws, as suitable, and in spite of and their limitations, in order to best accomplish their goals of resource protection, continued access and use of the places and resources that are of great importance to their physical, cultural, economic, and spiritual well-being and survival.

What becomes apparent upon reviewing these federal laws, their applicability and compliance standards, and potential usefulness to American Indians and tribal governments for protecting and advocating for the protection of culturally significant resources is that all are deficient. In varying degrees, and for different reasons, each of these federal laws is inadequate for accomplishing what many tribal governments strive to accomplish; specifically to protect, preserve, and enhance the quality, condition, and ensure continued tribal uses of culturally significant and tribal trust resources for the current and future generations of American Indians and tribal members. It is a reflection of the inherent problem of relying on a framework of historic preservation, a framework that was never developed by or for the intended benefit of American Indians and tribal governments.

In recent years, some efforts have been undertaken to address this lack of representation in federal laws that are relevant to cultural resources of concern to American Indians and tribal governments. One of the most significant achievements by American Indians and tribal governments in their common efforts at the protection of culturally significant resources was the passage and adoption

of the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990. In the eyes of most American Indians, NAGPRA is more than a cultural resources law; it is a landmark piece of human rights and civil rights legislation. A more detailed review of NAGPRA is presented in Chapter IV, but suffice it to say, it is considered a first step by many American Indians of a long struggle for both self-determination and cultural restoration throughout Indian Country.

Another significant development for tribal governments wishing to increase their participation in the practice of established CRM and historic preservation under NHPA occurred in the 1992 in the form of amendments to the Act, and subsequent revisions of its implementing code of federal regulations, 36CFR800. The most significant change resulting from these amendments were the provisions for the creation of Tribal Historic Preservation Offices (THPOs) to allow federally recognized tribes to assume 11 discrete functions otherwise tasked to State Historic Preservation Offices (SHPOs) for their tribal lands. The second change of significance to Tribal CRM was to expand the definition of "historic properties" to include "Traditional Cultural Properties" (TCPs) as an eligible property type under NHPA criteria. While these changes to NHPA are significant in the rubric of historic preservation law and practice, both are problematic to some degree, and opinions vary on their usefulness for actually protecting culturally significant resources or enhancing tribal sovereignty over tribal and reservations lands.

The details of NHPA and its 1992 amendments will be discussed in Chapter III, but they are mentioned here because attempts by tribal governments to work with the existing framework of historic preservation poses significant challenges to American Indians and tribal governments. Willingness to persevere in spite of these challenges underscores the level of commitment and determination of American Indians and tribal governments to utilize all legal resources available to them in their continual efforts at both self-determination and the protection of culturally significant resources. In short, it is the "everything including the kitchen sink" approach to protecting culturally significant resources. It is a patchwork approach out of necessity, and it is one that continually falls short of accomplishing tribal goals for resource protection and management.

**7. Some Issues in Historic Preservation**

In my professional experience I have concluded that one of the key problems is that for a variety of legal, jurisdictional, institutional, and philosophical reasons, tribal governments are often disappointed in the outcome that results from working within the historic preservation framework. Often management priorities are different for tribal governments attempting to achieve meaningful protection of culturally significant and tribal trust resources on non-tribal lands and land managers looking to complete their compliance with NEPA and NHPA so that a proposed project can occur. Tribal governments face legal

hurdles when attempting to assert jurisdictional authority, in some cases even on tribal lands. The problems of jurisdictional authority in certain circumstances, the lack of understanding on the part of many federal agencies and their officials, the institutional biases and a reliance on the established historic preservation framework often confound and frustrate tribal efforts at resources management. It is not that the current approaches never protect tribally significant resources, in many cases they do. It is more often that the outcome falls short of the goal, and in some cases fails to adequately protect the resources in question in the appropriate manner.

These challenges and limitations in existing law reveal the need for a more holistic, effective, culturally appropriate, and tribally beneficial approach be developed and adopted by tribal governments engaged in Tribal CRM. One has emerged over the past three decades that is sophisticated in technology, method, and theoretical approaches in addition to being a natural progression of tribal participation in the legal processes that impact culturally significant resources. More importantly tribal influence on environmental resources management, practice and policy, is changing how CRM is being practiced in the US, particularly within federal agencies. Tribal input is being solicited and obtained by federal managers who carry out these federal responsibilities on behalf of the government.

The existing framework of historic preservation and historic preservation law often does not provide adequate or meaningful ways to insure the protection of

a wide range of culturally significant resources, particularly if they fall outside the narrow definition of an eligible “historic property”. Even worse, none of these laws actually mandate the protection of these “historic properties” even if they are impacted as a result of “federal actions” under NEPA or “federal undertakings” under NHPA.

It has been my experience that one fundamental problem in CRM as it exists today is based upon an assumption, by many within the profession, that CRM is synonymous with historic preservation. Or that historic preservation guarantees protection. Often the practice of contract archaeology is viewed as the primary form of compliance with existing federal historic preservation law (King 2004, 2002). The concept of historic preservation as it exists today is not necessarily based upon an American Indian perspective or the goals and objectives of tribal governments. Rather, it is founded upon Euro-American perspectives about land-use and American values towards places of cultural or historic significance. This is changing as a result of tribal government involvement and participation in historic preservation efforts, even the assumption of specific functions for NHPA compliance such as the creation of Tribal Historic Preservation Offices (THPOs).Those changes are having significant influence on how NHPA compliance is practiced in the US, particularly by federal agencies.

The increasing participation and influence by tribal governments and communities in national, state, and local historic preservation efforts has resulted in the emergence of  what is now called Tribal CRM. What has evolved as a result

of tribal efforts to influence how historic preservation laws are developed, interpreted, and implemented is the growing awareness that existing laws and approaches for historic preservation often obscure the relationship between people and place and the significance of that relationship to living culture. This awareness should be cause for some serious self-examination on the part of the historic preservation, archeological, and CRM professions.

Since the passage of the Antiquities Act in 1906, a series of federal laws have been enacted with a stated purpose of preserving places of historic and cultural significance for future generations of Americans. Some laws were intended to manage or regulate the excavation of archaeological sites and others for protecting and preserving historically significant buildings, structures, or landmarks usually associated with early Euro-American settlement or events significant to American history. These federal laws were drafted and enacted by Congress with the intent of promoting historic preservation of federally managed lands or in relation to federally funded projects. The intended beneficiaries of these laws are the American people, not American Indians or their tribal governments. This intent is critical to understanding the fundamental conflicts that arise in the application of these laws when applied to tribal governments, tribal trust lands, and resources within tribal ancestral lands. It is fair to assert that tribal governments, and their unique status with the US federal government, were not adequately considered at the time most of these laws were written and enacted by Congress.

The issue of applicability of federal environmental and cultural resource laws on tribal trust lands, lands held in trust for the tribe by the Department of the Interior, is often controversial. Many tribal governments operate under a philosophy of inherent tribal sovereignty that would preclude the applicability of federal regulatory processes on tribal lands. Conversely, some tribal governments and reservation communities have embraced the applicability of federal environmental and historic preservation laws and those regulatory processes on tribal lands. Equally problematic, is the applicability of federal environmental and cultural resources laws on non-tribal federal lands (lands owned or managed by the US federal government and its agencies) for resources associated with American Indians. Who's priorities determine how those resources are best managed; the federal agencies, the tribal governments, or the archeologists and preservationists?

The toolkit of federal laws utilized by many tribal governments and their CRM professionals has been built primarily on a premise of historic preservation and compliance archaeology, not due to its relevance or effectiveness to achieve tribal goals, but because this was the established process before tribes had the ability to have significant input. The prevalence and dominance of the values, priorities, and methods of archeologists and preservationists is a reality that tribes engaging in these issues must confront. Some federal agency officials may be entrenched in the historic preservation and archeological frameworks and may be dismissive or unsupportive of tribal values and priorities articulated during formal consultations. American Indians and tribal governments are changing how CRM

is viewed and practiced on federal lands as a result of the enhanced government-to-government relationship between federally recognized tribes, but many challenges still remain.

It is due to the tribal trust responsibilities of the federal government with regards to federally recognized tribes and tribal trust resources that these laws and their implementation are incredibly important. These are the laws that are utilized to determine the management of natural and cultural resources on federal lands. While tribal governments no doubt have significant concerns over the management of resources throughout their ancestral lands, regardless of ownership, the reality is that tribal governments and individual American Indians often face complex political and legal obstacles to asserting their goals and rights on private, local, state, or federally owned lands, even on their own reservations. Compounding the problem is the fact that the existing historic preservation framework as it is practiced in the US often falls short of helping American Indians and tribal governments overcome these obstacles, or fully protect these culturally significant and tribal trust resources.

Recent amendments in 1992 to NHPA are an attempt to better accommodate tribal concerns over the management and protection of culturally significant and tribal trust resources and are to be commended. The amendments are significant and included the ability for tribal governments to apply for THPO status for the purposes of NHPA oversight and compliance on their reservations and tribal lands. In some ways the attempts to make NHPA more responsive to

tribal concerns actually serves to underscore the inherent inadequacies of the historic preservation framework. The limitations of existing historic preservation law often fail to accomplish tribal goals for cultural resources protection, yet it is sometimes the only framework under which these efforts often occur.

In my professional experience I have observed that the practice of CRM is often focused on locating, identifying, assessing, and evaluating project impacts on discrete sites under very narrow definitions set by Section 106 of NHPA or conducting determinations of eligibility under Section 110. Compliance with existing historic preservation laws does not guarantee the preservation or protection of culturally significant resources. And herein lies the problem for most tribal people I consult with in my line of work: commemoration is not necessarily protection, preservation is not necessarily appropriate management, and relationships between resources and living cultures and communities are rarely serious considerations beyond determinations of significance or eligibility under NHPA criteria by some CRM professionals.

At the same time that increasing tribal involvement in the historic preservation and the practice of CRM has occurred, developments in technologies and their applications in the environmental sciences have also forced a shift in how land and resources are viewed, evaluated, and managed around the world. The introduction of Geographic Information Systems (GIS), mapping and satellite technologies have contributed to growing awareness of the complexity of interconnectedness of species, communities, ecologies, and biodiversity. These

developments in new technologies and scientific approaches to understanding the physical world in which all species live on this earth have quickly been applied to efforts across all disciplines, particularly those that focus on environmental resources and the study and management of these resources on the landscape.

Today, most federal resource managers rely heavily on GIS and similar technologies to map and analyze spatial relationships between all kinds of resource types, be they individual species of plant or animal, habitats or ecosystems in which they live, or the communities or bio-regions they occupy, or occupied. Today, most large parcels of land are monitored, evaluated, and managed at a landscape-level. This landscape-level approach is a direct result of an increased and expanded understanding of the complexity and interconnectedness of life within our global environment and the limitations and pitfalls of a single-species or individualistic approach that was common in past land management objectives and activities. It is within this context, an expanded understanding of biodiversity and interconnectedness resulting from the applications of new technologies and ways of understanding the physical world, that the need for a similar shift to occur in CRM becomes evident.

What is needed is a new approach; one that more adequately and appropriately addresses the issues of tribal trust, promotes the protection of culturally significant and tribal trust resources, more holistically encompasses cultural and natural resources, establishes provisions for their protection and management, and enhances tribal sovereignty through increased self-determination

and jurisdictional authority. My study of these issues and over seven years of professional working experience with American Indians, federal agencies, and tribal governments shows that there is indeed a better and more effective approach. A better approach is one that enhances tribal sovereignty, encourages the protection of culturally significant and tribal trust resources, and enables tribes to advocate and legislate for tribally appropriate management of both cultural and natural resources for cultural purposes. It is my conclusion that NEPA offers a better model.

## 8. Utilizing the NEPA Framework for Tribal CRM

The rubric of historic preservation law has grown increasingly ineffective for many tribes as they advance their own goals for environmental and cultural protection and restoration. In contrast to the historic preservation framework, the process of assessment and mitigation as established under the National Environmental Policy Act (NEPA) provides a process and model for incorporating these emerging technologies and understandings of the interdependency of resources and ecologies in resources management. NEPA mandates that bodies of environmental and social knowledge be developed, analyzed, and utilized in federal agency planning and decision-making (Boggs 1991: 31). It is through the NEPA process, and by relying on NEPA mandates, that tribal governments can introduce social knowledge that is often ignored in the historic preservation

framework (Boggs 1991). By replacing an outdated and ill-fitting model of historic preservation with an interdisciplinary approach for resources management that focuses on the impacts to the "human environment" tribal governments have the unique opportunity for developing a tribal regulatory framework. It is within this tribal regulatory framework that tribes can introduce social and traditional knowledge, and advocate for the inclusion of tribal values about culture and environment. Through this approach tribal governments can more adequately and effectively protect culturally significant and tribal trust resources, and advance the sovereignty of tribal governments over their own reservation lands.

A shift to a landscape-level approach to understanding and managing cultural resources, and more importantly the relationship between people and place, is not only timely; it is necessary. For many advocating for a Tribal CRM approach, it is a long overdue paradigm shift from the narrow and limited emphasis on historic preservation in CRM efforts. Site specific management has not been an effective approach to interpreting or protecting cultural places and resources in America. A landscape-level management strategy based on a tribal environmental ethic and supported by a tribal environmental regulatory framework provides a way for tribal governments to articulate, advocate for, and influence the way cultural and natural resources are considered and managed in a holistic manner. A framework developed by a tribe will be much more suitable to tribal values about history, culture, land, resources, and the relationships between all and

more adaptable for addressing the long term goals and management objectives for protecting those resources of greatest cultural importance to a tribe.

It is because of the shortcomings of historic preservation law that the National Environmental Policy Act (NEPA) has become increasingly more useful to tribal governments who seek to protect their culturally significant resources. NEPA is considered an umbrella or process law. It is a process-oriented law that requires, or triggers, the compliance with all applicable federal, state, local environmental laws and Executive Orders (EOs). Tribal laws also qualify under NEPA mandates, as long as they do not conflict or contradict existing federal laws. This is because federal laws apply on tribal lands in the absence of applicable tribal laws.

Under NEPA the potential and cumulative impacts of a proposed "federal actions" must be identified, assessed, evaluated, considered, and where individual laws require, mitigated. NEPA provides additional and unique opportunities for tribal governments to advocate for the protection and continued use of significant cultural and natural resources. A NEPA review process provides a forum for advocating tribal concerns over treaty rights, reserved and retained rights, and historic injustices that have adversely impacted the health and quality of these resources. Furthermore, NEPA requires the consideration of cultural and socio-economic impacts resulting from a proposed federal action, including the loss of access to, and the degradation of these resources.

Federal agencies operate under “federal policy domains”, areas of policy that rely on systems of knowledge and regulations that are both institutional and ideological (Boggs 1991: 31-32). In the arena of resources management and American Indians, each agency has its own policy domain that determines what bodies of knowledge are relevant for consideration and analysis under NEPA (Boggs 1991:32). While many federal agencies attempt to dismiss or ignore American Indian concerns, issues, and social knowledge in their NEPA review processes, NEPA actually provides tribal governments with the legal and regulatory process through which those views and knowledge systems can be introduced and included in the NEPA review process, particularly for Environmental Impact Statements (EIS) that are required if a proposed federal action is determined to have the potential to result in significant impacts to the human environment (Boggs 1991).

Compliance studies under NHPA often do not consider or include cultural and ecological traditional knowledge except in very limited and narrow contexts. This can be due to lack of information, time, resource required to obtain, interest by the investigator, deliberate intent by the Lead Agency, or lack of input from the affiliated Tribes. When it comes to cultural resources and assessing impacts within the NEPA process, compliance with NHPA is often the only consideration or analysis of impacts to cultural resources. Compliance with NHPA is often viewed by the “Lead Agency” as being adequate review and assessment of the impacts of a proposed “federal action” on culturally significant, tribal trust, reserved and

retained resources of great importance to tribal governments and American Indians. Nothing could be further from the truth, however, and it is of the utmost importance for Tribal CRM professionals to not only be aware of the inherent limitations of existing historic preservation laws, but also the potential for tribal governments to effectively advocate for the protection, management, and enhancement of culturally significant resources and protection of tribal rights through the NEPA process.

It is important to stress at this juncture that the NEPA process has often proven to be less than satisfactory to many tribal governments in actually resulting in protection and appropriate management of significant environmental and cultural resources. The institutional biases, the reliance on quantitative data and commensurate analyses often exclude the consideration of cultural and social impacts on American Indians and their communities (Boggs 1991, Epseland 2001). In fact, the result of many NEPA processes has often been to somehow justify the destruction of significant resources, or minimize the social, cultural, and economic impacts of proposed federal actions on those resources and communities. Since NEPA is a process law, it only mandates documented compliance with the process as established in its regulations, 40 CFR 1500-1508. This limitation also applies to NHPA. Too often the impacts of proposed federal actions on American Indians, tribal trust and cultural resources, are either ignored, or worse minimized or distorted in ways that suggest the proposed action would benefit tribal interests, when clearly the tribes do not agree with that assertion.

This bias is one example of the institutional biases that are reflected in federal agency policy domains, the body of information that a federal agency makes and implements its resource management decisions (Boggs 1991:31).

In spite of the inherent problems and biases in the way many NEPA reviews are conducted, particularly by federal agencies, NEPA provides some unique opportunities to American Indians and tribal governments who wish to engage in the process in the hopes of achieving a more balanced result and determination in an EIS. One of the most promising opportunities NEPA provides tribal governments result from the ability of tribal government to participate as a cooperating agency (40 CFR 1501.6), participate and contribute studies as part of the interdisciplinary research effort on identifying and assessing potential impacts and cumulative effects (40 CFR 1502.6), describing and defining the affected environment (40 CFR 1502.15), identifying and assessing the environmental consequences (40 CFR 1502.6), conducting tribally-determined cost-benefit analyses (40 CFR 1502.23), and engaging in government-to-government consultation with the lead agency and other cooperating agencies throughout the NEPA process (40 CFR 1502.25). In addition to providing tribal governments several levels of meaningful participation in the NEPA process, the regulations also include an often over looked provision of profound significance. The NEPA process requires the production of a single document that complies with all applicable federal, state, and local environmental laws and Executive Orders. It is for this reason that the development of tribal environmental and cultural resource

laws offer significant potential for tribal governments to have greater influence on the consideration and management of cultural and natural resources in a NEPA process and on their own tribal and reservation lands.

**9. A Tribal Environmental Policy Act to Protect Tribal Resources**

My thesis is that one powerful tool for advancing tribal values and goals for cultural and environmental management is to develop and adopt a NEPA inspired approach rather than only relying on a patchwork of existing historic preservation law in tribal efforts to protect culturally significant resources. This idea is not to discount the accomplishments of Tribal CRM programs that have successfully utilized NHPA and other historic preservation laws to protect cultural resources. These laws are critical to ongoing and future efforts in CRM and cultural resources protection in the US. Rather, I am proposing that Tribal CRM programs incorporate and maximize the potential benefits for tribal governments that a NEPA approach provides through the development of tribe-specific environmental review processes that includes tribal values, goals and standards of management for cultural resources.

A Tribal Environmental Policy Act (TEPA) is a fairly recent concept in Indian Country and is modeled by a similar approach by many states in the development of state-wide environmental review processes, often referred to as mini-NEPAs (Suagee and Parenteau 1997, Mittelstaedt *et al*. 2000). A TEPA is not a new federal law, it is a process established through tribal law for

environmental review and mitigation of tribal actions or actions on tribal lands (Suagee and Parenteau 1997). While some proponents of TEPAs emphasize the potential benefits for strengthening tribal regulatory authority on their reservation lands it is important to note that such attempts have not been legally tested and it is a matter best left to legal scholars. I am not proposing a TEPA for regulatory purposes, although tribal governments can and do often pass laws, ordinances, and codes for this very purpose and TEPAs can strengthen the tribes authority to enforce and implement these policies (Suagee and Parenteau 1997). Rather, I am proposing the development of TEPAs for the purpose of developing tribally-determined environmental and cultural resources review, assessment, and mitigation. This is  to increase and enhance tribal involvement and influence in NEPA reviews that impact tribal lands and resources and to assist tribes in establishing a comprehensive framework for identifying and assessing impacts and promoting tribal management goals for tribal projects on tribal lands.

A TEPA is a tribal law, but like NEPA it is a process-oriented law and provides no provisions for enforcement. Compliance with a TEPA requires meeting the established standards for review, assessment, and mitigation of impacts prior to the commencement of a major action. Enforcement and regulations are adopted through tribally established processes, such as the adoption of tribal codes and ordinances. For this reason a TEPA is not a regulatory law in itself, rather it can provide a legal and procedural framework to integrate and support tribal environmental codes and ordinances.

I propose that Tribal CRM programs consider developing and utilizing a NEPA based strategy for promoting tribal goals of protection and enhanced tribal roles in the management of culturally significant resources. This strategy does not rely solely on the rubric or inadequate patchwork of existing historic preservation laws, although it will include them. It is an approach that builds upon the framework established by NEPA and relies instead on the development and adoption of a tribal equivalent, a TEPA that emphasizes cultural resources. Most importantly it allows the consideration of natural and environmental resources as cultural resources.

Tribal governments are frequently involved and affected by NEPA processes, either through their own projects or projects proposed by outside agencies or entities that impact tribal lands and resources. NEPA requires consultation with tribal governments on proposed federal actions. Tribal governments are often involved in NEPA reviews at many levels and for this reason it is beneficial for tribal governments to establish environmental programs that have capacity to meaningfully engage in these processes in order to advocate for tribal resource issues and goals.

A TEPA can be written to provide tribal governments with the ability to:

- identify and define “cultural resources”,
- make direct links between environmental and cultural health and well-being,

- determine what constitutes culturally appropriate management of cultural and natural resources,
- establish a process for adequately assessing potential impacts to cultural and natural resources resulting from proposed actions,
- establish tribally-determined standards for mitigation of impacts,
- develop as solid legal framework of tribal policies, codes, ordinances, and regulations that promote tribal values for environmental and cultural resource protection and restoration, and
- enhance and strengthen tribal involvement in NEPA review processes that include tribal lands and trust resources.

TEPAs will be discussed in detail in Chapter V and two examples of TEPA's developed and adopted by two tribal governments, the Campo Band of Kumeyaay and the Swinomish Tribe, are provided as Appendices (Appendix A and B, respectively). In spite of some of the problems inherent in the traditional NEPA process, particularly for tribal governments fighting to protect significant cultural and natural resources, I believe a TEPA is one of the strongest tools tribal governments can utilize to influence the process in meaningful ways that meet tribal goals and objectives in environmental and cultural resources management.

# II. Literature Review

The existing body of published literature relevant to CRM tends to fall into five categories: historic preservation law and methods, compliance archeology method and theory, cultural landscapes and their application in historic preservation, Indigenous and American Indian cultural landscape studies, and Indigenous archeology and Tribal CRM. While most of this literature is informative, particularly from a historic preservation or compliance archaeology perspective, it tends to be limited in scope. The majority of the published literature is of limited relevance to tribal concerns and issues involving the protection of tribally significant cultural and natural resources. In fact, very few published books or peer reviewed journals articles are dedicated to providing useful information for American Indians who are interested in examining these issues or developing and implementing a Tribal CRM program beyond the limitations of the established historic preservation and archeological frameworks that dominate the practice of CRM in the US. Because the literature is weak on addressing the practical issues facing tribes engaged in these efforts, a detailed and ethnographic study of the process is helpful for identifying steps forward.

## 1. Historic Preservation

The largest body of literature on CRM consists of books and guidances devoted to historic preservation, method, theory, practice, and law (Advisory

Council on Historic Preservation 2004, Gibbon 2005, King 2000, 2002, 2004, 2005, McManamon and Hatton 2000, Richman and Forsyth 2004). Outside of Tribal CRM, historic preservation and CRM are virtually synonymous. Historic preservation law is cited as the basis for compliance archaeology, the practice of archaeology for the sake of compliance with mandates for identification, assessment, and evaluation under the provisions of NHPA.

Literature in this category is often unhelpful to Tribal CRM efforts because it does not provide a workable or adequate framework to address the range and scope of issues surrounding the management of resources that are of cultural significance to American Indians and tribal governments. Definitions and methods for review and assessment are based on NHPA criteria for "significance" and "integrity" for the purpose of nominating "eligible properties" to the "National Register of Historic Places". As a result, much of the historic preservation literature is devoted to getting discreet properties on the "National Register of Historic Places", not necessarily with protecting and managing cultural resources for continued and future use.

The National Park Service (NPS) has issued numerous bulletins and guidances for NHPA review and compliance. All of these NPS publications are limited to NHPA evaluation and treatment of eligible "historic properties". While these technical bulletins and guidances along with the Secretary of Interior's Standards for Evaluation are often utilized, required, and cited as the way to comply with a long list of historic preservation laws these guidances and standards

are usually intended to regulate and promote archeological research under NHPA provisions. What is notable is that in spite of numerous publications, only one guidance, NPS Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (Parker and King 1990, Revised 1992 and 1998), actually allows for the incorporation for a American Indian worldview in the identification, evaluation and assessment of significant resources through NHPA.

2. Compliance Archaeology

The practice of CRM is often considered to be synonymous with compliance archaeology; archaeological research conducted solely for the purposes of mandated compliance with NEPA or NHPA. As a result of this narrow, albeit flawed, interpretation of what NEPA and NHPA actually require, there are a number of published studies and books on the practice of compliance archaeology under the Section 106 process (Anyon *et al.* 2005, Ferguson 1999, Neumann and Sanford 2001, King 2000, 2002, 2004, 2005, Stapp and Burney 2002, Watkins 2000). The National Park Service has published a variety of bulletins for conducting compliance archaeology studies under NHPA review. The ACHP has developed the implementing regulations for NHPA compliance in 36CFR800. The body of literature devoted to compliance archaeology is based on a premise that mitigation of adverse effects to archaeological resources requires archaeological excavation. As a result of this premise, most of the compliance archaeology literature is devoted to conducting or reporting archaeological

investigations under the Section 106 process as part of NHPA and NEPA compliance. This body of literature is noteworthy in that it describes in detail how to conduct archaeological investigations for the purposes of compliance, but rarely makes note of the fact that archaeological excavations are not necessarily the only means available for NHPA or NEPA compliance.

### 3. Cultural Landscapes and Historic Preservation

The term "cultural landscape" was first introduced by Carl O. Sauer, a geographer recognized as the originator of the cultural concept. Sauer defined cultural landscapes as:

> The cultural landscapes is fashioned from a natural landscape by a culture group. Culture is the agent, the natural area is the medium, the cultural landscape is the result (1925:46).

Numerous academic variations on this term and definition have followed since Sauer, but all emphasize the role of culture in the relationship between land/nature and communities.

The NPS definition was developed with compliance and resource management purposes in mind:

> A cultural landscape is a reflection of human adaptation and use of natural resources and is often expressed in the way land is organized and divided, patterns of settlement, land use, systems of circulation, and the types of structures that are built. (NPS-28 1994).

Much of the work in cultural and environmental resources management in the US is driven by methods utilized in historic preservation and archeological research. As a result, much of the technical and compliance literature on cultural landscapes is focused on the preservation and restoration of historical architecture, designed landscapes, cemeteries, homes associated with important historical figures and events, such as presidential mansions or Civil War battlefields. Under this historic preservation model, a cultural landscape is defined and described as finite and local and always evaluated in terms of historic preservation criteria of "significance" and "eligibility".

NPS has identified four types of cultural landscapes (Birnbaum *et al.* 1996, NPS 1997, Page *et al.* 1998):

- ***Historic designed landscapes:*** deliberate artistic creations reflecting recognized styles such as the 12-acre Meridian Hill Park in Washington, DC with its French and Italian Renaissance garden features. Designed landscapes also include those associated with important persons, trends, or events in the history of landscape architecture, such as the Frederick Law Olmsted National Historic Site and the Blue Ridge Parkway; and

  A landscape significant as a design or work of art; was consciously designed and laid out either by a master gardener, landscape architect, architect, or horticulturalist to a design principle, or by an owner or other amateur according to a recognized style or tradition; has a historical association with a significant person, trend or movement in landscape gardening or architecture, or a significant relationship to the theory or practice of landscape architecture.

- ***Historic vernacular landscapes:*** landscapes that illustrate people's values and attitudes towards the land and reflect patterns of settlement, use, and development over time.

Vernacular landscapes are found in large rural areas, and small suburban and urban districts. Agricultural areas, fishing villages, mining districts, and homesteads are examples. The 17,400-acre rural landscape of Ebey's Landing National Historical Reserve represents a continuum of land use spanning more than a century. It has been continually reshaped by its inhabitants, yet the historic mix of farm, forest, village, and shoreline remains; and

A landscape whose use, construction, or physical layout reflects endemic traditions, customs, beliefs, or values; in which the expression of cultural values, social behavior, and individual actions over time is manifested in physical features and materials and their interrelationships, including patterns of spatial organization, land use, circulation, vegetation, structures and objects; in which the physical, biological, and cultural features reflect customs and everyday lives of people.

- ***Historic sites:*** those significant for their association with important events, activities, and persons. Battlefields and presidential homes are prominent examples. At these areas, existing features and conditions are defined and interpreted primarily in terms of what happened there at particular times in the past; and

- ***Ethnographic landscapes*****:** those associated with contemporary groups and typically are used or valued in traditional ways. In the expansive Alaska parks, Native Alaskans hunt, fish, trap, and gather and imbue features with spiritual meanings. Jean Lafitte National Historical Park and Preserve illustrates the strong interrelationship between the dynamic natural system of the Delta region and several cultural groups through many generations. Numerous cultural centers maintain ties to distinctive, long established groups with ethnic identities.

  Areas containing a variety of natural and cultural resources that associated people define as heritage resources, including plant and animal communities, geographic features, and structures, each with their own special local names.

The cultural landscape concept in historic preservation literature is deeply rooted in landscape architecture and landscape design. The basic model is to identify and assess the eligibility of measurable landscape characteristics, and then preserve or restore them where possible. The cultural landscape approach is well established and is implemented within the National Park Service Cultural Landscape Program for the management of cultural landscapes within NPS lands. The current set of NPS "landscape characteristics" (Birnbaum 1994, Birnbaum *et al.* 1996, NPS 1997, Page *et al.* 1998) are:

- Natural Systems and Features: geomorphology, geology, hydrology, ecology, climate, and native vegetation.
- Spatial Organization: physical forms, visual association.
- Land Use: activities that form, shape, and organize space.
- Cultural Traditions: cultural uses of land.
- Cluster Arrangement: organization and spatial relationships.
- Circulation: systems of movement across landscape.
- Topography: 3-D configuration of landscape, earthworks, terraces.
- Vegetation: indigenous and introduced plant communities.
- Buildings and Structures: constructed elements and features.
- Views and Vistas: range of vision, composite of features.
- Constructed Water Features: built water systems.
- Small-Scale Features: signs, benches, road markers.
- Archaeological Sites: ruins, artifacts, remnants of human activity.

NPS developed a classification system for cultural landscapes that designated four types of cultural landscapes: historic sites, historic designed landscapes, historic vernacular landscapes, and ethnographic landscapes. While these classifications provide some context for identifying contributing elements, or characteristics for evaluation, the classification is problematic as it implies that only specific types of cultural landscapes are potentially eligible historic properties. It can also be confusing when, as is often the case, a single landscape may actually possess elements or characteristics that fit into more than a single classification. By their nature as spatial-temporal locales the multi-historic and multi-component nature of many landscapes make such a classification system problematic.

The NPS model is also useful in establishing the method and process for identifying and evaluating cultural landscapes (Page *et al.* 1998 (3):12). The NPS model outlines the following steps for the identification and evaluation of cultural landscapes:

- research: site history.
- examine: existing conditions.
- analysis: compare site history with existing conditions.
- evaluate, identify and assess conditions of Landscape Characteristics;
- determine cultural landscape significance under NHPA criteria; and

- determine integrity of Landscape Characteristics under NHPA criteria; and

- if determined eligible for inclusion to the National Register, nominate the cultural landscape as an archeological and/or historic district.

The NPS began to incorporate a cultural landscape concept in agency historic preservation efforts in the 1940s (Ahern *et al.*1992:ix). Early studies in cultural landscapes were focused on historic sites and constructed environments in discreet locales (i.e.: architecture) and did not explore spatial relationships, cultural ecology, or a landscape-level approach to historic preservation (Ahern *et al.* 1992:ix). As the theoretical schools of landscape ecology, cultural ecology and cultural geography began to merge through technological advances (i.e.: computers, databases, geographic information systems) landscape level approaches to land and resources management within federal agencies began to evolve. The NPS study of cultural landscapes and its attempt to fit the concept within its existing historic preservation framework has resulted in several NPS Bulletins and guidances for historic preservation practitioners to aid in the incorporation of the cultural landscape concept in NHPA evaluations:

- *Cultural Resources Management Guideline, NPS-28* (NPS 1981).

- National Register Bulletin 18: *How to Evaluate and Nominate Designed Historic Landscapes*.

- National Register Bulletin 30: *How to Identify, Evaluate, and Register Rural Historic Landscapes* (McClelland *et al.* 1989, revised 1999).

- National Register Bulletin 38: *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (Parker and King 1990, revised 1992, 1998).

- *Cultural Landscape Bibliography* (Ahern *et al.* 1992).

- *Making Educated Decisions: A Landscape Preservation Bibliography* (Birnbaum *et al.* 1994).

- *The Secretary of Interior's Standards for the Treatment of Historic Properties* (Weeks *et al.* 1995).

- Preservation Briefs 36: *Protecting Cultural Landscapes: Planning, Treatment, and Management of Historic Landscapes* (Birnbaum 1996).

- *Guidelines for the Treatment of Cultural Landscapes* (Birnbaum *et al.* 1996).

- *Cultural Resource Management Guideline* (NPS 1997).

- *Caring for the Past: Landscapes, Battlefields, Landmarks, Federal Preservation* (NPS 1997).

- *Guide to Cultural Landscape Reports Part 1: Contents, Process, and Techniques* and Part 2: *Landscape Lines* (Page *et al.* 1998).

- *Making Educated Decisions 2: A Landscape Preservation Bibliography* (Birnbaum *et al.* 2000).

- *Cultural Landscapes Inventory Professional Procedures Guide* (Page *et al.* 2001).

In spite of the importance of this NPS guidance, and its impact on how many resources are identified and evaluated under NHPA, this approach has not translated into inclusion of American Indian cultural landscapes within this growing sub-discipline in historic preservation. In fact, most cultural landscape reports and supporting documentation prepared for evaluating and nominating a

cultural landscape to the National Register of Historic Places (the purpose of NHPA compliance), are often only identified as “districts” of “historic properties” per existing NHPA definitions and criteria. Needless to say, the NPS approach towards incorporating the cultural landscape concept is extremely limited, and only works within the existing historic preservation framework. This presents some real problems and frustrations to tribal entities that often take hold of the concept under the belief or hope that it will somehow provide for the inclusion of American Indian and tribal values and worldviews in a way that protects those cultural and natural resources in a manner consistent with those values.

**4. Indigenous and American Indian Cultural Landscapes**

Several international studies on cultural landscapes reveal that the concept of attachment and identity as defined by association to a place is not uniquely American Indian, but rather indigenous (Carr 2004, Holland 2000, Memmot and Long 2002, Palmer 2004, Powell 2000, Ramakrishan 2003, Torrence 2002, Works and Hadley 2004). Furthermore, these studies underscore the role of colonialism, its impacts on indigenous cultures throughout the world, and the cultural and political significance of these types of studies for contemporary indigenous people and communities.

What becomes evident after reviewing many of these studies is that indigenous cultural landscapes are symbolic, spiritual, and cannot be confined by

discreet categories and classifications of isolated locales. Indigenous landscapes can only really be interpreted from an emic, or insider, perspective (Allison 1999, Hurt 2003, Kuwanwisiwma and Ferguson 2004). Some studies emphasize the importance of emic interpretations, accounts, and descriptions in order to convey their meaning and cultural significance (Carr 2004, Holland 2000, Memmot and Long 2002, Palmer 2004, Powell 2000, Ramakrishnan 2003, Torrence 2002).

Other studies utilized historical documents, archival information, and ethnographies to interpret and support conclusions drawn from the archaeological data (Anschuetz *et al.* 2001, Keeley 2002, Stoffle and Evans 1990, Stoffle *et al.* 2000 ). Many studies combine ethnographic information and TEK for the purposes of implementing plans for landscape management and ecological restoration (Anderson and Barbour 2003, Carr 2004, Fowler *et al.* 2003, Keeley 2002, Lewis and Anderson 2002, Ruppert 2001, Stewart 2002, Wray and Anderson 2003). Some studies extend the concept of cultural geography to resources management, interpretation, and the management of public lands by government agencies (Carr 2004, Keeley 2002, Works and Hadley 2004).

Several studies on American Indian cultural landscapes and cultural geography have been published in recent years and rely on ethnography, oral history, and traditional ecological knowledge (TEK) to define and describe an indigenous worldview (Allison 1999, Ball 2000, Basso 1996, Carr 2004, Carroll *et al*. 2004, Cochran 1995, Hunn 1990, Hurt 2003, Kuwanwisiwma and Ferguson

2004, Martin 2001, Snead 2002, Stewart et al. 2004, Stoffle *et al*. 1997, Stoffle *et al*. 2000, Sundstrom 1996).

Snead (2002) studies the archeological remains of the traditional trail system in the Pajarito Plateau of New Mexico and analyzes its relationship to Pueblo culture and worldview. The study examines traditional Pueblo trails as a social system that reflects the spatial and social organization of the cultures that created and utilized them (Snead 2002:762). Snead concludes that the study of these traditional trails reveal a uniquely Pueblo social landscape; a system that connects people and places and persists through oral history and stories of the Pueblo people (Snead 2002: 764)

In a study of the Inuit of the lower Kazan River located in Nunavut Territory, Canada the critical role of TEK and oral history for accurately interpreting the archeological record, the past and present significance of specific locations revealed in the examination of caribou hunting locations (Stewart *et al.* 2004). One important observation by the authors is that the significance of the archeological evidence at these locations can only be understood through the interpretation and examination of oral histories and TEK of the Inuit people who have used them through the generations. The relationship between the places and the people are interdependent on the resource, the caribou, for which they were created (Stewart *et al.* 2004).

The concept of a American Indian "homeland" is examined in a study of the historical displacement and relocation of the Muscogee (Creek) Nation,

originally from the southeastern US but forcibly relocated to the Indian Territory (present-day Oklahoma) under the 1830 Indian Removal Act (Hurt 2003). This study examines not only the ancestral cultural landscape of the Muscogee's prior to forced relocation, but also the persistence of the Muscogee worldview and culture within a new and very different landscape, and homeland, in the Indian Territory. It serves as an excellent study on the real-world consequences of historical events on Indian Nations and also as a reminder that interpretations of the ancient past cannot be disconnected from the traumatic events of the more recent past, particularly when examining issues of cultural knowledge, persistence of TEK, and changing cultural values towards land and place.

The significance of oral history and TEK in the identification and interpretation of the Apache cultural landscape have been the focus to two studies (Basso 1996, Ball 2000). Basso's study in mapping and interpreting the Western Apache landscape is interwoven with oral histories and traditional stories that reveal the complex and interdependent relationship between cultural identity and places associated with oral histories and traditions. Similarly, Ball's study on the Mascalero Apache's sacred geography, specifically sacred mountains, identifies the interdependence between "spiritual ecology, ceremonial traditions, prayer, and cultural identity" (2000:264). The study concludes that the "Mescalero culture cannot be separated from its geographical place in the natural and cultural meaningful environment" (Ball 2000:277).

The importance of ethnographic information and TEK for interpreting the archeological record are the focus of a study on Hopi cultural resources management. The author's use the term "footprints" to describe cultural sites and archeological resources found within Hopi ancestral lands (Kuwanwisiwma and Ferguson 2004:26). The concepts is entirely dependent upon oral history and TEK and informs the interpretation and understanding of the resources, or "footprints", that exist throughout the Hopi cultural and ancestral landscape. The authors conclude that Hopi understanding of the past reflects a complex spatial and spiritual geography that is transmitted and passed on through oral tradition, an approach that is quite different than the western, linear, concepts of time and space (Kuwanwisiwma and Ferguson 2004:28).

In a cultural landscape and geography study of the Black Hills of South Dakota, the shared cultural importance of this area to neighboring Indian Nations is examined (Sundstrom 1996). Known as "*Paha Sapa"* to the Lakota, the Black Hills are also sacred to the Cheyenne, Arapaho, Kiowa, and Kiowa-Apache, Mandan and Arikara (Sundstrom 1996:177). The oral histories and traditions of all these Indian Nations relate the cultural and sacred importance of the area shared by all, and individually by community. The area has been the subject of numerous land grabs, and subsequent conflicts between Indian Nations and the federal government and American settlers since gold was discovered in the 1850s. The federal courts ruled in 1980 that the seizure of the Black Hills by the federal government in 1877 was illegal and a cash settlement was awarded, but rejected by

the Lakota tribal governments (Sundstrom 1996:177). As Sitting Bull, the Lakota Chief who led the Indian resistance to forced relocation and the seizure of their most sacred place, said in numerous negotiations and councils held between 1850 and 1887, and as affirmed today; the land is not for sale. This study underscores the political realities facing many tribal governments today, and helps illustrate the long and well-documented articulation by Indian people about the sacredness and cultural significance of the land that persists and determines tribal governmental policies on environmental resources management.

The role of an American Indian worldview and its reflection and interdependence on the cultural landscape of the Dine (Navajo) is examined in relation to the role of tribal consultation, specifically government-to-government consultation (Martin 2001). Martin identifies the reciprocal relationship between tribal governments and federal agencies and land managers as one that both informs appropriate management and provides the Dine the opportunity to identify management priorities by interpreting and informing federal agencies on the cultural significance of a wide range of resources within the lands they manage. This study serves as an excellent example of the importance of meaningful consultation with tribal governments on land and resources management, the opportunities it provides tribal governments to advocate for and promote tribal values, and the benefits of the information for federal agencies and land managers tasked with the responsibilities of protecting tribal trust resources on federal lands.

The relationship between the Southern Paiute and the Grand Canyon are examined in two cultural landscape studies (Stoffle *et al.* 1997, Stoffle *et al.* 2000). In a cultural landscape study examining the cultural meaning and significance of rock art in the Grand Canyon, a specific rock art location is interpreted through its association with a Ghost Dance ceremony performed by the Southern Paiute in 1890 (Stoffle *et al.* 2000:15). The study utilizes oral history, ethnographic and archival information, and historical documents to provide context for understanding the Ghost Dance and its significance to the Southern Paiute. This information is then relied upon to interpret the rock art panels identified at this location not as an isolated site, but as part of a larger cultural landscape associated with the Ghost Dance site with natural springs, traditional trails as elements of a multi-component cultural, social, economic, spiritual, and ceremonial landscape (Stoffle *et al.* 2000:24).

The applicability of the TCP category added to NHPA in 1992 is examined in a cultural landscape study of the Grand Canyon and the Southern Paiute (Stoffle *et al.* 1997). This study underscores the inadequacy of the western-science approach to understanding American Indian cultural landscapes where resource types are identified and studied as discreet and isolated resources instead of as components of a larger cultural landscape comprised of five types: holy landscapes, storyscapes, regional landscapes, ecoscapes, and landmarks (Stoffle *et al.* 1997: 229-250). The study concludes that a cultural landscape approach is far more relevant and accurate a way for defining, describing, interpreting, assessing,

and managing a American Indian landscape than the TCP under NHPA criteria (Stoffle *et al*. 1997:249-250). This is in large part because many aspects of the Paiute cultural landscape are intangible and do not relate to the narrow definition of "historic properties" under NHPA or the requirements for establishing significance and integrity under NHPA criteria. The problem is, in large part, due to the desire to identify TCPs as discreet pieces of the landscape rather than inclusive of a larger cultural and environmental landscape that is identified through ethnographic research, oral histories, oral traditions, ceremonial, spiritual and traditional ecological knowledge of the Southern Paiute people (Stoffle *et al.* 1997:249-250).

5. Indigenous Archeology and Tribal CRM

. The term "indigenous archeology" was coined by Joe Watkins (2000:xiii) as a "discipline developed with the control and influence of indigenous populations around the world". Archeology is often considered an extension of colonialism, particularly in North America (Atalay 2006, Echo-Hawk and Zimmerman 2006, Gonzalez *et al.* 2006, Lippert 2006, Martinez 2006, Nicholas 2006, Smith and Jackson 2006, Two Bears 2006, Watkins 2000). The degree to which Indian Nations engage in both CRM and the practice of archeology varies widely, and in large part depends on the effects of the colonial experience, experience of interactions with practicing archeologists, and the motivations for either developing or not developing internal tribal capacity to meet tribal goals

(Watkins 2000). In an examination of the relationship between archeologists and American Indians, Watkins (2000) examines the need for archeology to change to respond to the changing cultural, social, and political, and legal climate. Issues of ownership and control underlie the legacy of conflict over the management of cultural and archeological resources (Watkins 2000:175).

A survey of several tribal archeology programs examines the ways that NHPA has changed the role of archeology for several tribal governments (Ferguson 1999). According to Ferguson, tribes were not involved in archeological practice. The development of compliance archeology programs at Zuni Pueblo and Navajo Nation is attributed to a response to the increasing numbers of archeologist working on Indian lands following the passage of NHPA (Ferguson 1999:33). More importantly the author asserts that NHPA is the reason for a growing role in cultural resources management on tribal lands (Ferguson 1999:34). In 1999, a list of 57 tribes was compiled to represent tribes actively engaged in archeology and historic preservation programs, to varying degrees (1999:34). Tribal interest and participation in both archeology and historic preservation are a result of tribal commitment to influence and change the practice of archeology (Ferguson 1999:36). The role of the non-tribal archeologist is described as one of a "cultural broker" interpreting the goals and objectives of both archeologists and American Indians (Ferguson 1999:36).

The profession of archeology is examined through the lens of racism and colonialism in a series of papers recently published in *American Indian Quarterly*

(Atalay 2006, Echo-Hawk and Zimmerman 2006, Gonzalez *et al.* 2006, Lippert 2006, Martinez 2006, Nicholas 2006, Smith and Jackson 2006, Two Bears 2006). The role of racism in the practice of archeology and its prevalence in archeological theory and method is evaluated in terms of the consequences for the professional credibility and relevance of archeology (Echo-Hawk and Zimmerman 2006:461).

The case of the Ancient One (Kennewick Man) is examined in a debate it inspired between some American Indians, the authors, and some archeologists (Echo-Hark and Zimmerman 2006:462-470). What underlies the entire dialogue is the issue of race, and more specifically the racialism inherent in some of the theories and anthropological interpretations relied upon to support the plaintiffs in the lawsuit over these ancient human remains (Echo-Hawk and Zimmerman 2006:471-472). When one considers the origins of American archeology (the "Moundbuilder Theory") and the racialism it was intended to prove, it is understandable that many American Indians see the debate over the Ancient One, and the larger debate over "who *owns* the past?" and by inference its material remains, as an extension of racist colonialism (Echo-Hawk and Zimmerman 2006:474-475). The role of "indigenous archeology" is introduced as a potential way to moving past the problems of archeology as colonialism and racialism, towards a more holistic and humanistic discipline (Echo-Hawk and Zimmerman 2006:482).

The dominance of western values in the theory, method, and practice of archeology is directly linked to the colonial history of the Americas (Atalay

2006:280). The role of indigenous cultures and communities as the long-term stewards of cultural resources is explored in contrast to the dominance of archeological ownership of objects, sites, and academic interpretations of the past (Atalay 2006:280-288). The rise of the role of American Indians in the practice of archeology begins during the civil rights era, and is strengthened in the 1970s, 1980s, and 1990s through the actions of American Indian activists, authors, and tribal governments (Atalay 2006:288-290). In short, Indigenous Archeology is the indigenous response to the colonial nature of archeology as it has been developed and practiced; a response that includes rather than excludes tribal identy, history, culture, and values in theory, methods and interpretation.. (Atalay 2006:294). The development of "indigenous archeology" requires the inclusion of indigenous worldviews, as expressed in language, geography, history, and spirituality and traditional knowledge (Atalay 2006).

The role of American Indians in the profession of archeology is examined by a tribal archeologist in a study of archeology as practiced by the Navajo Nation (Two Bears 2006). The stewardship of cultural places, archeological and cultural resources has been a Dine practice for generations, prior to the arrival of the first Europeans (Two Bears 2006:381). The problems of cultural considerations and institutional biases are challenges that American Indian archeologists must confront and overcome (Two bears 2006:383-384). Where the Navajo Nation archeology program was once dominated by non-tribal members; that is changing

as qualified tribal member archeologists are assuming those leadership, managerial, and technical roles for the tribe.

The term "Tribal CRM" was coined by archeologists that have worked on tribal efforts at cultural resources protection for many years (Stapp and Burney 2002:4). It is not by accident that the authors decline to define the term because their thesis is that there is no single approach, theory, or method. Rather, they present a very holistic approach towards cultural stewardship of significant resources (Stapp and Burney 2002:4-5). The term is used to describe CRM that is practiced, influenced, and directed under the leadership of American Indians (Stapp and Burney 2002:8). The result is "cultural resources stewardship" a concept in which practitioners utilize historic preservation, archeological and anthropological methods and theories to protect culturally significant places in ways that benefit the people to whom they are culturally and spiritually necessary (Stapp and Burney 2002:10).

A study of tribes engaged in compliance archaeology and a comparison of a handful of Tribal CRM programs by the Navajo, Zuni, Hopi, Hualapai, Gila River, and White Mountain Apache tribes demonstrates significant variation in how tribes embrace and engage in archeology as a part of Tribal CRM efforts (Anyon *et al.* 2000). The study provides a good introduction to several tribal archeology programs in the US.

The issues of tribal sovereignty and self-determination in the practice of CRM is examined in a study of the cultural landscape of the Klamath, Modoc, and

Yahooskin Nations, as represented by the federally recognized entity, the Klamath Tribe (Allison 1999). This study recognizes the multi-generational body of cultural and environmental knowledge that is reflected in tribal values and ideas about cultural and environmental resources management and stewardship. It contrasts cultural resources, as viewed by the dominant society and agency policy with tribal views about land, environment, and culture; recognizing that story and history are intrinsically linked to land and people over thousands of years (Allison 1999:273).

Indigenous archaeology is about decolonizing the practice of archaeology by putting tribes in the lead of developing research questions, study and data collection methods, conducting studies and analyses, interpreting findings, making management recommendations in compliance studies, and compiling reports (Atalay 2006, Smith and Jackson 2006). Most significantly indigenous archeology is the practice of archeology as relevant to modern-day American Indians and tribal communities. Rather than the study of archeological resources as disembodied artifact collections with no association to contemporary American Indian communities, it is the study of archeological resources as cultural resources. The value therefore, is not the value they hold for archeologists, but for their potential to provide better understanding of past lifeways and changing environmental and cultural conditions of these communities. Often these efforts are driven by research questions of a holistic and tribal determined nature that relate to tribal efforts in cultural restoration and revitalization or the resolution of land claims. As a result, the interpretations and the significance are far more valid

and meaningful to tribes than archeology practiced by the mainstream CRM or academic archeological professions.

## 6. Discussion

A review of the published and peer reviewed literature on cultural resources management is dominated by historic preservation method, theory, and application, particularly with regards to compliance with NHPA and NEPA. The practice of archaeology tends to dominate the literature devoted to historic preservation approaches to CRM giving a somewhat distorted impression that archaeology is both the ends and the means for historic preservation when it comes to ancient cultural resources.

The application of the cultural landscape concept in resources management has been dominated by both historic preservation and landscape architecture as it relates to NHPA compliance. The intensive development of the concept and its application by the NPS within a historic preservation framework has resulted in the near exclusion of a American Indian worldview or application of the concept, almost to the point of being of little relevance to Tribal CRM efforts.

Case studies in Indigenous and American Indian cultural landscapes and geography reveal and need for alternative approaches for defining, describing, and interpreting both the human and natural environments and the cultural relationship that defines the two. Too often these ideas are isolated within the literature, and are not included or reflected in the NPS publications that dominate the theories and

applications utilized by the CRM profession. These studies have much to offer the evolution and progression of CRM, particularly Tribal CRM, and deserve more consideration and incorporation into the professional publications, guidelines, and standards for evaluation. They reveal a holistic approach to resources management that is inclusive of a American Indian worldview.

The lack of literature of particular relevance to Tribal CRM beyond indigenous archeology exposes an area for further research and consideration. Why is the existing framework of historic preservation of so little use or relevance to tribal issues and goals for the management of cultural and natural resources that comprise an American Indian cultural landscape? What is it about these approaches, and the laws that guide them, that fail to adequately capture or consider these resources that tribal governments are devoted to protecting? How can this worldview and environmental ethic, as evidenced in numerous cultural landscape and geography studies, be incorporated and reflected in Tribal CRM efforts and the resource management priorities of federal agencies?

# III. Methods

In general, the methodology utilized for this study is "self-ethnography" (Alvesson 2003: 174). Rather than acting as a participant-observer, a more adequate description is that of an observing participant (Alvesson 2003:174). I am writing not as an expert of tribal government, policy, or practice, but as a member of the professional community that is often put in the position of working with and for tribal governments on issues concerning cultural and environmental resources management. The insights, perspectives, and analysis presented are based upon my experiences within CRM, from the academic training I have received, my professional experiences as a federal employee, my education within a Tribal CRM program, and my overall professional development within the field of environmental sciences. I do not claim to be an expert on any one of these areas, and particularly not in the arena of tribal self-governance and self-determination. I have however, obtained a unique perspective through my work between these various cultures and subcultures as I attempt to navigate these issues of law, regulations, federal policy domains, tribal and academic issues within CRM. I am not a tribal member, an American Indian, an expert on tribal matters, or tribal goals, nor am I an expert in federal law or policy.

I am a practicing Tribal CRM professional with an interest in environmental resources management and the nexus between federal policy and tribal efforts to protect culturally significant resources. The methods I am called upon to utilize daily include technology based information systems such as GIS,

archeological field methods for survey and assessment, legal and regulatory frameworks relied upon for NEPA and NHPA compliance, oral and tribal history and traditional tribal law and knowledge about the environment and what constitutes good stewardship, and the utilization of innovative approaches to environmental and cultural resources management that extend far beyond the scope of historic preservation and archeological resources law and method. In this chapter, I will discuss some of my personal and professional experiences that have evolved and informed my research and my own understanding of the issues, challenges, and opportunities for tribal governments and CRM practitioners

The insights and perspectives presented in the following chapters are based upon my personal and professional experiences over the past decade beginning with graduate school and academic training followed by my professional experience as a federal archeologist and later a Tribal CRM professional. My individual evolution from student, to archeologist, to Tribal CRM professional has brought insights that can only come from first-hand experience of working within the profession and interacting with other archeologists, CRM professionals, federal agency representatives, and tribal members committed to the protection and preservation of their culturally significant resources and lifeways. Throughout these experiences I have been required to be a continually open to new experiences, as opposed to being an expert. I have to be open to a continual re-examination of my own cultural background, biases, and academic training. An open mind and willingness to acknowledge the difference between fact and

opinion, legal mandates and common perceptions about laws and regulations, has enabled me to examine not only the benefits of academic and dominant government approaches towards CRM, but also the limitations of these approaches when confronted with the real-world concerns of tribal governments that strive to protect and manage culturally significant resources. Similarly, my professional experience has forced me to re-evaluate the relevance and usefulness of the body of law that mandates and regulates the practice of archeology and CRM in the US.

My experiences as a Tribal CRM professional have forced me to expand my knowledge beyond my own academic training, broaden my personal philosophy about resource management, and the social and ethical responsibilities that are inherent to working on these issues on behalf of and with a community to which I do not belong and do not share a common history. Furthermore, these communities have suffered tremendously as a result of decisions and actions taken by the government and society, particularly in relation to indigenous rights to subsistence, cultural survival, and self-determination. It is my observation that many who serve in agency and CRM capacities in the US are far too ignorant or misinformed about the actual histories of American Indian people and tribal communities, the legacy of colonialism, past federal policies of cultural and actual genocide directed at indigenous people, and the ways that the practice of archeology has often been viewed by American Indians as an extension of this colonialist agenda. Too often I have heard fellow CRM professionals and archeologists complain about the political nature of Tribal CRM and tribal

governments that engage in the management of cultural and environmental resources, as if these things are a fabrication of Indian activists rather than the contemporary manifestations of a multi-generational struggle for self-determination and restored sovereignty over ancestral lands and resources. Tribal concerns over approaches and practices of CRM and archeology are not a recent development. Indigenous Peoples' beliefs and values about land and resources have often been in conflict with Euro-Americans prior to the creation of the US, the federal government, or contemporary American culture (Brown 1970, Jackson 1881, Vanderwerth 1971). I can attest from professional experience in CRM, that this difference in perspective is often exposed when dealing with management decisions on federal lands that impact culturally significant tribal resources contained within those lands.

My introduction to CRM occurred through my study of the field of archeology as a graduate student in applied Anthropology in 1997 at Oregon State University (OSU). Prior to my enrollment in graduate school at OSU, my academic background had been exclusively in fine arts and art history. I began my graduate work with a desire to learn about material culture of past civilizations. Itwas my interest in art, functionalism, and history that led me to study anthropology and archeology as a discipline.

As a beginning graduate student, I primarily took courses in the history and methods of applied archeology from professional and academic archeologists. I supplemented these courses with courses in American Indian art history taught in

the Department of Art at OSU. Methods courses focused on artifact analysis, faunal analysis, human osteology, and the practicum known as the archaeological field school. In general, I followed a curriculum that is required for professional archeologists and CRM professionals meeting the Secretary of Interior Standards for archeology. This curriculum and credential is a federal and state professional standard for serving as a principal investigator on all sorts of CRM projects. These professional standards and the associated academic and educational requirements are the primary reason the practice of CRM has become synonymous with the practice of archeology. It is also why there is often a shortage of qualified tribal people who meet these requirements; the standards require extensive training in archeology.

When I look back on my goals as a beginning graduate student, I am struck by my naiveté and ignorance of the political issues surrounding the profession of archeology, and the inherent political and legal nature of the CRM profession. I had not yet contemplated the role of the professional archeologist, had never worked as an archeologist, was not aware of any tribal concerns about the practice of contemporary archeology, or the issues I would have to confront in pursuing this course of academic study. In many ways, naiveté can be a good thing, as had I known at the time, I might have balked at the challenges ahead and chosen another course (something that I did consider midway through my academic process). Ten years later I find myself in the role of a Tribal CRM professional, a career path that

has proven more challenging and more rewarding than I could have ever possibly envisioned as a naïve graduate student.

I was introduced first-hand to tribal issues in CRM during my archaeological field school in 1997; a professional and academic requirement of all Secretary of Interior qualified archeologists and CRM professionals who work in the management of archeological and cultural resources. In short, our field school was delayed due to a lack of consultation with the affiliated Tribe, the failure to secure a permit, and a hefty amount of skepticism on the part of the particular tribe's CRM director as to the merits, and validity of the proposed excavations that were the basis of the investigation and the field school. The permit issues were resolved after in-depth consultation with the tribe, and the field school proceeded, with the added component of a tribal cultural resources monitor and a site visit by the members of the tribal council.

At the end of the field school, the tribe extended the invitation to all of the participants to visit the tribal offices, tour the facilities, and meet with the tribe's CRM director to learn about tribal concerns about archeology and the rights and responsibilities of practicing archeologists with regards to the law and obligations of consultation with affiliated tribes. Not all of the students accepted the invitation, but almost half of us did. It was a significant experience and one that initiated me and several of my field school cohorts in American Indian CRM. The experience, while unanticipated, was one of the most valuable educational and professional lessons I received as a graduate student.

As a requirement of my degree in Applied Anthropology I was required to complete an internship. I was fortunate to receive the opportunity to complete this requirement with the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), Cultural Resources Protection Program (CRPP). I was introduced to the real-world applications of indigenous archeology, contract CRM, and more specifically Tribal CRM from leaders in the field. It was my first experience with compliance archeology in relation to the National Environmental Protection Act (NEPA), and Section 106 of the National Historic Preservation Act (NHPA). I wrote clearance reports, conducted archival research, reviewed site records, and helped prepare sections of larger CRM documents being prepared by the program. I did not do any field archeology through the entire internship, and to be honest, I was fine with that.

What I was exposed to during my internship is difficult to describe. On a practical level, I was introduced to a fully functioning CRM program being run and directed by a federally recognized tribe. I was exposed to the realities of professional employment (what archeologists do for a living) for people with degrees in archeology: compliance archeology a.k.a. CRM. Even more significant, I was exposed to a tribal approach in which the goal, at all times, was protection and continued use of culturally significant resources throughout the tribe's ancestral lands (not just the reservation).

The CRPP staff is comprised of experienced tribal and non-tribal professionals, knowledgeable, and well trained in archaeological field methods and

CRM methodology and relevant laws. Added to that knowledge, tribal member staff possessed vital cultural knowledge, traditional knowledge, and a personal commitment to tribal resource protection. It is the tribal focus of the CRPP that made it exciting and rewarding. I found what had been missing in my prior training in archeology, a connection to living the people and culture, a sense of purpose, and a unifying principle of resource protection. What impressed me most was the scope and scale of CRM concerns for the CTUIR. The CRPP was not limited to contract CRM or the practice of compliance archeology, although it was an important part of the program. It was a program committed to landscape level resource management with a primary goal of protecting a wide range of culturally significant resources throughout their ancestral lands in a way that protected and promoted tribal interested and goals. I left CTUIR CRPP inspired, motivated, and refocused on examining the holistic nature of Tribal CRM and the role of environmental sciences and environmental resource law within its practice and implementation.

Over the course of the next year, I started my PhD program in Environmental Sciences Graduate Program at OSU. At the time I was particularly interested in the interdisciplinary nature of Tribal CRM and environmental resource management. I became interested in the management of culturally significant natural resources beyond archaeological resources.

Through my own deliberations and further academic studies, particularly in ethnic studies, I came to realize that much of the external and contemporary

conflict between tribal communities and the archaeological community was actually philosophical and epistemological in nature, yet the common feature was a fundamental conflict over how to best manage resources that exist within a given landscape.

It is important to understand that this tension and conflict over land, land use, and resource management did not emerge out of the blue, but in fact has been an ongoing and unresolved conflict, reflected throughout the history of US-Indian relations, from Indian wars, to the treaty-making era, to the creation of reservations, the 1887 Dawes "Allotment" Act that resulted in the diminishment of those reservations, and the ongoing struggle for sovereignty and self-determination that is the experience of all tribes throughout the US (Brown 1970, Jackson 1881, Vanderwerth 1971).

Another significant professional training of my graduate student experience was my summer employment as a field archeologist at the Crescent Ranger District on the Deschutes-Ochoco National Forest (Forest) in the Oregon Cascades. I learned how federal agencies approach resources management; as single and discreet resource types managed at the landscape level. Federal agencies place a heavy emphasis on locating, documenting, and assessing with the latest in mapping and GIS technology. Every aspect of resource management within a National Forest is conducted at a landscape level. Resource management on federal lands is interdisciplinary in nature, integrating multiple departments and programs with a unifying goal of complying with federal laws and implementing

the regulatory processes that are part and parcel with those laws. The resources, however, are treated and managed by specialists within a single resource type.

The practice of archeology on a National Forest is usually conducted for two reasons: fulfillment of federal agency responsibilities under Section 110 and compliance reviews for NEPA or NHPA under Section 106. Under Section 110, federal agencies are required to inventory their lands, identify all possible historic properties, evaluate those properties for their eligibility for inclusion on the National Register, and if eligible develop management plans for future management. When a federal action is proposed, an inter-disciplinary team is assigned to conduct the necessary studies to ensure compliance with NEPA and other applicable federal laws, including NHPA's Section 106 requirements for identification, assessment, and evaluation. Federal undertakings may occur outside the NEPA process and in those situations; Section 106 compliance is also conducted. It was through my experience as a federal employee that I became fully aware of the primary role and utility of NEPA in CRM, a role that had never been introduced or adequately examined in my graduate school course work for archeology or anthropology.

The National Forest system has its own personality often referred to as the "Forest Service Culture". This is often said in jest, but in actuality it is a very accurate description. Forest Service employees are federal employees charged with carrying out specific mandates set by Congress and the current administration in the White House. Forest Service (FS) employees are a close-knit group of

specialists trained to carryout specific functions on the forest. National Forests are "lands of many uses", a politically correct way to emphasize that National Forests are not National Parks, not exclusively intended for preservation or recreation, but are actually intended to be managed for the extraction of resources (primarily timber and other forest products). As a result, FS facilities are often located in remote areas and surrounded by rural communities that hold a deep suspicion of the federal government and its land managing bureaucracy that regulates how forest resources are used and who gets to use them. Given the geographical isolation, the frequent lack of local support for the agency, and the specialized nature of the work FS employees are charged to do, it has indeed evolved into its own culture and way of thinking.

I found the FS culture to be inclusive and accommodating within the agency, as federal scientists and specialists work on managing a landscape from very different disciplinary backgrounds and levels of education, with a common goal of forest health in the face of external pressures (from local communities, state governments, and politicians in Washington DC) to extract economically valuable resources from forests lands. It is also, however, a closed community and one that often is reluctant to include outside interests, particularly federally recognized tribes as active participants not so much in the planning and decision-making process, put in the identification and evaluation process, particularly when it comes to NEPA and NHPA compliance. In my professional experiences I have found that this limited inclusion is not unique to the Forest Service, but is evident

to some degree across all the federal agencies I have worked with as a Tribal CRM professional. I attribute this selective exclusion to be institutional and a result of the management and policy approaches established within each agency. This is a very real obstacle tribal governments have to deal with and it is changing, slowly and incrementally, as federal agencies are required to engage more directly with tribal governments on planning and management decisions and federally recognized tribes are increasingly engaged beyond the notification and consultation level in federal agency actions.

As an intern with the CTUIR, I was trained in CRM report preparation and introduced further to the importance of the protection of culturally significant resources to a contemporary tribal community actively engaged in both compliance archeology and cultural resources management. As a FS field archeologist I was introduced to the day-to-day activities associated with field-based researchers engaged in conducting compliance reviews for NEPA and NHPA. I was required to learn the applicable federal laws, and the associated Code of Federal Regulations (CFRs) for each law that set forth how the laws were to be applied on federal lands. I learned the CRM terminology and jargon required for the preparation of compliance-related documents. I learned how to conduct comprehensive field surveys to federal and agency standards. I learned how to conduct systematic archaeological testing for the purpose of identifying the presence or absences of sub-surface archaeological resources within a specific project location. I refined my mapping and navigation skills, and utilized applied

geomorphology and soil science in field-testing and analysis of findings from those tests. I learned how to collect and apply GIS data and specific site information in order to assist the Forest in analyzing the distribution of resources across the landscape. I came to appreciate the role of federal resources laws and the importance of interdisciplinary field methods and research for the purpose of NEPA and NHPA review and compliance.

In my experiences at the FS it was my impression the practice of archeology tended to be focused on excavation as the primary means of identification, evaluation, and mitigation in order to allow a proposed project to proceed. Rather than protecting the resource in place, the goal of mitigation is often to salvage the scientific data (or a percentage of it) through archeological excavation and analysis in a process known as “data recovery”. Once the data has been recovered, the mitigation is considered adequate and the project often proceeds, even if it means the destruction of the remainder of the resource or site.

It is not uncommon for federal agencies to approach NEPA’s mandates to evaluate and consider the long term and cumulative impacts to the cultural and human environment, as only requiring compliance with NHPA for their consideration of impacts on cultural resources. In short, whether they realize it or not, federal archeologists are usually employed by the agency for the primary purposes of NEPA and NHPA compliance. Heritage Program Managers in federal agencies have broader responsibilities but again these are usually determined by NEPA and NHPA mandates. The reality is that outside academia, degreed

archeologists will most likely only find professional employment within their chosen field under the auspices of compliance CRM as mandated by NEPA and NHPA, whether as a federal or state employee, a tribal employee, or a private contractor or consultant.

My experiences as a federal employee and a FS archeologist exposed me to both landscape level and interdisciplinary approaches towards resource management. For that experience I am entirely grateful as it trained me and prepared me to apply similar approaches and methodologies to my work as a Tribal CRM professional. Federal agencies and federally recognized tribes have much in common with regards to the need to manage land for multiple uses while complying with applicable laws. Many of the methods are identical even when the overarching goals and objective may be very different. Where I observed divergence and even conflict, and see it today in my role as a Tribal CRM professional, is with regard to tribal rights, federal responsibilities, tribal trust resources within federal lands, and the role and responsibilities of both groups with regards to consultation and management decisions. As a federal employee I saw first-hand how resource management decisions were implemented on the ground, what I did not see was how those decisions were made, what types of consultation and planning were conducted, or how federally recognized tribes were brought into the process. My lack of exposure to the full NEPA process is understandable. I was a field archeologist and a seasonal one at that, a student employee, and as

such was not exposed to the hierarchical nature of government-to-government agency negotiations with federally recognized tribes.

I completed an interdisciplinary master's degree from OSU in 2003. My program required three concentrations and mine were CRM and Native American studies within Department of Anthropology and American Indian art history within the Department of Art. My Master's paper and project were focused on the application of NAGPRA and NAGPRA compliance for museum collections, specifically for portions of a collection held by the OSU Horner Museum. I continued with my doctoral program within the Social Sciences track of OSUs Environmental Sciences Graduate Program (ESGP). Upon completion of my masters and my coursework and work experience in both archeology and CRM, I met the Secretary of the Interior Standards for archeology. This credential qualified me to serve as principal investigator for cultural resources work and compliance under NHPA and NEPA. In 2003, I was hired by the Yurok Tribe, a federally recognized tribe located in northwestern California, as the tribal archeologist within the Tribe's Culture Department. Later reorganization within the tribal government placed me as the Assistant Director of the Cultural Resources Division of the Yurok Tribal Environmental Program.

It is through my professional experiences this position that I have gained the greatest insights to the challenges facing tribal governments as they work within existing federal resource laws to advocate for the preservation and protection of culturally significant resources throughout their ancestral lands. It is

in this capacity that I have become aware of the practical and very real pitfalls and limitations to the current approach to CRM as it is implemented and practiced. I have come to recognize that the historic preservation framework upon which most CRM efforts are based is inadequate and insufficient to addressing the resource protection and management objectives of many tribal governments. For many American Indians, cultural resources are more than a discreet and narrow subset of historic properties or specific cultural sites and properties. For many American Indians, commemoration and preservation for the purpose of commemoration, as opposed to protection, are not the motivating factor for their involvement in these issues and within the CRM arena. Yet the historic preservation framework is the framework they are expected, and often required to work within.

It is important at this time to explain the issues of confidentiality and the role of confidentiality agreements that most tribal employees sign when accepting tribal employment. My confidentiality agreement was one of the first documents I signed upon acceptance of my internship with CTUIR and my position with the Yurok Tribe. It is a legally and ethically binding agreement between me and the Tribe that restricts my use of knowledge and information obtained as the result of being a tribal employee. Personally, I had no problem signing this agreement and take very seriously the obligation not to disclose or use for personal or professional gain any tribal knowledge or information acquired in the course of carrying out my duties for the Tribe. I would also like to note that I was also required to sign a confidentiality agreement when I accepted employment with the Forest Service.

While that confidentiality agreement was less restrictive, it is important to mention that the practice is not limited to tribal governments, but actually standard operating procedure for any government entity. Even private industry often requires this type of document be signed prior to employment.

Within many tribal communities, and certainly within the CTUIR and the Yurok Tribe, access to traditional and cultural knowledge is privileged, exclusive, and hierarchical. Even within the American Indian community, cultural and traditional knowledge is not shared equally. Access to knowledge and who gets access and who gets to learn it is often determined through traditional systems of culture that outsiders will never have access to, let alone understand. This restricted access probably serves multiple purposes. First, it is probably a reflection of traditional culture and the way historical and cultural knowledge is passed on within a community that relied exclusively on oral transmission. Second, in more recent times, it is way of keeping intact true traditional knowledge and protecting it from dissemination, misappropriation, misinterpretation, distortion, and exploitation by non-tribal entities or individuals. In other words, this strategy is a vital component of tribal cultural preservation. Finally, there is no one-size-fits-all rule for tribal communities. Each tribal community has a unique history, culture, and tradition. What applies to one, does not apply to all, so the extent to which some share and others do not, is entirely consistent with the fact that no two tribes are the same.

Archaeological information is already protected and restricted information under NHPA regulations, so in many ways the confidentiality agreement is simply an extension of this type of restriction. Tribal employees, as staff and in the course of conducting tribal business, are often provided with tribal and sensitive information that they would never otherwise be privy to. This is particularly true for cultural knowledge, traditional knowledge, and resource management information. There can be external pressures to share this knowledge for either professional or personal benefit, and the confidentiality agreement serves to prohibit this from occurring. I find this agreement to be very helpful, since it clarifies my roles and responsibilities as a tribal employee and permits me to explain, in absolute terms, what can and cannot be discussed or shared. These agreements are restrictive, but they also reinforce the privileged status of tribal employees and remind us that we have a unique responsibility to protect tribal knowledge for the tribe. As a result, I do not discuss the details of my work with the tribal communities I work for in this study. Rather I am presenting my analysis of the challenges facing Tribal CRM programs and professionals working within the existing legal and professional framework that dominates the practice of CRM today. It is my goal to provide informed analysis of the existing framework and the challenges it poses for tribes that are engaged in cultural and natural resources management and protection.

As a Tribal CRM professional I have a wide array of responsibilities that include but are not limited to resource management compliance under NEPA and

NHPA. We conduct ethnographic research work to protect tribal trust resources (natural and cultural) on tribal, federal, state, and private lands. An overarching commitment to cultural preservation and restoration is the single most unifying theme of every tribal government I have had the privilege to work and interact with, regardless of their diverse cultures and histories. It has been my observation that most tribes have, to some degree or another, a cultural resources protection program. This can be a group of interested and committed elders and community members, a formal committee, a single tribal employee, the tribal council, or a fully developed tribal cultural resources program. It is often said that tribes have always done CRM and in many ways that is true. While what they are referring to is traditional cultural stewardship, practiced for many, many generations, the development of a CRM program for tribes often varies to the degree of tribal government resources, extent of tribal land ownership, ongoing land use concerns, relationship and proximity to federal agencies and federal lands, and a myriad of related priorities for tribes, many with limited resources, to pursue these goals and address resource management issues throughout their tribal trust and ancestral lands.

In many ways the methods I use as a Tribal CRM professional are similar to those I learned and utilized in my work as a FS archeologist. As a Tribal CRM professional, I also do compliance CRM as required under NEPA and NHPA on a project-by-project basis. I conduct field surveys, complete site records, evaluate sites, conduct compliance studies, write and prepare CRM compliance reports for a

large area that includes reservation and ancestral lands of the Tribe. Many of the methods used and the laws that mandate compliance CRM are the same. The differences, however, are highly significant.

First, much of what Tribal CRM programs do is not limited to the identification of archaeological resources or historic properties for the purposes of NHPA and NEPA compliance. Tribal CRM programs and professionals utilize a diverse array of laws and methods unified by the goal of cultural resources protection, preservation, and restoration. Archeological field methods are often utilized, but also utilized are ethnographic methods, ethno-history, traditional ecological knowledge (TEK), and environmental resources methods. Second, in a Tribal CRM program, cultural resources include natural and spiritual resources, in short, any environmental resource of cultural significance historically, traditionally, and of ongoing contemporary value deemed vital to the preservation of the tribal community and culture. A third difference is the role and applicability of state environmental and cultural resources law for lands that fall within ancestral boundaries, but are not in federal or tribal ownership. This places an additional demand on Tribal CRM professionals that extends beyond the role of those CRM professionals working exclusively on federal lands. In this capacity, Tribal CRM professionals have to learn state and local resource laws much the same as those professionals employed by private contract CRM firms. Fourth, the role of tribal consultation in relation to the identification and interpretation of significance is very different within a Tribal CRM program.

Meaningful consultation with tribal governments and affiliated American Indians should occur at the early planning phases for any federal undertaking or action. NHPA and NEPA say so. For too long, many federal agencies approached tribal consultation as an afterthought or notification, not a consultation or exchange of ideas. Notification often means sending a certified letter informing a tribe of a proposed project and allowing 30 days to respond. If no response is received, the legal requirement for consultation is considered fulfilled and the response is considered negative (i.e., no concerns). This is not the way tribal governments view consultation on projects or resources nor is it adequate as determined by federal court rulings and a series of Executive Orders or agency declarations on the issue. When it comes to cultural resources, ongoing, intensive, and often lengthy consultations are necessary within the tribal government structure in order to determine the best course of action for a given project or proposal.

As a Tribal CRM professional, my most serious obligation to the tribe is to accurately incorporate the findings of tribal consultation with various committee and community members on how to best balance project demands with cultural values and tribal goals of resource protection and preservation. I conduct this type of consultation not only under the requirements of NHPA and the Section 106 process, but more importantly because it is expected and required of me by the tribe. It is important to note that this type of consultation specific to NHPA and NEPA compliance for cultural resources is not the same, nor does it substitute for

the mandates government-to-government consultation required of federal agencies as part of the federal governments trust responsibility to tribal governments.

Tribal consultations can be extensive and incredibly time-consuming, but they are also informative, educational, and vital to proper interpretation of tribal goals for the management of the resource, particularly when a proposed project will have a direct impact on that resource. Additionally, tribal consultations are required under many federal laws and a series of Presidential Executive Orders. The emphasis on extensive consultation is part of the tribal governing structure and culture, in which decisions are deliberated, discussed, and considered at length before reaching a decision. Furthermore it is an obligation of the federal government that agencies actively facilitate and engage in meaningful consultation with federally recognized tribes in reaching management decisions on federal lands. Such consultations are sometimes far more intensive and lengthy processes for tribally-directed, on-reservation projects than for those occurring on federal lands and with outside agencies and entities due to the direct implications and potential impacts on reservation resources and the reservation community. Regardless of the scope or extent it can be said with certainty that meaningful and in-depth consultation with the tribal community is the foundation of effective Tribal CRM efforts.

Finally, the most striking difference between tribal and non-Tribal CRM is the desired outcome of engaging in the compliance and consultation process. The role of mitigation is critical to understanding this difference. Under the NHPA and

NEPA processes a proposed project may proceed even when it results in the destruction of a significant resource, as long as that damage is mitigated. The process of mitigation is often considered to be synonymous with resource extraction and data recovery through excavation, analysis, and curation. On federal lands, such as National Forests, the desire to complete the proposed project often overrides resource protection concerns. On a practical level this means if a proposed logging operation or recreational facility has been determined to have a potential adverse effect on the integrity of an eligible historic property, this adverse effect must be mitigated. This usually results in a research design that requires test excavations and possibly full-scale excavations for data recovery.

When one practices archeology on a National Forest, this is the reality of what is being conducted. It is compliance driven archeology and will require negotiations between the affiliate tribe(s), interested parties, and the federal agency to develop a Memorandum of Agreement (MOA), a Historic Properties Treatment Plan (HPTP), and a Plan of Action (POA) if NAGPRA eligible objects or human remains are encountered. These types of excavations are strictly regulated and while the goal is data recovery, the primary objective is not research-oriented but rather compliance-oriented, although the two are not mutually exclusive. CRM professionals conducting work on federal lands need to be knowledgeable of these laws and requirements prior to extracting or removing archaeological resources from federal lands. The permitting process is intended to insure that those

conducting such research are both qualified and knowledgeable of the laws and regulatory requirements prior to any excavation or extraction.

Mitigation through excavation, data recovery, and analysis is a common approach, in fact the dominant approach, for federal land agencies when proposing and developing strategies for implementing a proposed project that will damage a specific archaeological resource or historic property. Some agencies have codified this approach in their agreements with the ACHP or the SHPO on how the agency will conduct NHPA compliance for the lands they manage. Many federal archeologists feel that developing research designs that include excavation as a means of mitigating impacts is the only way for them to answer the necessary research questions, and to be honest, to practice their profession. Archeology is the means through which data recovery through archeological excavation is usually undertaken on federal lands. This approach to NHPA, it application, and the concept of mitigation is needless to say often a point of conflict between tribes, archeologists, and federal land managers. Excavation as mitigation is not an approach that is often promoted by many tribal governments nor is it commonly promoted by many Tribal CRM professionals.

The degree to which tribes support excavation as research or mitigation varies widely between tribal communities and is often dependent on the specifics of each project and each culture. Again, there is no one-size-fits-all rule to how comfortable or willing individual tribes are to engage or participate in this type of mitigation. In my experience as Tribal CRM professional, I have witnessed serious

deliberations over decisions about projects with the potential to impact cultural areas, ceremonial places, and places associated with cultural geography. I have learned that s common goal of tribes facing many circumstances is usually, *in situ* protection of the resource, whenever and wherever possible. I have seen tribal projects cancelled or completely re-designed in order to protect cultural resources and avoid the potential pitfalls of mitigation. When avoidance is not possible and the tribe has concluded the project is necessary, great concern is evident on how best to balance the cultural concerns and protection of the resource with the execution of the project. Many tribes do actively engage and participate in the practice of archeological research, both for research and compliance purposes, and in no way do I intend to imply that an aversion to the practice of archeology is universal, or that one approach is superior to another. Rather, the purpose of this study is to examine the existing legal framework utilized in CRM and some possibilities or enhanced tribal participation in the compliance processes in which most are already engaged, to some degree or another, in ways that improve tribal efforts at cultural resources protection. How tribes, through their tribal governments, departments, and programs, approach these issues and the methods they utilize are entirely within the realms of their tribal self-determination and sovereignty. It is my goal to present analysis and one alternative that tribes can utilize, if in fact, archeology is not a preferred methodology for NEPA and NHPA compliance and overall tribal resources management.

Excavation as a means of mitigating impacts is extremely counterintuitive, and does not serve the primary goal of *in situ* protection. Once a site is fully excavated it has no potential to provide future research. This has significant implications on a site's eligibility for inclusion to the National Register. For decades, some tribes have articulated concerns about cultural resources, particularly ancestral sites and human burials with a consistent declaration that things that are in the ground need to stay in the ground. It is my observation that this is a deeply embedded cultural belief that is common to many American Indian communities. It is for this reason, that excavation as a means of mitigation is sometimes a significant concern for tribal governments. Often the goal is to return disturbed materials to the earth with as little intrusive study and analysis as possible. Needless to say, this view is often in direct conflict with the goals and objectives of professional archeologists, and even federal agencies that have the responsibility of complying with all applicable laws in each case. Many agencies and archeologists are far more interested in studying the items found for their scientific value and information. Protection-in-place is cultural resources conservation and it is often a preferred approach to the tribal governments I have worked with over the years. It is an approach that federal agencies are more seriously considering in recent years and I consider this change one of the benefits of improved and increased government-to-government consultation between federal agencies and federally recognized tribal governments.

In this study I am examining the existing legal and policy frameworks that tribes are required to navigate when they enter the realm of CRM, particularly within federal agencies and contexts. The examination is not as a lawyer, but as a practitioner who is called upon to understand, interpret apply the laws in my professional efforts to accomplish the goals and objectives of the tribes I work for and with as a Tribal CRM professional. Tribal CRM professionals must work within multiple cultures: tribal, inter-tribal, federal agencies, state agencies, local governments, archeologists, anthropologists, environmental scientists, and professional and academic institutions and organizations. Most importantly, Tribal CRM professionals are not employed by tribal governments to promote the values and goals of archeologists, anthropologists, agencies, or academics. Rather, they are employed to utilize their training, degrees, and skills to promote and advocate for the goals and objectives of the tribal government they serve. It is a challenging, and at times daunting and overwhelming responsibility, but in all honesty, it is also the most rewarding work I have ever done or could hope to do as a CRM professional and a human being.

## IV. Examination of Existing Laws and Regulations

The practice of CRM has been described as, “applied archeological research under a bunch of obscure federal laws.” (King 2002:5). These laws are:

- Antiquities Act (1906)
- National Park Service Organic Act (1916)
- Historic Sites Act (1935)
- Federal Property and Administrative Services Act (1949)
- National Trust for Historic Preservation (1949)
- Archeological and Historic Preservation Act (1960)
- National Historic Preservation Act (1966)
- National Environmental Policy Act (1969)
- National Marine Sanctuaries Act (1972)
- Coastal Zone Management Act (1972)
- Department of Transportation Act (1974)
- Public Buildings Cooperative Use Act (1976)
- American Indian Religious Freedom Act (1978)
- Archeological Resources Protection Act (1979)
- Abandoned Shipwreck Act (1987)
- Native American Graves Protection and Repatriation Act (1990)
- American Battlefield Protection Act (1996)

In my professional experience there are five of these laws that comprise the majority of CRM efforts, but all of these laws are potentially applicable for any CRM professional. My study focuses on the five I utilize most frequently as a Tribal CRM practitioner:

- National Historic Preservation Act (1966)
- National Environmental Policy Act (1969)
- American Indian Religious Freedom Act (1978)
- Archeological Resources Protection Act (1979)
- Native American Graves Protection and Repatriation Act (1990)

A review and analysis of these five major federal resource laws is presented in this chapter. I have identified some of the challenges facing American Indians and tribal governments that I observed in their efforts to protect, preserve, enhance, maintain, manage, and access culturally significant resources that exist throughout their cultural landscape and ancestral territory, even tribal lands. These five laws and compliance with these laws are often the focus of government-to-government consultations between federally recognized Indian tribes and the US federal government, its agencies, and officials with regards to federal land management, particularly federal lands and tribal trust lands, lands held in trust for tribes by the federal government.

What is needed is an honest and straightforward discussion of these five federal laws, their potential strengths and weaknesses in promoting tribal values and objectives in the actual practice of CRM, and how they are most commonly

utilized in CRM. The following section is not a comprehensive legal analysis or historical recounting of these federal laws, but rather a presentation of the relevant excerpts with the actual language and requirements of each of these five laws, followed by a discussion of how each law is commonly interpreted and applied by federal agency officials, State and Tribal Historic Preservation Offices, and the established CRM profession. The discussion will include the identification of the sometimes faulty or biased assumptions made by those entities and professionals in their interpretations and applications. Also included is a discussion of the strengths and weaknesses of each of these laws as they related to accomplishing Tribal CRM goals and objectives for protecting culturally significant resources.

**1. National Historic Preservation Act (1966), as amended, 16 U.S.C. 470.**

**A. The Law and Regulations**

The National Historic Preservation Act (NHPA) was not the first federal historic preservation law in the US; rather the 1906 Antiquities Act was the first law regulating the practice of archaeology on federal lands. NHPA is the dominant framework of both the current practice of CRM within federal government and its agencies, the basis for the practice of compliance archaeology, and the law that often causes the most distress and concern to American Indians and tribal governments who are continually striving to protect culturally significant and

tribal trust resources throughout their ancestral and tribal lands. The adoption of NHPA has had significant influence on how CRM is conceptualized and practiced today, over forty years after its passage. In those forty years, these concepts and practices have become rigidly established in the minds, values, and practices of many federal agency officials, federal land managers, federal employees, academic and professional archaeologists, CRM professionals and historic preservationists, and entities created via specific provisions of the Act; the Advisory Council on Historic Preservation (ACHP), State Historic Preservation Offices (SHPOs), and even some Tribal Historic Preservation Offices (THPOs).

It is due to this overwhelming influence and dominance of NHPA in the practice of CRM that it is given more detailed attention in this chapter than the other four federal laws that follow. This is not due to any strongly held conviction on my part that would suggest that NHPA provides superior approach to Tribal CRM, in fact it is my conclusion that it is not. Rather, I believe the over emphasis on NHPA is actually a significant obstacle facing American Indians and tribal governments working to protect culturally significant resources. I also believe that many of the misunderstandings, frustrations, and even conflicts over the management of land and environmental resources actually arise as a result of the often biased or faulty interpretation, implementation, and compliance with the Act.

NHPA was passed for the expressed purpose of declaring and national policy on historic preservation and establishing a federal program and processes for encouraging the preservation of the historical heritage of the US. The law was

passed in 1966, and has been amended several times, most recently in 1992. The origins of the law are attributed to then First Lady, Lady Bird Johnson, inspired by a study and report, entitled “A Heritage So Rich” (King 2004:22).Recommendations from the study included the creation of a national program devoted to historic preservation (King 2004:22). The result was NHPA. While under the authority of the Secretary of the Department of the Interior, the responsibility for overseeing implementation of the Act and its provisions was assigned to the National Park Service (NPS), an agency within the Department of the Interior.

First and most importantly, NHPA makes a declaration of a national policy on historic preservation:

> Section 1
>
> (b) The Congress finds and declares that —
>
> (1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;
>
> (2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;
>
> (3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;
>
> (4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;

Second, NHPA sets a policy of historic preservation for the federal government:

> Section 2
>
> It shall be the policy of the Federal Government, in cooperation with other nations and in partnership with the States, local governments, Indian tribes, and private organizations and individuals to —
>
> (1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;
>
> (2) provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations and in the administration of the national preservation program in partnership with States, Indian tribes, Native Hawaiians, and local governments;
>
> (3) administer federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations;
>
> (4) contribute to the preservation of non-federally owned prehistoric and historic resources and give maximum encouragement to organizations and individuals undertaking preservation by private means;
>
> (5) encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment; and
>
> (6) assist State and local governments, Indian tribes and Native Hawaiian organizations and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

Following Sections of the Act implement this policy by establishing a National Register of Historic Places (National Register) and assigning the creation

and expansion of the National Register to the Secretary of the Interior the designation of National Historic Landmarks. Subsequent sections require the development of criteria, "in consultation with national historic and archaeological associations" for properties to be included on the Register and for identifying National Historic Landmarks, establishes a process for nominating properties to the Register, and directs the creation of the Advisory Council on Historic Preservation (ACHP), the designation of State Historic Preservation Officers (SHPOs) for the purpose of overseeing the implementation and compliance with the Act, provides for the creation federal grant and tax incentive programs devoted to historic preservation, and provides a series of definitions for interpretation and application of the Act.

Section 101(b) of the Act provides for the creation of State Historic Preservation Programs and Offices, and outlines eleven primary functions of State Historic Preservation Offices (SHPOs). In the 1992 amendments to the Act, this ability was extended to tribal governments in providing for the creation of Tribal Historic Preservation Offices (THPOs) as outlined in Section 101(d) for the purpose of assuring and overseeing compliance with NHPA on Tribal lands and the assumption of these eleven SHPO functions:

> (3) It shall be the responsibility of the State Historic Preservation Officer to administer the State Historic Preservation Program and to —
>
> (A) in cooperation with Federal and State agencies, local governments, and private organizations and individuals, direct and conduct a comprehensive statewide survey of historic properties and maintain inventories of such properties;

(B) identify and nominate eligible properties to the National Register and otherwise administer applications for listing historic properties on the National Register;

(C) prepare and implement a comprehensive statewide historic preservation plan;

(D) administer the State program of Federal assistance for historic preservation within the State;

(E) advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities;

(F) cooperate with the Secretary, the Advisory Council on Historic Preservation, and other Federal and State agencies, local governments, and organizations and individuals to ensure that historic properties are taken into consideration at all levels of planning and development;

(G) provide public information, education, and training, and technical assistance in historic preservation;

(H) cooperate with local governments in the development of local historic preservation programs and assist local governments in becoming certified pursuant to subsection (c) of this section;

(I) consult with the appropriate Federal agencies in accordance with this Act on —

(i) Federal undertakings that may affect historic properties; and

(ii) the content and sufficiency of any plans developed to protect, manage, or to reduce or mitigate harm to such properties; and

(J) advise and assist in the evaluation of proposals for rehabilitation projects that may qualify for Federal assistance.

Section 106 of the Act mandates review under NHPA guidelines and criteria for all “federal undertakings”. Section 106 is the basis under which most

compliance archaeology and CRM are conducted in the US today. It is the Section 106 process that must be completed in order to demonstrate compliance with NHPA, and assuring its compliance is one of the primary responsibilities of SHPOs, THPOs, and federal agency officials and land managers. It is also the basis of much of the misinterpretation over what NEPA actually requires for analysis, assessment, and consideration for cultural impacts of proposed "federal actions". Many practicing CRM professionals and federal agency officials sincerely believe that compliance with NHPA's Section 106 is the only cultural resources review required under NEPA. Section 106 is presented here in its entirety:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

Section 106 outlines some very specific mandates for compliance with the Act, specifically requiring all federal agencies and projects receiving federal funds to have evaluated the effects of a proposed "undertaking" on eligible "historic properties". The Advisory Council on Historic Preservation is created out of the Act and is delegated with the responsibility of promulgating implementing

regulations for the Section 106 process. These regulations are known as 36 CFR 800. Section 110 of the Act out lines the responsibilities of federal agencies for preserving "historic properties" by ensuring compliance with the provisions of the Act, particularly as they may affect eligible and potentially eligible properties on federal lands or as a result of a federal "undertaking" or "action". Section 110 is the strongest component in NHPA as it gives clear directive to federal agencies that they have additional responsibilities for protecting eligible and potentially eligible "historic properties" both in terms of government-to-government consultation and preservation efforts. While Section 110 stops short of mandating protection of historic properties on federal lands, it does stress more responsibilities on federal agencies to preserve, where possible, these properties that do exist on those federal lands.

Section 110

(a) (1) The heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency. Prior to acquiring, constructing, or leasing buildings for purposes of carrying out agency responsibilities, each Federal agency shall use, to the maximum extent feasible, historic properties available to the agency in accordance with Executive Order No. 13006, issued May 21, 1996 (61 Fed. Reg. 26071). Each agency shall undertake, consistent with the preservation of such properties and the mission of the agency and the professional standards established pursuant to section 101(g) of this Act, any preservation, as may be necessary to carry out this section.

(2) Each Federal agency shall establish (unless exempted pursuant to Section 214) of this Act, in consultation with the Secretary, a preservation program for the identification,

> evaluation, and nomination to the National Register of Historic Places, and protection of historic properties. Such program shall ensure —
>
> > (A) that historic properties under the jurisdiction or control of the agency, are identified, evaluated, and nominated to the National Register;
> >
> > (B) that such properties under the jurisdiction or control of the agency as are listed in or may be eligible for the National Register are managed and maintained in a way that considers the preservation of their historic, archaeological, architectural, and cultural values in compliance with section 106 of this Act and gives special consideration to the preservation of such values in the case of properties designated as having National significance;
> >
> > (C) that the preservation of properties not under the jurisdiction or control of the agency, but subject to be potentially affected by agency actions are given full consideration in planning;

Section 301 of the Act defines the terms used in the Act and to be applied in both legal interpretation and implementation of the Act in regulations and compliance efforts. It is important to consider the legal definitions embedded in each law, because they vary, particularly in the ways that their mandates apply to American Indians, tribal governments, and tribal lands. Essential definitions are provided below:

> (2) "Indian tribe" or "tribe" means an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act [43 U.S.C. 1602], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(3) "Historic property" or "historic resource" means any pre-historic or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource.

(4) "Undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including —
(A) those carried out by or on behalf of the agency;
(B) those carried out with Federal financial assistance;
(C) those requiring a Federal permit license, or approval; and
(D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

(14) "Tribal lands" means —
(A) all lands within the exterior boundaries of any Indian reservation; and
(B) all dependent Indian communities.

In 1992, Congress amended NHPA in an attempt to make it more compatible with the goals and concerns of many American Indian and tribal governments. The 1992 amendments have had a significant impact on some tribal governments, particularly for those who were already actively involved in NHPA compliance and utilizing NHPA in their own tribal efforts to protect cultural resources. The three primary changes in the 1992 amendments were the provisions enabling federally recognized tribes to apply for and assume the eleven SHPO functions for “tribal lands” as defined in the Act, the addition of Traditional Cultural Property (TCP) as an eligible “historic property” type for inclusion to the Register, and detailed language on government-to-government consultation requirements of NHPA. The provisions for developing programs and regulations to assist Indian Tribes, conditions for the creation of Tribal Historic Preservation

Offices (THPOs) were established in the 1992 amendments included in Section 101(d) of the Act:

> (1) (A) The Secretary shall establish a program and promulgate regulations to assist Indian tribes in preserving their particular historic properties. The Secretary shall foster communication and cooperation between Indian tribes and State Historic Preservation Officers in the administration of the national historic preservation program to ensure that all types of historic properties and all public interests in such properties are given due consideration, and to encourage coordination among Indian tribes, State Historic Preservation Officers, and Federal agencies in historic preservation planning and in the identification, evaluation, protection, and interpretation of historic properties.
>
> (B) The program under subparagraph (A) shall be developed in such a manner as to ensure that tribal values are taken into account to the extent feasible. The Secretary may waive or modify requirements of this section to conform to the cultural setting of tribal heritage preservation goals and objectives. The tribal programs implemented by specific tribal organizations may vary in scope, as determined by each tribe's chief governing authority.
>
> (C) The Secretary shall consult with Indian tribes, other Federal agencies, State Historic Preservation Officers, and other interested parties and initiate the program under subparagraph (A) by not later than October 1, 1994.
>
> (2) A tribe may assume all or any part of the functions of a State Historic Preservation Officer in accordance with subsections (b)(2) and (b)(3) of this section, with respect to tribal lands, as such responsibilities may be modified for tribal programs through regulations issued by the Secretary if —
>
> (A) the tribe's chief governing authority so requests;
>
> (B) the tribe designates a tribal preservation official to administer the tribal historic preservation program, through appointment by the tribe's chief governing authority or as a tribal ordinance may otherwise provide;
>
> (C) the tribal preservation official provides the Secretary with a

> plan describing how the functions the tribal preservation official proposes to assume will be carried out;
>
> (D) the Secretary determines, after consultation with the tribe, the appropriate State Historic Preservation Officer, the Council (if the tribe proposes to assume the functions of the State Historic Preservation Officer with respect to review of undertakings under section 106 of this Act), and other tribes, if any, whose tribal or aboriginal lands may be affected by conduct of the tribal preservation program —
>
> (i) that the tribal preservation program is fully capable of carrying out the functions specified in the plan provided under subparagraph (C);
>
> (ii) that the plan defines the remaining responsibilities of the Secretary and the State Historic Preservation Officer; and
>
> (iii) that the plan provides, with respect to properties neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe, at the request of the owner thereof, the State Historic Preservation Officer, in addition to the tribal preservation official, may exercise the historic preservation responsibilities in accordance with subsections (b)(2) and (b)(3) of this section; and
>
> (E) based on satisfaction of the conditions stated in subparagraphs (4) (A), (B), (C), and (D), the Secretary approves the plan.

**B. Discussion**

The previously cited excerpts from NHPA have been presented to highlight the provisions of the law that are most relevant to Tribal CRM and American Indian efforts at protecting culturally significant resources throughout their ancestral and tribal lands. What is evident in a review of the language in the law is that the entire goal of the law is commemoration as a means of preservation of "historic properties". The law is a process law, meaning it mandates review and

consideration for the purposes of commemoration (nomination to the National Register of Historic Places) rather than meaningful protection. A close examination of the declarations, provisions, and definitions in NHPA helps to highlight some of the inherent problems confronted by American Indians and tribal governments when attempting to work within the NHPA framework in advocating for the protection, access to, and continued use of cultural and traditional resources of great importance to American Indians and particular tribes. It also highlights the potential opportunities provided by the Act to enhance tribal involvement, participation, and ideally, influence over how the NHPA and Section 106 processes are conducted in ways that enhance tribal sovereignty and protect culturally significant and tribal trust resources.

First, and most problematic, is the lack of any actual requirements in NHPA or its implementing regulations mandating protection of any "historic properties" found to be eligible or potentially eligible for inclusion on the Register. While Section 110 clearly recommends that federal agencies give special consideration and engage in government-to-government consultation with federally recognized tribes, and advocates a policy of preservation over destruction, it is not mandated that federal agencies protect and preserve all eligible or potentially eligible "historic properties" on federal lands. This is a little understood fact, and one that is often not conveyed by SHPOs, THPOs, or the ACHP in the NHPA process until an Indian tribe or other interested party challenges a project, a determination of effect by a Lead Agency under NHPA

Section 106 per 36 CFR 800, and appeals a decision to a SHPO, THPO or the ACHP. Rather, NHPA only mandates process meeting a specific standard of review per Section 106 of the Act, for a federal "undertaking", and encourages federal agencies to protect and preserve those found to be eligible or potentially eligible. What Section 110 of NHPA does require is that federal agencies inventory and evaluate their lands for the purposes of identifying and nominating eligible and potentially eligible "historic properties" to the National Register. Understanding what NHPA actually mandates is critical to understanding its limitations for American Indians and tribal governments who tend to be far more invested in protecting significant cultural resources on federal lands than they are in seeing them evaluated for the purpose of nominating them to the Register.

While American Indians and tribal governments have their rights of consultation affirmed in NHPA and its regulations, their concerns and goals only have to be considered, they do not have to be incorporated into project plans or agency actions. Furthermore, even when requested by tribal governments, the involvement of SHPOs, THPOs, or ACHP in disputes over NHPA determinations and mitigation plans are not subject to approval by any of those entities. At the end of the day a federal agency has complete authority to sacrifice the resource for the project. They may have to evaluate the site or mitigate the damage, and for archeological resources this tends to mean limited excavation and data recovery, but this does not mean they have to preserve the site. NHPA recommends preservation, but it is not required. This latitude is also granted to tribal

governments when they are the lead agency on undertakings on their own reservations and tribal lands. So it is important to note that in these circumstances this ability to select a project over protection can be a right of a tribal government too.

"Concurrence" obtained from a SHPO or a THPO is the goal of the Section 106 process, the point at which NHPA Section 106 compliance is complete. It is important to point out that "concurrence" under NHPA is not approval; it is an acknowledgement that the Section 106 process has been adequately followed to its completion per 36 CFR 800. Memorandums of Agreement of (MOAs) used to detail the mitigation of "adverse effects" in a proposed undertaking are not subject to approval by any of those entities, even tribes. Furthermore, "adverse effects" are limited to those activities that would alter the characteristics of an eligible or potentially eligible historic property to the point of destroying their integrity to the point of making them ineligible for inclusion to the Register.

In all cases, the power rests entirely in the hands of the Lead Agency Official. For instance, if an the official makes a determination, and even if the SHPO, THPO and the ACHP disagree with that determination, as long as the agency can document that the Section 106 process has been followed, the agency determination stands; even if it means a significant and eligible property is destroyed as a result of the "undertaking". The agency official is responsible for ensuring that standards of review are met, that affiliated tribes and all interested parties have been consulted, that qualified professionals have conducted the

evaluation and assessment, and that concurrence has been requested. NHPA does not mandate conditions or standards for the MOAs that are designed to mitigate an "adverse effect" determination and if there is no agreement on the mitigation between an agency and the THPO or SHPO, it is simply referred to the ACHP for comment to the agency.

Compounding the problem, is the narrow definition of "historic properties" and the stated purpose in NHPA; evaluating and nominating eligible "historic properties" the National Register. Tribal values about culture and resources are not easily compartmentalized and tend to have a strong environmental component. As a result tribal views on cultural resources and their protection often include much more emphasis on the environment than on discrete features within that environment. For instance, natural features such as rivers, streams, lakes, and rock outcrops are not considered eligible property types under. Subsistence resources such as subsistence resources are not considered under NHPA, except when they are eligible as Traditional Cultural Properties (TCPs) and often the emphasis on TCPs is on the locality, not the resources it contains.

NHPA is primarily focused on the built environment: buildings, structures, objects, sites, and districts, and remnants of past human activity (historic and archeological resources). Even with the addition of TCPs in the 1992 amendments, the emphasis is on limited and discrete features within an environment. For instance, most TCP designations are usually considered to be ethnographic in nature and are often not treated with the same consideration by federal agency

officials and land managers as, say, a historic building or an archaeological site. TCP designation often requires significant documentation of cultural beliefs and practices be compiled and provided to outsiders. This is required in order for properties to be accepted and managed as TCPs by SHPOs or federal agencies. These documentation demands often pose great concern for American Indians and tribal governments, and this concern is justified; not just for reasons of protecting significant sites from intrusion or vandalism, but also in terms of being asked to disclose culturally sensitive and privileged information while at the same time being provided no assurances that such disclosures will result in the desired protection of these places. Even more problematic is the subsequent requirement that in order to be considered "eligible" these TCPs must be evaluated for their "significance" and "integrity" using NHPA criteria. These requirements often are so problematic to tribal governments, who have responsibilities to their own tribal membership and cultural traditions that they decline to document or designate TCPs unless doing so promises some hope that they will indeed be protected from damage and destruction resulting from a proposed undertaking or action.

The 1992 amendments to NHPA strengthened participatory role of federally recognized tribes with regards to consultation on proposed "undertakings" and "actions", and clearly outline the responsibilities of federal agencies on conducting government-to-government consultation on undertakings and management decisions on federal lands. These amendments and subsequent Executive Orders (E.O. 13084 "Consultation and Coordination with Indian Tribal

Governments", and Executive Memorandum of April 29,1994, "Government-to-Government Relations, E.O. 13007 "Indian Sacred Sites", and E.O. 12898 "Federal Actions to Address Environmental Justice in Minority and Low-Income Populations") mandate government-to-government consultation with tribes and the consideration of the federal government's trust responsibility to federally recognized tribes. The problem, unfortunately, is that often consultation does not require the meaningful incorporation of concerns or goals identified by tribes during the consultation process. This is particularly true for NHPA, and while it is always important to tribal governments to participate in the consultation process, the outcomes are often disappointing for those tribal governments because at the end of the day, the federal agency is allowed, under the provisions of the Act, to ignore the concerns and goals of the tribal governments who have participated in the process and proceed with the undertaking.

On of the most common and pervasive interpretations by federal agency officials, SHPOs, and state and local governments engaged in NHPA compliance is that Section 106 of the Act mandates archaeology be conducted, either for evaluation or mitigation. While it is not my position to argue that archaeology should never be conducted, it is my assertion that nothing in NHPA or 36 CFR 800, or any other federal law, actually mandates that archaeology be conducted. It has been my observation that this misinterpretation about what NHPA actually mandates is often disseminated by many professionals in the CRM, historic preservation, and archaeological communities, and even some state and federal

agencies. I attribute this in large part due to academic institutions that teach this interpretation of the law as fact or the lack of adequate training in the law for many professional archeologists.

I have had many conversations with well-educated and highly skilled archaeologists that are absolutely convinced that NHPA mandates archaeology. As one asked me recently, “How can you mitigate if you don’t excavate?”. Similarly I have been asked, “How can you evaluate without excavation?” My answer is simply to ask them to show me where in the laws or implementing regulations that excavation is required. I don’t believe that they can although I also often don’t believe they will take the time and effort to check it out for themselves. This is not to say it shouldn’t be done, it is just to point out that nothing in the laws require that this is the only way it can be done.

Dr. Thomas King has somewhat cynically observed that this misperception is a somewhat self-serving one, one that was developed and perpetuated by archaeologists for the benefit of archaeologists (2002:1). I have come to conclude that he is may be correct in this observation. The academic requirements for meeting the Secretary of Interior Standards for Archeology, the professional standards for CRM and archeology within the federal and state agencies teach and often promote archeology not resources management and protection. Many academic archeology programs offer little or superficial training cultural resources law and tend to focus it solely on the practice of archeology, not resources

management. The problem is that most archeology is practiced under the mandates of existing laws, not for some greater archeological purpose.

My purpose for making this point is not to anger or insult archaeologists, or to imply that there is no need or benefit for archaeological research or training, it is only to make the reader aware that the dominance of archeology in CRM is not accidental, nor is it the only way to approach these issues. There are other approaches to CRM and NHPA compliance that are equally valid and it has been my professional experience that those other approaches are often ignored, dismissed, or not even explored. This is in large part due to the prevalent misperception that NHPA and Section 106 and Section 110 compliance are synonymous with archaeological research.

This misinterpretation of what NHPA actually mandates has been the source of significant concern to some tribal governments who are seeking meaningful and effective ways to actually protect culturally significant resources, particularly those within federal and reservation or tribal lands. It is important for tribal governments to be aware that even when a determination of "adverse effect" has been made, and even if it involves an archaeological resource or site, the law does not mandate that archaeology be conducted. It is well within the provisions of the law for tribal governments to advocate for, and for THPOs, and SHPOs to concur with assessments and evaluations, determinations of effects, and even mitigation measures in MOAs for archaeological resources without requiring any form of archaeological excavation.

It is important to note here that some tribes actively engage in archaeological research, excavation, and compliance archaeology under NHPA. The decision to engage in archaeological research, at any level, is ultimately the exclusive right of the tribal government in question as it exercises its sovereignty. The point of this observation is not to place a value judgment on the practice of or the participation by tribes in archaeological research, it is only to point out that the NHPA does not mandate archaeological excavation.

I mention this common misinterpretation of the law, not to undermine those who wish to promote or engage in archeological research, but because I think it is important to share it. It has been my observation that many American Indians and their tribal governments often have strong cultural reasons that make them averse to the practice of excavation-oriented archaeology, particularly as the means of compliance with a federal project. Federal agencies and their officials have an obligation to make tribal leaders aware of their full range of alternatives beyond archaeological excavation when participating in the government-to-government consultation process for NHPA. Unfortunately it is my observation that they are often not informed of anything but an archeo-centric alternative in an NHPA process that is dealing with an archaeological resource. In fact, in some cases tribal officials and interested American Indians are informed that the law mandates that archaeological excavation occur.

Archeological excavation is often presented to American Indians and tribal governments as a mandatory requirement, not one of many alternatives. This

misinterpretation of NHPA mandates can be perpetuated by SHPOs, federal agency officials, archaeologists, and CRM professionals; the people that tribes are required to work with through the NHPA process.

Tribes have alternatives to archeology within the NHPA and Section 106 and Section 110 processes and they do not have to become THPOs to have that range of alternatives considered on tribal or federal lands. Tribal governments should be provided with a full range of alternatives and then given the respect they deserve in reaching their own tribally determined decisions on what type of approach they prefer. Many tribes engage in archeology by choice, but many do not.

The 1992 amendments to NHPA included the terms and provisions that allowed for the creation of THPOs and the assumption of 11 SHPO functions by a THPO for lands within the external boundaries of an Indian reservation. THPO status is granted by the National Park Service to tribes who apply and are determined capable by NPS to carry out such functions. The THPO is appointed by the tribal government in its application to the NPS with a tribal resolution. The THPO provisions in NHPA can be problematic for some tribal governments, and the potential benefits should be considered and are ultimately decided upon by those tribal leaders. On one hand, the ability to assume the functions of the SHPO has the potential to limit or reduce the intrusion by the SHPO on tribal lands. It also offers the very real benefit of enabling tribes to control how NHPA compliance activities are conducted on a tribal lands, and in many cases on the

reservation. These are certainly powerful incentives to consider assuming SHPO functions and creating a THPO for many tribal governments. It is in part for this reason that currently 66 federally recognized tribes have applied for and received THPO status under these provisions (NATHPO 2007).

On the other hand, some may view the conditions of recognizing a SHPO's authority on the reservation, or the NPS right to determine a tribe "qualified" to manage their own cultural resources, to actually be an encroachment on tribal sovereignty and self-determination, particularly in regards to tribal activities on tribal lands. Furthermore, granting the NPS the authority to deem whether or not a tribal government is capable of managing its own lands and resources under NHPA can be problematic. In other words, embracing the regulatory authority of a federal agency and its delegated state officer, being required to request and apply for THPO status from the National Park Service and Department of Interior, and accepting the authority of the National Park Service to determine whether or not a tribal government is qualified or capable of implementing the provisions and requirements of the Act, are decisions tribal governments do not make lightly..

Ultimately, the decision to request THPO status is one that is made by tribal governments after considering these issues, weighing the potential benefits and risks, and are often based upon a variety of tribal-specific issues such as: the frequency and scope of undertakings on a reservation, the percentage of tribal lands versus non-tribal lands within a reservation, land claims or settlement activities, and the tribe's financial status. A tribal government that is heavily

dependent on federal funds for infrastructure development may have a strong incentive to create a THPO because it will be conducting many federal undertakings that require NHPA compliance as a condition of receiving those federal finds. Similarly, a reservation that is checker-boarded or has significant non-tribal ownership within the reservation may cause a tribal government to assume SHPO authority and create a THPO because it will have a stronger role in how non-tribal entities comply with NHPA within the reservation. A SHPO can still assert authority in those non-tribal cases, but often it is not necessary or requested by the landowner. Tribal governments wishing to exclude state entities from interfering in their own development of tribal lands may opt for THPO status. Finally, THPO status appears to have had a significant impact on the relationship between federal agencies and tribes through increased and focused consultation on cultural resources management on federal lands. There are, no doubt, potential benefits to tribal governments for assuming SHPO functions over their reservations, but again, it depends on the unique circumstances of the tribe and is the ultimate decision of tribal leaders.

SHPOs and THPOs have the authority of and responsibility for "concurring" with an agency's "determination of effect" of a proposed undertaking on potentially eligible and eligible "historic properties". One important potential benefit for creating a THPO per NHPA provisions is that the THPO is the party from whom the project lead must obtain concurrence on their determination of effect. This includes the ability to influence project planning, to review compliance

studies and assessments, and final management recommendations put forth by the qualified professionals who conduct such studies on behalf of the Lead Agency. If a THPO or SHPO deems, upon review, that a determination is faulty, flawed, based on inadequate investigation, that the methods of evaluation and assessment do not meet current professional standards, or recommendations not provide adequate mitigations, they may choose to withhold concurrence until additional assessments and evaluations are conducted. And most importantly, SHPOs and THPOs have significant influence over lead agencies when negotiating terms of MOAs for mitigating "adverse effects". While the lead agency holds the ultimate power in the process, the goal is obtaining concurrence as quickly and expediently as possible. The ability to successfully negotiate an MOA for an "adverse effect" will not necessarily prevent a project, but it will delay its implementation and for that reason agency officials may agree to mitigation measures proposed by THPOs and SHPOs in order to expeditiously obtain concurrence in order to proceed. If a tribe is opposed to the archeology as mitigation approach that dominates the CRM profession, and many SHPOs, creating a THPO provides the way for a tribe to opt for non-invasive and non-excavation alternatives for mitigating an adverse effect determination.

In large part what constitutes adequate review, assessment, and mitigation of an "adverse effect" per 36 CFR 800 is entirely within the purview of the THPO or SHPO to determine, subject to review and comment by the ACHP. It is ultimately the decision of the Lead agency official responsible for NHPA

compliance to make the determination of effect of a federal undertaking and it is only their responsibility to be able to demonstrate that it followed the process, not that it protected any resources. At the end of the NHPA process, the outcome is often not protection of the identified resource, for although it is encouraged it is not required. Rather, and much to the dismay of many American Indians and tribal governments who participate in the NHPA process, the goal is to evaluate sites for their potential inclusion in the National Register.

A review of the some of the practical and legal limitations of NHPA reveals some of the problems inherent in attempting to utilize NHPA in American Indian and tribal government efforts to protect and preserve culturally significant resources, even on tribal and reservation lands. These limitations are often the reasons why many tribal governments have not opted to assume the SHPO functions by creating THPOs. Many tribal governments and shun the idea of recording, evaluating, or nominating culturally significant sites and resources under NHPA criteria unless doing so becomes necessary in order to attempt to save the site from severe damage or destruction as a result of a proposed project. Even then, documenting such sites does not guarantee that they will be avoided or protected, even on federal and tribal lands. Furthermore, the misapplication of NHPA mandates in the promotion of compliance archeology has made many tribal governments wary of NHPA and its potential to offer tribes protection of culturally significant resources. Finally, the THPO provisions in the 1992 amendments include language that forces the tribal government to submit itself to NPS approval

and ACHP oversight, even requiring that the ability to be a THPO is determined not by the tribal government, but by the NPS. Needless to say, these requirements chafe many tribal leaders, especially those with a strong commitment to tribal sovereignty and self-determination.

The 1992 amendments to NHPA are problematic, but highly significant and the gradual increase in tribes applying for THPO status suggests that as tribes experience some of the benefits (increased control over the practice archeology, tribal influence in NHPA compliance and the diminished role of SHPOs on reservation lands) and share those experiences and benefits with other tribes, more tribes have decided to apply for THPO status with NPS. It is important to note that the 1992 amendments were a result of increased tribal consultations and lobbying efforts by many tribal governments and inter-tribal organizations. The 1992 amendments are a significant attempt to make NHPA more responsive to tribal concerns, and for that they must be commended. THPO programs are changing the way NHPA compliance is being considered and implemented, particularly within federal agencies. THPO programs are ways for tribes to diminish the intrusion of the BIA and SHPOs on reservation lands and to determine what constitutes both adequate review, consideration of impacts, and even acceptable mitigation of adverse effects. THPOs have had a dramatic influence on federal agencies and the important role of THPOs in federal agency NHPA compliance can not be overstated.

In conclusion, it is important to understand the overwhelming influence NHPA has on the practice of CRM and archaeology in the US today. Many of the challenges faced by American Indians and tribal governments working to protect culturally significant resources are a result of the dominance of compliance archaeology within NHPA. This is evident when considering the entity delegated with the responsibility of promulgating regulations for Section 106 and NHPA, the ACHP, which is entirely comprised of archaeologists and historic preservationists. This bias for archaeology is compounded by the Secretary of Interior Standards for determining who can hold federal agency positions for CRM and who can conduct NHPA assessments, since these standards require a Master's degree in archaeology or historic preservation with very specific curriculum requirements for both. Tribal involvement in NHPA compliance is often prevented under these standards by entities and agencies, including SHPOs, that determine that tribal governments are not qualified because they do not have cultural representatives or staff that meets these professional standards (Stapp and Burney 2002).

Too often the concerns of American Indians and tribal governments are dismissed or ignored by those with the greatest responsibility for NHPA compliance and the management of culturally significant tribal trust resources. It is a deeply imbedded institutionalized bias and one that has resisted change, but as a result of tribal involvement, persistence, and commitment, it is changing, albeit slowly. These institutional problems underscore a larger issue facing tribal governments concerned with the meaningful protection of culturally significant

and tribal trust resources and also underscore the limitations inherent in NHPA and the historic preservation framework when developing a Tribal CRM approach and program. These problems reveal the necessity for a different framework, one that is more relevant to the goals and concerns of tribes who see all aspects of their landscape, resource base, and environment as cultural resources and whose motivations for protection include the spiritual, physical, economic, and cultural health and well-being of their people.

**2. American Indian and Religious Freedom Act of 1978, as amended.**

The American Indian Religious Freedom Act (AIRFA) became law on August 11, 1978 (Public Law 95-341, 42 U.S.C. 1996 and 1996a) and has been amended once. The language of AIRFA is actually quite brief, but it's intent is powerful. AIRFA is one of the most important acts of Congress ever passed in its impact on American Indian culture, cultural resources, and tribal efforts at cultural restoration and preservation. Significant amendments to the Act were passed in 1994 as the Religious Freedom and Restoration Act (RFRA), Public Law103-344 [H.R. 4230]; October 6, 1994, "An Act to emend the American Indian Religious Freedom Act to provide for the traditional use of peyote by Indians for religious purposes, and for other purposes".There are no implementing regulations or CFRs for AIRFA, the law itself and a subsequent Executive Order provide the guidance for its implementation. AIRFA has had a profound influence on Tribal CRM

efforts on federal lands because it strengthens the ability of tribes and American Indians to advocate successfully for continued rights to access and utilize sacred and ceremonial places on federal lands, a right that for many generations had been denied by the federal government. Furthermore, it mandates the protection and stewardship of these sacred sites and ceremonial places by federal agencies that manage those lands.

## A. The Law and Regulations

AIRFA was passed to effectively decriminalize the practice of American Indian traditional religious and spiritual practices. These practices had been explicitly declared illegal by the US federal government following the Ghost Dance phenomena and its culmination in the Wounded Knee Massacre.

AIRFA is a brief law with no implementing regulations.

> Section 1
>
> On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.
>
> Section 2
>
> The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after August 11, 1978,

> the President shall report back to Congress the results of his evaluation, including any changes* which were made in administrative policies and procedures, and any recommendations he may have for legislative action.
>
> *One of the changes in administrative policy and procedure was Executive Order 13007,Indian Sacred Sites.

In 1994, AIRFA was amended with what is known as RFRA. These amendments resulted from a US Supreme Court decision on the practice of traditional Indian religion, but its scope was much broader than the case in question; a case over the right of American Indians to use and possess peyote as part of their religious practices. More significant that the allowance of this practice, were the legal definitions provided in the amendments:

> (c) For purposes of this section
> (1) the term `Indian' means a member of an Indian tribe;
>
> (2) the term `Indian tribe' means any tribe, band, nation, pueblo, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;
>
> (3) the term `Indian religion' means any religion
> (A) which is practiced by Indians, and
> (B) the origin and interpretation of which is from within a traditional Indian culture or community; and
>
> (4) the term `State' means any State of the United States, and any political subdivision thereof.
>
> (d) Nothing in this section shall be construed as abrogating, diminishing, or otherwise affecting
>
> (1) the inherent rights of any Indian tribe;

> (2) the rights, express or implicit, of any Indian tribe which exist under treaties, Executive orders, and laws of the United States;
>
> (3) the inherent right of Indians to practice their religions; and
>
> (4) the right of Indians to practice their religions under any Federal or State law.'

AIRFA guarantees religious freedom, but for federal agencies it is still approached with a very facilities-oriented focus. Recent challenges based on AIRFA and RFRA have underscored both the importance of the law and its amendments, but also its relevance to the NEPA process. These will be discussed in the following section. The 1996 Executive Order 13007, signed by President William Clinton, identified policies and procedures relevant to AIRFA. EO 13007 is also presented in its entirety:

> Executive Order 13007 of May 24, 1996
>
> Indian Sacred Sites
>
> By the authority vested in me as President by the Constitution and the laws of the United States, in furtherance of Federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:
>
> Section 1. Accommodation of Sacred Sites.
>
> > (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions,
> >
> > > (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and

> (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.
>
> (b) For purposes of this order:
>
> (i) ‘‘Federal lands’’ means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands;
>
> (ii) ‘‘Indian tribe’’ means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103–454, 108 Stat. 4791, and ‘‘Indian’’ refers to a member of such an Indian tribe; and
>
> (iii) ‘‘Sacred site’’ means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

**B. Discussion**

AIRFA, RFRA, and E.O. 13007 are federal laws relevant to Tribal CRM because they specifically provide for the rights of access to sacred sites and ceremonial places on federal and for spiritual and religious practice by all American Indians. These laws are little known or often considered to be of little relevance to the mainstream practice of CRM outside of federal agencies, American Indians, and tribal governments. AIRFA, RFRA and E.O. 13007 also

direct federal agencies to protect, where possible and practicable, the quality and condition of sacred and ceremonial places on federal lands. This is an acknowledgement of the federal government's trust responsibility to tribes. It is also an acknowledgment of the oft-touted American value of the right to religious freedom. Ironically, the right to religious freedom was not a right granted to tribes by the federal government for many, many generations.

The passage of the Act in 1978 was heralded as a significant victory in American Indian generations-long struggles for both the freedom to practice their traditional ceremonies and spiritual practices, access and utilize their sacred and ceremonial places for ceremonial and spiritual purposes, and to own and utilize their ceremonial regalia and sacred objects utilized in the practice of these religious, spiritual, and ceremonial aspects of their tribal and American Indian cultures and heritage. While this may seem obvious to the reader today, that this right to religious freedom and expression, the historical fact is that until the passage of AIRFA in 1978 these rights had been prohibited, even criminalized, by the federal government for decades.

For over 100 years, the practice of American Indian religion, traditional ceremonies, and spirituality were illegal in the US. During this time, American Indians were harassed, threatened, imprisoned, and even killed for exercising their sovereign rights to practice their traditional religions and ceremonies. Regalia and ceremonial objects were often confiscated, destroyed, or sold to museums and collectors. This history of religious persecution of American Indians is not well

known outside of American Indian society, but it remains very much a reality in the minds and memories of most American Indians. In fact, the dispossession and loss of sacred and ceremonial items as result of this prohibition, and the decades-long struggle by American Indians and tribal governments to retrieve these items, that resulted in the passage of another important law, the Native American Graves Protection and Repatriation Act in 1990.

Tribal governments and Tribal CRM programs often include efforts at protecting the condition of and access to sacred sites and ceremonial places throughout ancestral lands, regardless of land ownership. AIRFA, RFRA and E.O. 13007 reinforce these rights on federal lands and give clear direction to federal agencies and land managers to protect both the rights to access, use of, and condition of these sacred sites and ceremonial places. Much of the emphasis in tribal government efforts at Tribal CRM is grounded in a commitment to both cultural preservation, but also cultural restoration. AIRFA, RFRA and E.O. 13007 provide American Indians and tribal governments with the tools they need to remind federal agencies and land managers of the federal government's trust responsibilities in this regard, and also affirm and recognize the rights of American Indians to access and utilize these ceremonial and sacred places, and practice these ceremonial and spiritual traditions. All of these rights are critical to the health and well being of American Indians and their tribal communities and for that reason are of great importance to tribal governments. Contemporary American Indian culture and practice and the goals of Tribal CRM programs are deeply rooted in a

commitment to cultural preservation and restoration of those aspects of American Indian culture that were taken, denied, suppressed, and at times disrupted due to decades of racism and institutionalized discrimination of American Indians by the federal government. It is for these reasons that AIRFA remains one of the most important federal laws for American Indian rights, sovereignty, and Tribal CRM efforts.

The importance of this Act and its 1994 RFRA amendments have recently been demonstrated in the legal challenge between the Forest Service and six federally recognized tribes: Navajo, White Mountain Apache, Yavapai-Apache, Havasupai, Hualapai, and Hopi Nations. The case (*Navajo Nation et al. v. U.S. Forest Service et al.)*involves a federal agency, its handling of the NEPA review process in its EIS, the religious freedom and values of the affected tribes, and a private interest (Arizona Snowbowl Ski Resort) that had requested permission to utilize reclaimed wastewater to supplement snow in its recreational facility located within the lands managed by the US Forest Service. The place in question is the San Francisco Peaks in northern Arizona, a place of profound spiritual significance to all the tribes; their sacred and cultural landscape. At issue was the Forest Service's approved expansion and development of the area based on a 1979 EIS, and their determination in their EIS that the proposed actions had not cultural or religious impacts on the religious freedoms of the tribes that attach profound cultural and spiritual significance to the area. In 1997, the Snowbowl began to request permission to expand their facility and increase its profitability by using

reclaimed wastewater and effluent to make artificial snow. The Coconino National Forest had approved the proposed plan in a Facilities EIS and the tribes sued in US District Court. In January of 2006, the US District Court ruled against the tribes and in support of the Forest Service. The tribes appealed the decision and in March 2007, the Appeals Court reversed the lower court's decision based upon a determination that the Forest Service had violated both RFRA and NEPA in its EIS. The final outcome remains uncertain at this time, as it will likely be appealed to the US Supreme Court, but it is significant that the basis for the decision were both NEPA mandates for review and RFRA for religious freedom and not NHPA or its provisions. The ruling is significant on many levels, but it underscores the importance of NEPA and other federal laws for protecting culturally significant places and resources.

**3. Archaeological Resources Protection Act of 1979**

The Archaeological Resources Protection Act (ARPA) became law on October 31, 1979 (Public Law 96-95; 16 U.S.C. 470aa-mm), and has been amended four times. ARPA is the only federal cultural resource law that contains enforceable prohibitions on the illegal excavation or removal of archaeological resources or human remains from federal or Indian lands. ARPA has several key provisions that make it the only cultural resource law with criminal and civil penalties.

## A. The Law and Regulations

ARPA declares that archaeological resources are irreplaceable and valuable resources that must be protected on public and Indian lands. It acknowledges the past lack of protection of such resources and attempts to reverse a decades-long pattern of the removal of such resources:

> Section 2
>
> (a) The Congress finds that—
>
> (1) archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage;
>
> (2) these resources are increasingly endangered because of their commercial attractiveness;
>
> (3) existing Federal laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage; and
>
> (4) there is a wealth of archaeological information which has been legally obtained by private individuals for non-commercial purposes and which could voluntarily be made available to professional archaeologists and institutions.
>
> (b) The purpose of this Act is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before October 31, 1979 [the date of the enactment of this Act].

Terms and definitions of ARPA are provided in Section 3. As with each of the five laws, the definitions are significant to the applicability and interpretation of the law. ARPA provides clear definitions of the resources protected under the Act.

> Section 3
>
> As used in this Act—
>
> (1) the term "archaeological resource" means any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this Act. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in an archaeological context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.
>
> (3) The term "public lands" means—
>
> (A) lands which are owned and administered by the United States as part of—
>
> (i) the national park system,
> (ii) the national wildlife refuge system, or
> (iii) the national forest system; and
>
> (B) all other lands the fee title to which is held by the United States, other than lands on the Outer Continental Shelf and lands which are under the jurisdiction of the Smithsonian Institution.
>
> (4) The term "Indian lands" means lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for any subsurface interests in lands not owned or controlled by an Indian tribe or an Indian individual.

> (5) The term “Indian tribe” means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (85 Stat. 688, 43 U.S.C. 1601 et seq.).

Section 4 of ARPA established a permitting process for the authorized excavation and removal of protected resources from public and Indian lands. It also clearly grants tribal governments the right to deny a permit for excavations on “Indian lands”. It clearly declares all resources excavated and removed from public lands as the sole property of the US government. Finally, Section 4 provides penalties for violations of the terms of the permits issued.

> Section 4
>
> (a) Any person may apply to the Federal land manager for a permit to excavate or remove any archaeological resource located on public lands or Indian lands and to carry out activities associated with such excavation or removal. The application shall be required, under uniform regulations under this Act, to contain such information as the Federal land manager deems necessary, including information concerning the time, scope, and location and specific purpose of the proposed work.
>
> (b) A permit may be issued pursuant to an application under subsection (a) of this section if the Federal land manager determines, pursuant to uniform regulations under this Act, that—
>
> > (1) the applicant is qualified, to carry out the permitted activity,
> >
> > (2) the activity is undertaken for the purpose of furthering archaeological knowledge in the public interest,
> >
> > (3) the archaeological resources which are excavated or removed from public lands will remain the property of the

> United States, and such resources and copies of associated archaeological records and data will be preserved by a suitable university, museum, or other scientific or education al institution, and
>
> (4) the activity pursuant to such permit is not inconsistent with any management plan applicable to the public lands concerned.
>
> (c) If a permit issued under this section may result in harm to, or destruction of, any religious or cultural site, as determined by the Federal land manager, before issuing such permit, the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of section 9 of this Act.
>
> (g)(1) No permit shall be required under this section or under the Act of June 8, 1906 (16 U.S.C. 431), for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands of such Indian tribe, except that in the absence of tribal law regulating the excavation or removal of archaeological resources on Indian lands, an individual tribal member shall be required to obtain permit under this section.
>
> (2) In the case of any permits for the excavation or removal of any archaeological resource located on Indian lands, the permit may be granted only after obtaining the consent of the Indian or Indian tribe owning or having jurisdiction over such lands. The permit shall include such terms and conditions as may be requested by such Indian or Indian tribe.

Section 6 of the Act is considered to be the most important part of ARPA because it clearly outlines the activities that are civil and criminal violations and includes concise language about what constitutes a violation and the associated penalties.

> Section 6
>
> (a) No person may excavate, remove, damage, or otherwise alter or deface or attempt to excavate, remove, damage, or otherwise

> alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under section 4 of this Act, a permit referred to in section 4(h)(2) of this Act, or the exemption contained in section 4(g)(1) of this Act.
>
> (b) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource if such resource was excavated or removed from public lands or Indian lands in violation of—
>
> > (1) the prohibition contained in subsection (a) of this section, or
> >
> > (2) any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law.
>
> (c) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate of foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.

## B. Discussion

ARPA is a highly significant law for the protection of culturally significant resources but it is not without its problems. First, ARPA applies only to those resources that meet the definition of an "archaeological resource" per the terms of the Act. Many culturally significant resources of importance to American Indians and tribal governments are not in that definition. Second, ARPA does not prohibit all excavation on federal or Indian lands, but only those conducted without an ARPA permit. The permit is not subject to approval of the affiliated tribal government, except when the proposed excavation on "Indian lands" lands. ARPA

permits allow comment from the affiliated tribe(s) but these are not conditions for the permit. Furthermore, ARPA permits for excavation on Indian lands are not issued by the tribal government but rather by the BIA, acting as the "trustee" for the tribe. Most importantly however, is the emphasis on archeological value with such value based upon the scientific value of the resource to archeologists, not to American Indians.

What ARPA does do is provide both civil and criminal penalties for the destruction, defacement, illegal excavation, and removal without a permit of those eligible resources. The biggest challenges posed by ARPA are in the area of enforcement. It is solely up to law enforcement to determine that an ARPA offense has or may have occurred and to initiate an ARPA investigation. Without the active participate and support of law enforcement, you do not have an ARPA case, even if you have clear evidence of violation. This is not a minor problem and it is often compounded by the fact that many law enforcement agents, even those tasked with responsibility over federal lands, have not had adequate training in ARPA, if they have had any at all. It requires extensive training in order for law enforcement agents to be able to identify the signs of illegal excavation, and even more training to make them aware that this is indeed a serious criminal offense.

Additionally, the actions taken immediately following a report of illegal excavation are critical to the ability to have charges filed by District Attorneys within the court system. Professional Archaeological Damage Assessment Reports must be completed with excruciating attention to detail. Few professional

archaeologists have undergone this training and even fewer law enforcement officers have had an opportunity to be provided with the necessary training they need to execute a solid investigation that produces the level of documentation needed for a District Attorney to file charges, or a prosecutor to obtain a conviction. That said, ARPA is still an important part of Tribal CRM programs because of the prevalence of illegal looting of cultural sites throughout their ancestral territories.

In response to the need for highly trained law enforcement for successful ARPA cases, the Cultural Resource Protection Program of the Confederated Tribes of the Umatilla Reservation has developed a comprehensive ARPA training program specifically designed for law enforcement. The BIA provides excellent ARPA training for both law enforcement and archaeologists. Archaeologists that are called upon to prepare an Archaeological Damage Assessment Report must be highly trained in order to produce a quality document that will aid in the prosecution and hold up in court under attacks by the defense. A faulty or flawed report or investigation will result in the case being dismissed on all charges. ARPA is a very important law for assisting tribes in protecting culturally significant resources from destruction and illegal excavation or removal.

ARPA training should be an important component in every Tribal CRM program for both the archaeologists selected to prepare the damage assessment, but also for tribal, local and federal law enforcement agencies that hold the complete authority in determining whether or not an ARPA violation has occurred

or an investigation is warranted. Successful ARPA enforcement requires collaboration between Tribal CRM programs and law enforcement and adequate training. Tribal governments have begun to take the lead to make sure that ARPA offenses are recognized, investigated, and prosecuted to the fullest extent of the law. A robust Tribal CRM program will include an ARPA response protocol so that investigations are initiated, and crimes are documented to the high standard that federal courts require in order to obtain successful convictions.

The greatest limitation of ARPA is its narrow definition of what constitutes an archeological resource. Many resources that are of profound significance to American Indians are excluded from ARPA's protections. Compounded by the fact that the archeological value is based upon the scientific research value for archeologists, ARPA is often a major disappointment to tribes for the purposes of resource protection. ARPA does underscore the bias in much of the cultural resources law that tribes must work with in their resource protection efforts. Its scope and definitions, and its applicability are very narrowly defined and are not reflective of tribal concerns or goals, but with protecting archeological resources for archeologists.

**4. Native American Grave Protection and Repatriation Act of 1990**

The Native American Grave Protection and Repatriation Act became law on November 16, 1990 (Public Law 101-601; 25 U.S.C. 3001 et seq.) and has been

amended twice. NAGPRA is landmark piece of cultural resources legislation primarily because it was the first federal cultural resources law developed with the active participation and involvement of American Indians and tribal governments. Below are some of the key provisions of the law most relevant to the discussion of Tribal CRM.

## A. The Law and Regulations

The definitions used in NAGPRA and its implementing regulations, 43CFR10, are critical to both the interpretation and application of the law. The definitions in NAGPRA have been the cause of much debate, conflict, and need for mediation over the implementation of the law. The fact that they are the first provision of the law underscores their importance.

> Section 2
>
> For purposes of this Act, the term—
>
> (1) "burial site" means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.
>
> (2) "cultural affiliation" means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifyable earlier group.
>
> (3) "cultural items" means human remains and—
>
> (A) "associated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a

> culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.
>
> (B) "unassociated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,
>
> (C) "sacred objects" which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and
>
> (D) "cultural patrimony" which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

At the core of NAGPRA, its intent and final implementation, is the issue of ownership, both of eligible items subject to return under the law and the disposition of eligible items resulting from either authorized excavation or

inadvertent discovery. In this section NAGPRA clearly states its relationship to ARPA and adds additional responsibilities for consultation over final disposition of NAGPRA eligible items and human remains discovered as the result of an intentional and permitted excavation. The issue of ownership, particularly of items and human remains held in museums, universities, and other institutions covered by NAGPRA are at the heart of both the need for and intent of the law. Section 3 identifies how ownership of items and human remains will be determined under the law, for the purposes of repatriation. Section 3 also goes into some detail on the processes required for the excavation and removal of cultural items covered under NAGPRA is to be conducted on federal lands.

> Section 3
>
> (a) The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed)—
>
> (1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or
>
> (2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony—
>
> > (A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;
> >
> > (B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or

> (C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe—
>
> (1) [sic] in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or
>
> (2) [sic] if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.
>
> (b) Native American cultural items not claimed under subsection (a) of this section shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 8 of this Act [25 U.S.C. 3006], Native American groups, representatives of museums, and the scientific community.

Section 4 of the Act clearly identifies that the illegal trafficking of human remains and cultural remains is a criminal act and established criminal penalties for those convicted of a violation. Section 5 of the Act establishes the process for which institutions and museums with responsibilities under the act for conducting inventories and notifying tribes of collections that are in their possession. The inventory process is the first stage of the repatriation process. Section 6 of NAGPRA establishes the requirements of those institutions for preparing

comprehensive summaries for tribes to help them determine what items they may wish to file a repatriation claim for. It clearly identifies the rights of tribes to request and obtain all museum records for the purposes of determining cultural affiliation and history of acquisition of items in the summary. Both Sections 5 and 6 clearly identify the responsibilities of the institutions that hold collections of NAGPRA items eligible for repatriation to federally recognized tribes. Section 7 sets out the steps for repatriation of eligible items and human remains. This section also includes a provision permitting scientific study of items prior to repatriation, a point of serious contention for many tribes.

**B. Discussion**

In 1990, NAGPRA was passed in an attempt to reconcile some of the injustices of the past, particularly with regards to how archaeology had been practiced on federal lands with regards to the excavation and removal of human remains from grave sites and burial grounds on federal and "tribal lands". Additionally, it mandated "federal institutions" (museums and repositories that received federal funding, past or present) inventory all collections for those items that fit the definitions provided in NAGPRA in order to enable federally recognized Indian tribes to file claims for their repatriation, and return. NAGPRA is a landmark piece of federal legislation primarily because it was conceived, drafted, and passed with active involvement of American Indians and tribal governments across America. It was heralded as both human rights and civil rights

legislation by Indian Country, even though it was strongly opposed by the established archaeological, CRM, and museum professions and their institutions.

The implementation of NAGPRA, both in its applicability and enforceability on federal and "tribal" lands has been less than ideal, in the eyes of many American Indians and tribal governments that have attempted to utilize the law either to protect burial grounds and grave sites or to successfully repatriate human remains and other eligible "objects" under the provisions of the law. Conflicting and differing interpretations of the law, its implementing guidelines, and even its definitions have resulted in litigation, mediation, and a sense of general frustration on all sides, particularly American Indians who had high hopes for the implementation of NAGPRA and its promise to reverse several hundred years of injustices and loss of culture experienced by American Indians and tribes across the country.

NAGPRA was passed in response to American Indian, Native Hawaiian and Alaska Native (defined as "Native American" for the purpose of the legislation) concerns regarding the proper treatment of human remains, funerary objects, sacred objects, and objects of cultural patrimony discovered on federal or tribal lands either through archaeological investigation, inadvertent discovery, or other forms of acquisition of such objects from tribal or federal lands. In addition, NAGPRA provides for the inventory and repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony in museums, institutions, and federal collections.

Upon passage, NAGPRA was recognized by American Indian activists and supporters as "human rights legislation designed to remedy the inequality in treatment between Caucasian remains and American Indian remains: a history of inequality that, as Senator Daniel Inouye pointed out, 'carries a message of racism'" (Swidler *et al.* 1997:70).

For many, the signing of NAGPRA into law by President George W. Bush was the fulfillment of more than a century of efforts in what is often referred to as the Repatriation Movement (Thornton 2001:310). Thornton (2001:310) defines repatriation as "an organized effort to return Native American remains and cultural objects to the communities from which they come." The law is "based upon the unique relationship between Native Americans and the federal government" as recognized by the signing of treaties, executive orders, Supreme Court rulings, and the establishment of federal recognition for American Indians, Alaska Native communities, and Native Hawaiians (Trope 1996:9). Critics of NAGPRA often argue that the law is an obstruction of scientific inquiry and represents the appeasement of "militant Indian activists" (Swidler *et al.*1997:70). Proponents assert that it is "actually an attempt by advocates to grant Native Americans the same rights as Euro-Americans" with regards to human remains, burials and ceremonial or religious objects (Swidler *et al.* 1997:70). The law and the implementation of the law have been at times divisive, stirring controversy between the American Indian, archaeological and museum communities. At the core of this conflict are the issues of ownership, control, and consultation. The law

represents a dramatic shift in power over the ownership and management of American Indian collections and human remains. A review of the Repatriation Movement and the historical events surrounding the law provides some insight into why it was passed by Congress, and why it has been viewed as a major victory for American Indian rights' activists.

The development of a viable art collectors market, both nationally and internationally, led to the further dispossession of cultural objects and grave goods from Native communities. Only after the social and political movements of the 1960-70s, the passage of the American Indian Religious Freedom Act and the formal, united organization of many modern-day Native communities, did the Repatriation Movement take shape and gain momentum as part of the American Indian rights movement (Monroe 1997:395). By the mid-1980's American Indian activists, communities, and supporters joined with key Congressional leaders and drafted the first repatriation law.

While the law was opposed in large part by museums and the scientific community, discussions between the parties over the year 1989-1990 led to the "recognition that past practices were morally untenable" (Monroe 1997:396). It is in this context that the final passage of NAGPRA as law does indeed represent a victory in the struggle for human rights by American Indians (Swidler *et al.* 1997:70). While it is a start at righting past wrongs inflicted upon American Indian communities, implementation of NAGPRA has presented challenges that many did not foresee at the time it was signed into law. It has taken nearly a

decade of working with the legislation to see significant progress in repatriation to American Indian communities of NAGPRA eligible items (Thornton 2001:317).

After NAGPRA was passed in 1990, museums and institutions around the country have struggled to comply with the law. Several problems present obstacles to compliance including but not limited to inaccurate, incomplete, or missing records regarding the origins or provenience of objects housed in collections, and the lack of funding and human resources required to compile such information for the purpose of compliance. Additional problems are the lack of training and experience with NAGPRA and the lack of experience with tribal consultation that can complicate compliance efforts. There are also cultural differences between Native communities and museum professionals regarding the appropriate treatment of cultural objects and human remains. Concerns over repatriation and reburials, and the values that are embodied in the museum profession often conflict with traditional Native values.

The opposing view, promoted by the museum and the archaeological communities in earnest prior to the passage of NAGPRA, is based upon the premise that museum collections should be available to the public, as part of the public trust. Arguments have been made with regards to the loss of vital research material, research potential, loss of collections, and concerns over improper management once repatriated to Native communities. These arguments have been based upon science, educational value, freedom of research and inquiry, and a fundamental view about ownership of collected objects. The issues of ownership

and control have led to legal challenges of NAGPRA, such as the Kennewick Man lawsuit filed by anthropologists arguing that repatriation of ancient human remains under NAGPRA violates their right to scientific inquiry. While the Kennewick Man case is an extreme example of opposition to NAGPRA, it underscores the ideology behind many arguments against repatriation presented and promoted by members of the professional archaeological community.

NAGPRA represents a fundamental shift in control and ownership over collections, research, and archaeological investigations. Under NAGPRA eligible archaeological remains excavated from federal lands are no longer under the ownership of the federal agency, or the principle investigator, but instead are considered to belong to the federally recognized American Indian tribes associated with the area from which they are found. It is this shift in ownership, under NAGPRA, that many archaeologists and museum professionals find problematic and it is the area of NAGPRA that has generated the most controversy over the implementation of the law. Its development and passage is a direct result of the concerted efforts of American Indians, tribal governments, and tribal organizations such as the National Congress of American Indians. It is remarkable due to the fact that it is the first law to be drafted with the active input and participation of tribal representatives.

The significance of NAGPRA to American Indians and tribal governments that work diligently to protect, preserve, and restore the cultural and spiritual health of their communities cannot be overstated. NAGPRA is the most significant

federal law for Tribal CRM efforts, which often comes as a surprise to CRM professionals and archaeologists, even federal agency officials and land managers. The importance placed upon the law underscores the cultural importance and tribal ethic of stewardship and responsibility to ancestors. Tribal CRM programs often devote significant resources to NAGPRA and the act of repatriation and return of items and remains stolen and lost during a period of intense trauma and discrimination experienced by American Indians. Many American Indians and tribal governments see the ultimate return, or homecoming, of these ancestors and sacred and ceremonial items to be necessary for the healing and restoration of their land and people.

Tribal CRM programs devote significant time and resources not only to repatriation but also in protection of archaeological resources and burial grounds and cemeteries. Lesser-known provisions of NAGPRA allow for the development of Plans of Action (POAs) for the cases of inadvertent discovery of human remains in the process of ongoing activities, federal actions, and federal undertakings. Tribal governments have the ability and right to request a POA be developed prior to any undertaking if that tribe believes there is a possibility of encountering NAGPRA eligible items. POAs can be developed and signed on a project-by-project basis, but they can also be developed as programmatic protocols between federal agencies and tribal governments. It is to the benefit of tribal governments to utilize POAs in a proactive manner. A POA clearly outlines the ownership and disposition of NAGPRA eligible items and human remains prior to any ground

disturbing activity or excavation, either as a permitted action under ARPA, a mitigation measure under NHPA, or an inadvertent discovery of any kind.

It has been my professional experience that federal agency officials are often not aware of NAGPRA, its provisions, or that NAGPRA clearly puts ownership of NAGPRA items in the hands of the affiliated tribes. Too often federal agency officials, and museum curators, insist that objects and items on federal lands and within museums and institutions covered under the Act belong to the agency, and the determinations of what objects are eligible are in their purview to decide. This is an erroneous but prevalent assumption. Similarly, federal agency officials often believe that POAs are unnecessary or unwanted documents, when they should actually encourage them with all affiliated tribes in case of discovery, regardless of the nature of the discovery. Many archaeologists are completely ignorant or even hostile to NAGPRA, and even when working within the CRM profession, do not realize the legal requirements of NAGPRA, the rights of the tribes, and the benefits of embracing the law and its requirements when engaged in archaeological excavations or studies.

No other cultural resources law has served to expose the ideological divide between the American Indian and archaeological communities. Even after 17 years, NAGPRA still inspires more hostility from practicing archaeologists than any other law I work with. As a non-Indian I am exposed often to the complaints and ignorant or misinformed laments of archaeologists and land managers over the requirements of the law. The archaeological and academic communities bear much

of the responsibility for the perpetuation of this bias that borders on racism. Cases such as the Kennewick Man lawsuit only have deepened this rift, and the sense of mistrust on both sides of the argument. Perpetuating this conflict serves no constructive purpose and in the end only diminishes the relevance of archaeologists in the practice of Tribal CRM.

Further problems have been attributed to the fact that upon passage, NAGPRA was delegated to the National Park Service for implementation. During the years of the Kennewick Man dispute and lawsuit (1996-2002) over a particular set of ancient human remains collected from federal lands, many American Indians were disturbed by the fact that the NPS official making determinations on NAGPRA and its applicability in this case were made by the Park's chief archaeologist. This was a fair criticism since the issue was about the rights of archaeologists over tribes in the final disposition of human remains. Much like the problems of institutional bias prevalent in ACHP and the implementation of NHPA, the implementation of NAGPRA by the same federal agency, NPS, presents what should be obvious conflict of interest issues that put American Indians and tribal governments advocating for tribal positions at an extreme disadvantage because the power of interpretation and implementation is placed in the hands of professional archaeologists at the exclusion of American Indians.

As a Tribal CRM professional, I can assure my archaeologists colleagues that the common claims of NAGPRA critics are consistently false and expose not only cultural insensitivity but also ignorance of the laws that regulate their chosen

profession. NAGPRA is about rightful return and clearly places ownership, the right to declare ownership, and to determine appropriate disposition, in the hands of federally recognized tribes. By their actions archaeologists and CRM professionals show their biases and ignorance with their hostility to the law. Tribal CRM programs have taken the lead on NAGPRA and often have the most expertise, legally and practically, on the law and what compliance required. These programs work diligently to protect burial grounds and cemeteries and actively promote the use of POAs to establish protocols to ensure these burials and cemeteries are not disturbed or destroyed as a result of authorized activities. POAs protect the tribe, the ancestors, the contractors, archaeologists, and the federal agency. Tribal CRM programs often operate under a philosophy of preventing, wherever possible, the disturbance of cultural areas and cemeteries. They are devoted the protection of and the return of items and ancestors stolen and lost for decades and do so out of a commitment to the cultural and spiritual health of the tribe.

**5. The National Environmental Policy Act (NEPA) of 1969, as amended**

NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and E.O. 11514, Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977). NEPA was passed in 1970 in an attempt to coordinate compliance with an ever-

growing body of federal, state, and local environmental protection laws. NEPA is an umbrella or process law. It has no provisions of its own other than to establish procedural and regulatory requirements for assuring compliance with all applicable federal, state and local environmental laws for all federal actions. It is also considered a trigger law because it triggers compliance with all those applicable environmental laws. NEPA established a process for documenting and demonstrating adequate review and compliance. Its regulations are found in 40 CFR 1500 – 1508.

## A. The Law and Regulations

NEPA contains two primary declarations. First, it declares a national policy on environmental protection, the protection of the "human environment". Second it was a law that established a process for environmental review of all "federal actions". NEPA is considered an umbrella or trigger law. It encompasses all applicable federal, state, local, and tribal environmental law and mandates a process of review for compliance with all of them in a single document; an Environmental Assessment (EA) or Environmental Impact Statement (EIS). Three of the many applicable laws that NEPA triggers are NHPA, NAPGRA, and ARPA, when applicable. NHPA applies to all "federal undertakings" per NHPA

definitions, but NEPA always triggers NHPA review and compliance. In this way the NEPA process assures compliance with NHPA but also provides unique and additional opportunities for American Indians and tribal governments to advocate for adequate review and assessment of action impacts on culturally significant and tribal trust resources.

NEPA actually requires additional review beyond NHPA compliance, but this is rarely a fact that is made known to tribes working on an EA or EIS review of a federal action. A closer examination of the law is provided here to underscore the difference between NHPA and NEPA. First, NEPA declares a national policy on environmental protection and establishes the Council on Environmental Quality (CEQ) and tasks the CEQ with promulgating regulations:

> Section 2
>
> The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

NEPA declares that as part of a national policy on environmental protection, standards and protection of environmental resources, including historic and cultural resources, are to be national priorities:

Section 101

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
>
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
>
> (5) achieve a balance between population and resource

> use which will permit high standards of living and a wide sharing of life's amenities; and
>
> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.
>
> (c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation of the environment.

As part of this declared national policy, NEPA directs all federal agencies to comply with the regulations and rules to be established under the Act. NEPA requires an interdisciplinary approach to project review and assessment of project impacts on the environment.

> Section 102
>
> The Congress authorizes and directs that, to the fullest extent possible:
>
> (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and
>
> (2) all agencies of the Federal government shall—
>
> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by Section 202 of this Act [42 U.S.C. 4341-4347], which will insure that presently unquantified environmental amenities and values

may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Consultation with agencies having special expertise Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5 [of the United States Code], and shall accompany the proposal through the existing agency review processes;

(C) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

NEPA created the Council on Environmental Quality (CEQ) and tasked the CEQ with promulgating the implementing regulations, 40CFR1500, and also developing guidances to assist and assure compliance with the law. These CFRs were issued in 1978 and established the NEPA review process. NEPA review is mandatory for all “federal actions” per NEPA definitions. All applicable federal, state, local, and tribal environmental law must be complied with in the NEPA process and their compliance must be documented in the official NEPA document. Depending on the level of review required, this is usually in the form of an EA or EIS. The CFRs for NEPA outline the process and standards of review and compliance. Relevant sections of 40CFR1500 are presented here:

Sec. 1500.1 Purpose.

> (a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.
>
> (b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA

documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork--even excellent paperwork--but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

Sec. 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decision makers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

> (f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

**B. Discussion**

Some key components of NEPA are summarized below:

- Established a national policy to "encourage productive and enjoyable harmony between man and his environment" (Section 101).
- Established to ensure that all applicable federal, state, and local environmental laws are complied with in an agency's planning and decision-making process for any federal action.
- Requires all federal agencies to consider all of the potential environmental impacts of proposed federal actions in the planning and decision making process.
- Any proposed federal action with the potential "significantly affect" (See 40 CFR 1508.27) the quality of the "human environment" (See 40 CFR 1508.14) will trigger NEPA.
- Does not provide any criminal or civil penalties for non-compliance with NEPA, but laws applicable under NEPA may be enforceable.
- Requires all federal agencies to adopt policies for the purpose of complying with NEPA.
- Requires tribal consultation, and in some cases allowing the tribe to serves as a collaborating agency.
- Requires site-specific analysis be conducted before the final alternative is selected or decision is made.
- Requires all federal agencies to make efforts to include public participation in the process (scoping).

- Requires a single document be produced that complies with all applicable environmental laws and mitigation requirements.

NEPA is a process intended to promote excellent decision-making by federal agencies. It is intended to be interdisciplinary in scope. It requires that all applicable federal and state laws be complied with in the NEPA process but in the end an agency may implement its preferred alternative regardless of the environmental consequences as long as the agency can prove it has fully complied with the process. Lawsuits over NEPA compliance are filed over a failure (perceived or real) by the agency to follow the process, not over decisions made by the agency as a result of the process. If the process has not been followed fully, injunctions may be ordered requiring the agency to fully comply and document its compliance with the process.

NEPA explicitly and implicitly expands the scope and level of review of impacts to cultural resources beyond NHPA. NEPA is not limited to narrow definitions of "historic properties" or "archaeological resources" as are ARPA and NHPA, but instead speaks broadly of impacts to the "human environment" and requires assessment and consideration of all impacts (natural, cultural, economic, social, environmental, health, and aesthetic) in the NEPA process. NHPA has been revised and amended to make it more compatible with NEPA, but it is important to note that NHPA is a separate authority. In other words, NHPA stands alone, even if NEPA does not apply. The definitions of a "federal action" and a "federal undertaking" are not identical and it is critical to be aware of this difference. This

is one of the reasons why the legal definitions used in each law are so important, for they are neither universal in meaning nor application. In the case of NEPA, a "federal action" will always trigger NHPA and Section 106 review and compliance.

NEPA established the Council on Environmental Quality (CEQ), an oversight council similar to the Advisory Council on Historic Preservation (ACHP) for NHPA. However, the role and responsibilities of CEQ are very different than those of the ACHP. Responsibilities of CEQ include gathering information on the conditions and trends in environmental quality; to evaluate how well federal programs are complying with the purpose and intent of NEPA; to develop and promote national policies aimed at improving the quality of the environment; and to conduct research, including studies, surveys, and analyses related to ecosystems and environmental quality. The first responsibility of CEQ, however, was to establish implementing regulations that all federal agencies would have to comply with. These regulations were established in 1978 and codified in 40 CFR 1500 - 1508.

In order to ensure that federal actions meet the purposes set forth in NEPA, various considerations must be taken into account and documented into a synthesis document. These considerations include:

(1) The environmental impact of the proposed action;
(2) Any adverse environmental effects which cannot be avoided should the proposal be implemented;
(3) Alternatives to the proposed actions;

(4) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
(5) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented (42 U.S.C. 4321 Section 102(C)(i-v).

The synthesis document that will consider each of the previous components will vary depending on the level of affect the action will have on the environment. The first level of documentation is a Categorical Exclusion determination. A federal action may be categorically excluded from a detailed environmental analysis if the action meets certain criteria, which a federal agency previously determined as having no significant environmental impact. Several federal agencies have their own set of actions that are categorically excluded from environmental evaluation under their NEPA counterpart regulations. The second level of analysis is a written Environmental Assessment (EA), which makes a determination whether the federal action would significantly affect the environment, including historic, cultural, and natural resources (See 40 CFR 1508.9). If it is found that the action would not have a significant impact, then a Finding of No Significant Impact (FONSI) is issued.

The last level of synthesis documentation is an Environmental Impact Statement (EIS) (See 40 CFR 1502). An EIS is prepared when an EA finds that there will be a significant impact to the environment as a result of a federal project. An EIS is a more in-depth and detailed analysis of the proposed action, as well as alternatives. In addition, the public, other federal agencies, and outside parties may provide input in the preparation and completed draft of an EIS. It is not necessary

to complete an EA, if the federal agency determines early that an EIS will ultimately be necessary, due to the realized environmental impacts the action will likely have. In this instance, it is more resource and time efficient to simply complete only an EIS.

Furthermore, NEPA requires that the Project's "cumulative effects" be reviewed in the NEPA review process. The CEQ issued an official guidance on assessing cumulative effects under NEPA, "Considering Cumulative Effects Under the National Environmental Policy Act" in 1997. Under NEPA, the consideration of impacts and potential impacts to culturally significant tribal and tribal trust resources is not limited to NHPA review. In fact, NEPA requires consideration of culturally significant resources contained within the affected human environment beyond the limited scope of NHPA and its definition of potentially eligible historic properties. The CEQs regulations for implementing the National Environmental Policy Act (NEPA) defines cumulative effects as:

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regard-less of what agency (Federal or non-federal) or person undertakes such other actions (40 CFR ~ 1508.7).

NEPA provides the context and carries the mandate to analyze the cumulative effects of federal actions. By definition, cumulative effects must be evaluated along with the direct effects and indirect effects (those that occur later in time or farther removed in distance) of each alternative. The range of alternatives

considered must include the no action alternative as a baseline against which to evaluate cumulative effects. The range of actions that must be considered includes not only the project proposal but all connected and similar actions that could contribute to cumulative effects. Specifically, NEPA requires that all related actions be addressed in the same analysis (CEQ 1997:1). NEPA requires that the long-term, indirect and cumulative impacts to the environment must also be evaluated (42 U.S.C. 4321 Section 102(C)(iv)).

- Direct effects are caused by the action and occur at the same time and place (40 CFR 1508.8(a)).

- Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. (40 CFR 1508.8(b)).

- Cumulative impact is the impact on the environment, which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time (40 CFR 1508.7).

Here, the terms effects and impacts are used synonymously (40 CFR 1508.8). Although direct and indirect effects play a role in whether the action will have potential impacts, it is the cumulative impact analysis that identifies and assesses the possible long-term results of these effects. The cumulative impact analysis should include the *total* effect on a resource: natural processes and events,

the ecosystem, or on the human community as a result of the action. In addition, the cumulative impact analysis should be resource specific, therefore, there might be different cumulative impacts on various environmental resources. Considering cumulative impacts is an essential component in decreasing potential adverse impacts, as well as in developing appropriate mitigation strategies and monitoring those strategies effectiveness.

The CEQ (1997) developed the official NEPA guidance on cumulative effects. The CEQ identifies several questions that should be considered in order to assist in assessing such effects.

> (1) What is the geographic area affected by the project?
> (2) What are the resources affected by the project?
> (3) What are the other past, present, and reasonably foreseeable actions that have impacted these resources?
> (4) What were those impacts?
> (5) What is the overall impact on these various resources from the accumulation of actions? (*Fritiofson v. Alexander* 772 F.2d 1225 5th Circ. 1985).

These five questions help identify and assess potential cumulative impacts. The NEPA approach to identifying, evaluating, and assessing the potential and long-term, cumulative effects of a proposed "federal action" provides for a much more comprehensive review of project impacts to culturally significant resources than other existing historic preservation law. It is for this reason, that a robust Tribal CRM program will be knowledgeable in NEPA review and compliance.

The CFRs for NEPA clearly establish a review process to ensure timely project review and documentation of project compliance with all applicable law.

The issue of "applicable law" is critical to this discussion because it is because of this provision in NEPA that tribal governments can exercise the most sovereignty By adopting NEPA-based standards of review through a Tribal Environmental Policy Act (TEPA) tribes can determine adequate standards for their own federal actions. Under the Self- Determination Act of 1975, tribal governments have regained the authority to establish their own laws and regulations. Tribal governments have the ability to establish criteria and standards of review, permitting of specific activities related to environmental regulation, and pass tribal codes and ordinances for environmental protection on tribal lands. NEPA provides tribal governments with the flexibility and the opportunity to develop tribal standards of review and protection in through the adoption of a TEPA.

One of the primary complaints about NEPA, and it is a significant one, is that it is about process, not protection. In some cases, this is true, particularly when it comes to cultural resources. NEPA triggers all applicable environmental laws, and few environmental laws actually protect cultural resources, but rather natural resources. That said, it is important to note that to most American Indians, natural resources are indeed cultural resources, some of the most significant kind. The problem is, those are not what is often protected under NHPA, AIRFA, NAGPRA, or ARPA. NEPA provides a framework and a process, but too often the resources of most significance to tribes are those that get the least consideration in an EA or EIS. This is probably the most significant reason for Tribal CRM programs to become extremely NEPA savvy, in law and in process.

Some of the key strengths that NEPA offers tribes in advocating for a more holistic and tribally sensitive assessment of potential impacts and cumulative effects are the ability of tribal governments to assert tribal trust rights, treaty rights, other cultural resource laws, other environmental resource protections laws, and applicable Executive Orders that relate to tribal issues and concerns (Mittelstaedt *et al*. 2000:112). Some of the Executive Orders (EO) that tribes can utilize within a NEPA process to advocate for adequate assessment and mitigation of potential impacts include: EO 13007 (Sacred Sites), EO 12898 (Environmental Justice), EO 11593 (Pollution Prevention), and federal memorandums on government-to-government consultation with tribal governments.

For example, EO 12898 on Environmental Justice, issued in 1994, mandates federal agencies to develop an environmental justice policy for the purpose of identifying and assessing whether or not federal actions and policies have a disproportionate or adverse effects on low-income and minority communities. The requirements of EO 12898 include analysis and impact studies be conducted on issues such as tribal subsistence and consumption of traditional and natural resources.

In 1997, the CEQ issued it's guidance on Environmental Justice and it remained one of the most comprehensive government documents on the appropriate standards and methods for identifying and assessing potential impacts on low income and minority populations. Since tribal communities usually qualify as both low-income and minority populations, and they also have unique

requirements for continued subsistence and often practice traditional life ways that involve the management and consumption of many natural resources, this guidance can offer tribes engaged in a NEPA process a platform for requiring adequate studies, analysis, and consideration of impacts that may otherwise go ignored by federal agencies engaged in the process.

Similarly, EO 11593 on Pollution Prevention issued in 1990 mandates that federal agencies aggressively pursue pollution prevention on federal lands and resulting from federal actions. Many of the primary cultural resource concerns of tribal governments and American Indians have a strong environmental component, specifically over the degradation of the quality of a wide range of natural and environmental resources that have cultural significance. For example, many tribal governments and American Indians are very concerned with issues of water and air quality, illegal dumping and solid waste problems, and the destruction and contamination of culturally significant natural resources such as plants used for traditional medicines and basketry. EO 11593 directs federal agencies to reduce their uses of toxic substances on federal lands, where possible. As a result tribal governments and American Indians engaged in a struggle to protect the quality and purity of culturally significant areas, and resources, can utilize EO 11593 in their efforts to make federal agencies more responsive to tribal concerns. Since NEPA triggers all applicable environmental laws, including Executive Orders and governmental memoranda, it provides many opportunities for tribes to advocate

for cultural resources far beyond the narrow scope and limited application of federal historic preservation law.

The way that NEPA is implemented, and the way EIS mandates are conducted by federal agencies remains problematic for tribal governments engaged in resources protection and government-to-government consultation on federal agency decisions. Federal policy domains too often exclude the active participation and inclusion of tribal governments and American Indian concerns within the agency decision-making process (Boggs 1991:31-32). Federal agencies retain significant autonomy and power in the NEPA and EIS process and it is not power they are willing to relinquish to accommodate tribal concerns. The social sciences provide one of the greatest opportunities for tribes to assert their own worldview, concerns, and issues in the NEPA process (Boggs 1991). Because NEPA mandates the completion of studies to be utilized in decision-making, and requires the generation of knowledge and the use of that knowledge in decisions, it provides tribal governments with powerful tools for changing the dominant agency approach to policy (Boggs 1991).

One of the advantages that NEPA offers tribal governments within the EIS include the ability for tribes to request and act as “cooperating agencies” on the preparation of the EIS. This ability provides tribal governments the ability to actually participate in the writing of the EIS and the determination of both impacts and appropriate mitigations. Tribes can request to serve as cooperating agencies in most EIS processes. They can do so even if they oppose the proposed action.

Participation does not imply consent or approval, but it does elevate the tribal interests above the stakeholder or affected public, entities that are often relegated into the comment period on EIS documents that are basically a done deal by the time they are issued for public comment. As cooperating agencies, federally recognized tribes have a seat at the table in the entire preparation of the EIS, have access to all the studies and data submitted and reviewed, and can significantly influence the types of analyses required for the EIS process.

NEPA also provides for tribal governments to request that culturally appropriate and adequate studies on cultural, social, health, and spiritual impacts be conducted and utilized in the decision-making process. One of the most common statements by tribal governments and American Indians in regards to resources management is the inseparable link between the health of the people, the culture, and the environment on which they rely for survival, both physical and spiritual. These statements are not political ploys, but are expressions of a unique worldview that demands and deserves consideration and respect. The Arizona Snowbowl dispute underscores this very issue. The responsibilities of federal agencies to consider, not just environmental impacts but also the social, cultural and spiritual impacts within the NEPA process has recently been affirmed by a US District Appeals Court. That ruling was not based upon historic preservation law, but rather the role of religious freedom, social, cultural, and spiritual impacts far beyond the narrow scope of NHPA and other historic preservation laws. The Forest Service believed that because it had completed its NHPA compliance and

its tribal consultation, the NEPA process was complete for the consideration of cultural impacts. The lower court upheld that argument, but it was overturned at the appeals court level. How the US Supreme Court rules on the issue remains to be seen.

Through the NEPA review process tribal governments can request and submit Social Impact Assessments (SIA), Health Impact Assessments (HIA), and Cultural Impact Assessments (CIA) that address the linkages between environmental, cultural, spiritual, and physical health. SIAs often include the socio-economic impacts of proposed actions on specific groups and communities. EO 12898 on Environmental Justice requires that agencies consider the disproportionate impacts on low-income and minority populations resulting from their actions. Tribal communities fit both EJ definitions and as such have additional leverage for requesting that adequate and community specific analyses of potential, cumulative, and long-term impacts on those communities by a proposed federal action be assessed and considered in the EIS process. SIAs have emerged as part of the NEPA process even though early applications of NEPA failed to often consider the social impacts, the human impacts, of a proposed action. First utilized in a First Nation's case on a proposed oil pipeline in British Columbia, SIAs have become required and necessary components of NEPA review and compliance (Mittelstaedt *et al.* 2000:148).

CIAs can examine the cultural resource impacts beyond the narrow scope of NHPA, but can include NHPA findings as well. Cultural impacts include issues

related to religious freedom, cultural restoration efforts, and continued use and access to traditional use areas, ceremonial places, and ongoing spiritual practices. AIRFA, RFRA, EO 13007, NAGPRA and other laws relevant to tribal rights and religious can and should be considered in a CIA. CIAs are not well developed in methodology, but the Arizona Snowbowl case demonstrates how these types of assessments deserve a robust methodology and should be included in NEPA review, particularly when consultation indicates serious religious and spiritual concerns about a proposed action.

HIAs allow for the assessment and evaluation of both short-term and long-term impacts to human health resulting from a proposed action. While no previous NEPA reviews in the US have considered human health impacts in an EIS, this is changing. Currently, the Alaska Inter-Tribal Council is conducting several HIAs for NEPA reviews being conducted by the Bureau of Land Management and the Marine Mammals Service for oil and gas leases in Alaska. The Alaska Inter-Tribal Council successfully requested the ability to conduct these studies themselves, with the assistance of qualified public health professionals and following and established HIA model developed by the World Health Organization (Wernham 2007). This is a significant development, and how it plays out in agency decision-making in the EIS remains to be seen, but it serves as an excellent example of what tribal governments can do to influence the types of studies and analyses conducted within the NEPA process. It also underscores the

importance of environmental health to community health. The World Health Organization (WHO) defines health as:

> a state of complete physical, mental, and social well-being, not merely the absence of disease or infirmity.

Furthermore, NEPA makes four explicit references to health in the law (Section 2, Section 101, and Section 204) plus two more in 40 CFR 1508 (Wernham 2007). The WHO model for HIAs is:

> A combination of procedures, methods, and tools by which a policy, programme, or project may be judged as to its potential effects on the health of a population, and the distribution of those effects on the population" (Wernham 2007, WHO 2007).

Even though no previous EIS in the US has included an HIA, the efforts of the Alaska Inter-Tribal Council are changing that. It is significant to note that HIAs are required in most other countries, including the European Union.

Tribal efforts within the NEPA process are truly changing the way NEPA reviews and compliance are conducted. Indigenous worldviews can be incorporated and impacts can be identified, evaluated, and assessed within the NEPA process in ways that are far more reflective and responsive to tribal goals and concerns than the historic preservation framework, particularly with regards to impacts to cultural resources. It is for this reason that I have come to believe that NEPA offers a better way to promote meaningful cultural resources management than the existing historic preservation framework. Such an approach will not exclude or dilute the significant contributions that these historic preservation laws can make to tribal efforts, but rather expands the ability of tribal governments to

advocate for cultural resources protection and management beyond the narrow scope and applicability of these laws. NEPA provides tribal governments with many tools that historic preservation laws do not, particularly with regards to identifying potential impacts and determining appropriate mitigations. NEPA is not perfect, and agency control over the process can not be ignored or dismissed, but the NEPA process does provide more options and more access to the decision-making process and allows tribes to define and determine cultural impacts of proposed federal actions on their communities.

# V. Results and Recommendations

## 1. Tribal CRM and Existing Historic Preservation Laws

The previous chapter examined five major federal laws that are most utilized in Tribal CRM: NHPA, AIRFA, ARPA, NAGPRA and NEPA and included a discussion of the strengths and weaknesses of each law in Tribal CRM efforts. Each of these laws exists under a separate congressional authority and has unique definitions, criteria, and applicability. Each law has limitations in definitions, scope, and level of protection they require. NEPA was evaluated as a potential integrating mechanism to tie cultural and natural resource management together in tribal contexts.

Process-oriented laws, such as NHPA and NEPA are not written to guarantee protection of cultural resources, they only require that the impacts of an eligible project be reviewed and considered in the process. One of the primary problems facing Tribal CRM programs is that we are asked to work with an inadequate framework rooted in historic preservation rather than a process that adequately defines, identifies, assesses, and protects resources that are of cultural significance to American Indians and tribal governments. For this reason, a NEPA approach is recommended as an alternative way for Tribal CRM programs to better advocate for and proactively protect culturally significant and tribal trust resources in project planning and compliance review.

## 2. Cultural Landscapes and Tribal CRM

There are five primary types of cultural landscapes that are utilized in both the academic literature on the subject, and the historic preservation application of the concept. These five established types of cultural landscapes are:

- vernacular landscapes;
- designed landscapes;
- ethnographic landscapes;
- heritage landscapes; and
- associative landscapes.

In general, a vernacular landscape is one that is representative of everyday life and is usually conceived of as a landscape that has been constructed or crafted to reflect the needs and materials of a specific locality (Jackson 1984). Vernacular landscapes usually consist of buildings and structures that are of a local nature, originating from a local culture, community, or tradition (Jackson 1984).

A designed landscape is a landscape that has been constructed and deliberately designed to reflect an architectural or design concept, historical era, culture, or tradition. In contrast to a vernacular landscape, a designed landscape is intentional and often follows an established form or tradition (Egan 2003). For this reason designed landscapes fit well within the historic preservation framework and National Register of Historic Places criteria set under NHPA.

Ethnographic landscapes are those landscapes that acquire meaning through the cultural lens through which they are experienced. The category of ethnographic landscapes is often applied to describe those defined by cultural geography, or culturally determined concepts of space and significance. For this reason, the ethnographic landscape concept is often applied to considerations of American Indian and indigenous landscapes and geography. Under NHPA considerations, ethnographic landscapes are often comprised of archeological districts and traditional cultural properties (TCPs). Under the current application of the concept within the National Park Service, an ethnographic landscape falls under the management and purview of the NPS Ethnography Program, while the other four types fall under the Cultural Landscape Program. The problem with separating out the ethnographic landscape is evident when working with the concept and federal land managers, who often fail to see the connection between the tangible and non-tangible aspects of a American Indian landscape or cultural geography.

Heritage landscapes "are defined as those places-and depictions of them-that contain buildings, sites, and other features associated with history (Francaviglia 2000: 45). Again, this concept is deeply rooted in the historic preservation framework and relates well to the established historic property types of buildings, structures, and districts.

Associative landscapes are those that hold significance by association to culture and society, and are usually considered to be intangible (Jackson 1994).

Sacred places within a natural landscape, or natural features that possess sacred and spiritual significance are often considered as associative landscapes. The associative landscape is closely related to the concept of an ethnographic landscape, but is perhaps less concrete in terms of its physical attributes.

All five of these cultural landscape types are used within the academic and historic preservation literature. It is easy to understand, upon review of the definitions and the aspects that distinguish them from each other, that the ethnographic and associative landscape concepts are most likely to best capture the tribal and indigenous values and concepts that reflect a cultural geography. The problem arises in attempting to apply these approaches within an NHPA evaluation or under NHPA criteria, as these approaches tend to insist on breaking these into a western and non-indigenous categorical system that allows for the evaluation, and eventual preservation, of their separate elements and discreet criteria.

One thing that becomes evident upon reviewing various cultural geography studies conducted by and with indigenous people is that this western desire to compartmentalize and separate out elements into discreet and measurable components does not work. In fact it tends to fracture the holistic views that the cultural geography studies capture. It is for this reason that the historic preservation application of the cultural landscape concept often falls short of adequately describing or evaluating the significance or integrity of a given landscape, or its contributing elements.

My conversations with tribal representatives and cultural practitioners suggest that the cultural landscape approach is not in itself problematic, but rather the way it has been incorporated into the existing historic preservation framework and applied in the CRM and historic preservation fields. Constructed and historical parks, communities, and structures are easily incorporated into both the cultural landscape and historic preservation approaches. Sacred and natural landscapes with cultural significance and oral history spanning thousands of years are not so easily incorporated, and even worse, are often trivialized or diminished in attempts to classify them in such western terms and concepts. The truth is that American Indian cultural landscapes do not translate or fit easily or well within the established approaches, particularly under the criteria and methods for identifying, evaluating, or classifying these landscapes under the NHPA process.

The inadequacy of the NHPA approach to capturing or evaluating American Indian cultural landscapes is reflective of the western bias of the entire approach. In contrast, NEPA provides the opportunity to describe and evaluate potential impacts to a cultural landscape beyond the narrow focus and constraints of NHPA. It is for this reason that I believe NEPA provides unique opportunities to Tribal CRM and tribal governments that want to incorporate their own cultural geography, values, and a tribal-centric view of the role of the human and natural environment; concepts that are clearly and explicitly identified in NEPA and its implementing regulations (40 CFR 1500).

Cultural geography studies in various American Indian and tribal communities often identify a worldview that is in conflict, or is simply incongruent with a western worldview. Ideas about places, spirituality, and the role between humans, their Creator, and the natural world are holistic and expansive, and often not tangible but exist in the collective memory, history, language, and culture of a specific group. This holistic conceptualization does not conform to a compartmentalized and secular approach to evaluating buildings, objects, structures, artifacts or districts utilized in historic preservation and by default, CRM. Furthermore, there is little room for the inclusion of cultural geography within the established historic preservation framework, the practice of CRM, or NHPA evaluation.

Most American Indian cultural landscapes are shunted off to the NPS Ethnography Program rather than being incorporated within the established NPS Cultural Landscape Program. NHPA requires that eligible properties are defined as discreet, measurable, and tangible places associated with easily defined and classified events or features in history or prehistory. Indigenous cultural landscapes simply do not fit within these western cultural concepts, and as a result the entire NHPA approach to cultural landscapes falls short of capturing, and even worse, protecting those landscapes from impacts and developments (King 2003:298).

> Tribal concerns over the management of land and sacred and cultural aspects of the environment are not going to be adequately addressed through a process whose single goal is evaluating a discreet property for its eligibility to be included on a list, or possibly being commemorated with a plaque or a monument

(King 2003:298). And this is the ultimate downside of relying on NHPA or an historic preservation approach to Tribal CRM; it simply does not fit the goals and priorities of tribal communities and governments.

It is due to the lack of sufficient consideration of American Indian cultural geography and the lack of ability to inform the NHPA process to affect meaningful protection of tribal cultural landscapes that I have come to suggest the NEPA process over the NHPA process, particularly for articulating these concepts about environment and culture that are critical to tribal governments and American Indian communities. Where NHPA falls short, and is tied to a western-dominated approach of segmenting and categorizing resources in a historic preservation framework, NEPA provides many avenues and opportunities. NEPA provides not only the opportunity for tribes to articulate an American Indian worldview, cultural values, and relationships with the natural environment, but to also utilize that information in the NEPA review process. This includes the identification and assessment of potential adverse and cumulative impacts to communities, economies, cultures, spiritual and physical well-being. NEPA enables tribal governments to advocate for the protection and mitigation impacts to a wide range of cultural and natural resources that fall outside the narrow scope of NHPA and other historic preservation laws.

Cultural landscape and geography studies articulate American Indian and tribal-specific worldviews and values associated to the natural environment in great detail. They provide the basis for identifying and assessing potential impacts to that cultural landscape resulting from federal actions. Rather than being a means for nomination to the National Register under NHPA, these studies can and should

be utilized for the purposes of affecting meaningful and significant management and protections of these irreplaceable resources on which tribal cultural identity is dependent for its survival.

### 3. Tribal CRM and NEPA

The potential benefits that NEPA can bring to tribal efforts at cultural resources protection are not well established or understood primarily because of the dominance of NHPA and historic preservation in NEPA consideration of cultural resources. Too often, NHPA compliance is considered to be, and is accepted as, synonymous with NEPA compliance. This is not entirely a coincidence, and it is not entirely irreversible, but it is entirely based on a misinterpretation of what NEPA requires. Historically, NHPA compliance has been treated as synonymous with NEPA compliance because of the professional biases of those who are responsible for assuring both. Because NHPA is a discrete and separate federal authority, its mandates are clear and easy to incorporate into a NEPA review process. Because NHPA always applies in NEPA review, it is often mistaken as being all that is required under NEPA review when it comes to cultural resources. It is important to note here that the law does not say this, but rather NEPA implies that additional consideration and review of cultural impacts are required under NEPA, beyond what NHPA mandates. The challenge for tribal governments and Tribal CRM professionals is to know how best to identify and advocate for adequate consideration and assessment of impacts on tribal resources:

cultural, spiritual, subsistence, environmental, tribal trust, and reservation resources.

In 1994, the CEQ conducted a survey that included tribal governments (Mittelstaedt *et al.* 2000:17-18) and reported the following issues with NEPA identified by tribal respondents:

- NEPA process as burdensome and costly;
- Agencies scope the preferred alternative, not a range of alternatives;
- NEPA is often a formality to federal agencies;
- Many agencies deal with BIA and ignore tribal governments;
- Most agencies, especially the BIA do not have adequate NEPA personnel;
- Tribal governments often treated as "interested parties" in NEPA process, not on a government-to-government basis;
- Agencies vary on Categorical Exclusions (types of routine activities exempted from NEPA review) and what triggers NEPA review;
- Impacts and cumulative impacts of projects are not adequately monitored after they are completed;
- Tribal concerns are not taken seriously; and
- Agencies often notify tribal governments late in the process and not in time to influence project design or planning.

Each of these factors, or any combination thereof, may serve to discourage meaningful participation of tribes in the NEPA process, but they don't need to.

Tribal governments benefit from the active and proactive involvement of tribal staff and Tribal CRM program staff in the NEPA process because tribal

governments are well positioned to advocate for the inclusion of culturally significant and tribal trust resources in the NEPA review. While many federal agency officials may not be aware, or even supportive, of the government-to-government relationship between the federal government and federally recognized tribal governments, this relationship obligates all federal agencies to consult with tribal governments on more than one level, at more than one phase, of a NEPA review or federal action. Tribal governments can advocate for adequate and culturally appropriate analysis of project impacts on significant and tribal trust resources at more than one point in the NEPA process.

Furthermore, tribal governments can adopt tribal equivalents of NEPA, tribal ordinance, tribal permitting and review programs, and other forms of environmental protection and regulation on tribal lands. This can be accomplished through the creation and adoption of a TEPA, its implementing regulations, and tribal codes and ordinances for environmental and cultural resources review and protection.

Per the implementing regulations, the NEPA process must be streamlined and only a single compliance document is to be prepared. This requirement is significant, particularly with regards to the potential benefits of a TEPA. A single document requirement means that all federal, state, local, and by implication tribal laws must be complied with in the EIS and the EIS must demonstrate compliance with all those legal requirements for review, assessment, and mitigation.

NEPA provides tribal governments with the framework to establish and strengthen environmental standards of review and enhance tribal sovereignty through increased environmental regulation. It also provides a means for tribes to request adequate and culturally appropriate analyses be conducted in order to identify those aspects of the natural, cultural, and human environment that are necessary for the continued health and welfare of tribal communities. By adopting a NEPA framework, tribal governments can develop and adopt both law and process that strengthen the tribe's ability to protect and manage those resources of the greatest importance to tribal culture, beyond NHPA, beyond historic preservation, and including all applicable existing environmental law.

How NEPA is utilized to address tribal concerns about environment, culture, resources, and management varies from tribal government to tribal government, and federal action to federal action. What has become a common process in NEPA review has been the development of Social Impact Assessments (SIAs) for tribal and minority communities with the potential to be disproportionately impacted by a proposed federal action. SIAs, socio-economic studies, and environmental justice (EJ) analyses are often prepared and submitted by tribal interests in a NEPA review in order to document to the record tribal concerns associated with a proposed action in the EIS.

The consideration and assessment of social, cultural, and economic impacts on affected communities are key components of the SIA. SIAs utilize social science methodologies, and often include extensive ethnographic research and

economic analysis of aspects of a local community and economy. This approach is particularly useful to tribes and reservation communities who are often disproportionately impacted in ways that may otherwise fail to be noticed or evaluated within a NEPA process. Unfortunately, in many cases, those responsible for conducting NEPA analyses lack the cultural knowledge of the tribal community to accurately or adequately assess the impacts of a project, but tribes can and do conduct these studies themselves and often submit these findings to the lead agency responsible for the NEPA review. A good SIA that includes an EJ assessment can be the deciding factor in whether a proposed action is implemented, or if the impacts and required mitigations result in the modification or cancellation of the project. An example is the Orme Dam and proposed Central Arizona Project and opposition to the project by the Yavapai in the 1970s (Epseland 2001). Tribal participation in the NEPA process forced new analyses and new considerations of potential impacts. NEPA placed the tribe in the position of the affected community, the people who bear the costs of the proposed action, and under NEPA demanded that those impacts be evaluated, assessed and considered in the decision-making process (Epseland 2001:430). This was a position that prior to NEPA, tribal communities did not have in the eyes and minds of federal decision-makers.

NEPA requires that analyses be robust and interdisciplinary in nature, assessing both the social and natural environment, and including assessments on social, cultural, economic, and biological communities (Boggs 1991:32-33).

NEPA's mandates for protection of the human and natural environment provide the opportunity for tribal governments to identify and document environmental injustices and long-term cumulative effects on tribal trust resources, subsistence and traditional life ways, culturally significant resources, and how the health of those resources impacts the health and welfare of the tribe and its tribal membership.

The most common complaint about the NEPA process, particularly from those involved in advocating for tribal interests, are the lack of attention those interests receive in the EIS or NEPA process. In the 1994 CEQ survey, tribal respondents noted that federal agencies tend to relegate tribes to "stakeholder" or "interested party" status and rarely modify plans or projects to accommodate tribal concerns, particularly on cultural resources. It is for this reason that tribal governments may benefit from assuming as much control over the NEPA process as the law allows. Tribal governments and Tribal CRM programs will benefit not only from NEPA training, a multidisciplinary approach, but also the development of tribal environmental regulation and ordinance that include culturally significant resources as defined by the tribe. The ability to enhance tribal sovereignty is demonstrated in the ability to develop definitions, identify resources for protection, identify culturally appropriate management and standards of environmental review, and establish a regulatory framework for promulgating and enforcing tribal ordinance.

The problem becomes, how can tribal communities and governments effectively incorporate this worldview in meaningful ways within a NEPA or NHPA compliance process? This is not an idle or academic question; it is a real problem and challenge that tribal communities and tribal governments must struggle with on a regular basis. Too often there are serious consequences for opting out of the NEPA and NHPA compliance processes, even if the outcome is frustrating and less than desirable in terms of resulting in actual protection of tribal resources. The solution lies in the development of tribal standards for identifying, evaluating, and mitigating impacts to significant resources within the NEPA process.

It is my observation that NHPA is too invested in the historic preservation and archeological frameworks to be easily influenced, but I strongly believe that NEPA provides a way for tribal communities and governments to influence the outcome in ways that protect tribally significant resources in a manner that more adequately reflects a tribal worldview. One of the best ways for tribal governments to influence the NEPA process and its considerations of impacts on culturally significant resources and the tribal cultural landscape is to write their own environmental laws and permitting processes.

### 4. Tribal CRM and Tribal Environmental Policy Acts

Tribes can strengthen their own role as resource managers and increase their involvement in NEPA processes through the development of Tribal

Environmental Policy Acts (TEPAs) (Suagee and Parenteau 1997, Mittelstaedt *et al.* 2000). Under NEPA, applicable state, local, and tribal laws that do not conflict with federal environmental laws, apply and must be complied with in the Environmental Impact Statement (EIS) (Mittelstaedt *et al.* 2000:181). A TEPA can set tribal policy for environmental and cultural resources management and protection by establishing a tribally determined assessment, review, and mitigation process for projects on tribal lands. A TEPA can be written to dovetail and coordinate with the NEPA process. In this way it has the standards for review, assessment, and mitigation for tribal projects and NEPA reviews on tribal lands. If constructed properly, a TEPA has the potential to influence how NEPA reviews for projects occurring off tribal lands are conducted when those federal actions have the potential to impact tribal lands or tribal trust resources. Because a single EIS document is prepared under NEPA, it would need to comply with a TEPA in order to comply with NEPA requirements (Mittelstaedt *et al.* 2000). A TEPA can also serve as a regulatory framework from which individual tribal ordinances or tribal codes are developed and adopted thereby strengthening those ordinances and even enhancing tribal regulatory authority on reservation and tribal lands (Suagee and Parenteau 1997).

A TEPA is an environmental policy and process law that is written and adopted by the tribal governmental body. In all cases the scope and range of a TEPA are within the control of the tribal governmental body or council. A tribal government establishes the resources to be covered, the standard of review

required, the type of assessment to be conducted, and acceptable mitigations. A TEPA can be written to serve as the legal policy framework for the development and integration of tribal environmental codes, ordinances, permits, and licenses issued by the tribal government or tribal authority. TEPA review is conducted in order to provide tribal leaders with a range of environmental impacts and alternatives on tribal projects and federal actions on tribal lands before the project is implemented (Mittelstaedt 2000:188). A TEPA articulates the tribe's environmental policy for environmental management or protection of tribal lands. In this context, a TEPA can identify cultural resources, tribal values for appropriate management, and set standards for appropriate review, assessment, and mitigation beyond what commonly occurs under NHPA and NEPA. For these reasons, a TEPA provides a unique opportunity to tribal governments to enhance cultural and environmental protection, potentially enhance tribal sovereignty and environmental regulatory authority, and increase standards of review and assessment within a NEPA process and the preparation of an EIS (Mittelstaedt *et al.* 2000).

The degree to which a TEPA can benefit a particular tribe varies and depends on the unique circumstances of each tribe and the way the TEPA is constructed. One of the primary factors to consider is the ownership status of the reservation or tribal lands (Suagee and Parenteau 1997, Mittelstaedt *et al.* 2000:189). Another factor is the frequency of "federal actions" triggering NEPA review occurring on tribal lands, either by the tribe or by non-tribal entities. A

TEPA will create a standardized process for review and compliance for a range of environmental activities on tribal lands and in theory, streamline and coordinate compliance review for tribal projects and tribal participation in NEPA processes both on and off tribal lands. A TEPA may be developed with the intent of influencing how NEPA reviews and mitigations are conducted off tribal lands, but it is important to note that this idea has not been legally tested and it may not be advisable to do attempt to enforce these standards on NEPA reviews for actions occurring off tribal lands. Rather, it may be more effective to promote TEPA standards within a NEPA review process and during government-to-government consultation with the Lead Agency in an effort to influence how those studies and assessments are performed by the Lead Agency for the EIS. If a tribe conducts many federal actions or engages in many NEPA reviews, a TEPA should be written to be compatible with NEPA requirements so that it can be integrated into a NEPA process in addition to standing on its own as tribal process.

Some basic functions included in a TEPA are:

- coordinated review process in a single department,
- coordinated permitting process for approved and regulated activities,
- coordinating regulations and environmental code in tribal ordinances,
- coordinating compliance within tribal departments and non-tribal entities, and
- enhancing tribal member participation through reservation-wide scoping of proposed projects (Mittelstaedt *et al.* 2000:190-191).

One of the most significant reasons for adopting a TEPA is based on the single-document rule for NEPA compliance. CEQ regulations 40 CFR 1506.2(c) mandate that a single NEPA EIS be compiled that documents compliance with all applicable federal, state, and local law (Mittelstaedt *et al.* 2000:192). It is important to note that while CEQ does not expressly identify tribal governments in those regulations, the 1984 Environmental Protection Agency (EPA), "Policy for the Administration of Environmental Programs on Indian Reservations" (Policy) has recognized tribal authority as the primary authority for environmental policy and regulation of their reservations (Mittelstaedt *et al.* 2000:193).

As a result of the 1984 EPA Policy tribal governments now have the ability to apply to the EPA for "Treatment as a State" (TAS) in order to assume the role as the primary enforcement and regulatory authority for EPA programs on their reservations (Mandleco 2002, Mittelstaedt *et al.* 2000:275). Prior to this Policy tribal governments had been excluded from this ability (Mandleco 2002). Receiving this TAS provides tribal governments with the regulatory and enforcement authority of EPA programs on their tribal lands (Mandleco 2002).

Congress affirmed this tribal regulatory status in 1987 when it amended the Clean Water Act to allow the EPA to grant TAS to tribal governments for the purpose of establishing water quality standards within the borders of their reservations (Mandleco 2002). While the approval process places stringent qualification standards on tribes, the TAS provisions in the EPA Policy and subsequent amendments to federal environmental law have dramatically increased

tribal regulatory authority on their reservations. These new regulatory abilities have not gone unchallenged, but in spite of legal challenges have been upheld by federal courts to-date because these challenges have been dismissed under affirmations of EPAs authority from Congress. Some environmental law experts have suggested that a TEPA can also increase tribal regulatory authority on tribal lands (Suagee and Parenteau 1997, Mittelstaedt *et al.* 2000:192). This is an area best left to legal scholars and is not something I am promoting in this study, but it is important to note in the discussion of TEPAs that there is an established precedent of tribal environmental regulatory authority on reservation lands and it is an area that many tribal governments are actively exploring as they continue to develop strategies and approaches to increasing tribal governmental role in environmental management.

The decision to develop and write a TEPA must be made by a tribal governmental authority, or council, and with guidance and input from the tribal community and tribal legal counsel. Community scoping will help identify the environmental and cultural issues of greatest importance to the tribal community, it will also help identify the types of studies and level of reviews that need to be conducted in order to identify and assess project impacts on these culturally significant resources. The term, “cultural resources”, can be defined by the community and that definition can be the basis of Tribal CRM objectives, methods, and tribal ordinances designed to manage and protect those resources. Similarly, the resource management priorities, standards for review, methods for

analysis, and mitigation can be identified in consultation with the tribal community.

A TEPA can create a framework for conducting environmental impact assessments that emphasizes cultural resources protection beyond NHPA and existing federal or state historic preservation laws. A tribal government can develop a TEPA that defines cultural resources and describes management goals for Tribal CRM in specific terms and with priorities that reflect tribal values. A TEPA can support the development of a tribal permit process for the reservation for all projects with the potential to impact tribal lands and require TEPA review and compliance prior to any tribal action subject to NEPA review on the reservation (Mittelstaedt *et al.* 2000:215-216).

Due to the compliance and review requirements TEPAs contain, tribal governments have many considerations when deciding whether or not to develop a TEPA. First, the frequency of NEPA actions and reviews on the reservation or within the tribal government should be considered. Tribes with few NEPA actions either on or off reservation lands may have little incentive to develop a TEPA. On the other hand, a tribal government that is heavily dependent on federal grants, federal loans, or is regularly engaged in NEPA reviews as a consulting or interested party may have good reasons for considering a TEPA.

If a tribe is already engaged in NEPA processes, it can be beneficial to simply build internal capacity, enhance tribal NEPA participation, and develop and adopt a TEPA as an enabling environmental regulatory framework for all aspects

of tribal environmental management. Additionally, a tribal government that is actively engaged in the protection of a culturally significant and tribal trust resource, such as a river, a watershed, a lake, a landscape, or the subsistence resources they contain may want a TEPA. In such cases the adoption of a TEPA can enhance and strengthen the tribe's role in NEPA processes involving those resources and their long-term health and management. It is important to be aware that potential benefits of a TEPA are both enhanced environmental protection and review for tribal projects on tribal lands, but also enhanced participatory role in NEPA processes impacting tribal trust resources off and on tribal lands.

A model framework for a TEPA has been developed (Mittelstaedt *et al.* 2000:218-221) and contains the necessary components for NEPA compatibility and legal authority:

- Section 1: Purpose of policy statement;
- Section 2: Definitions and terms;
- Section 3: Applicability/Permits Required;
- Section 4: Application procedures and permitting process;
- Section 5: Environmental review Procedures and standards;
- Section 6: Permit limits, conditions, and mitigation;
- Section 7: Enforcement and judicial review
- Section 8: Coordination with federal environmental laws/NEPA;
- Section 9: Severability; and
- Section 10: Sovereign Immunity

## 5. Potential Benefits of a TEPA for Tribal CRM

A TEPA can include as much specificity and protection of cultural resources as a tribal government deems is needed. A TEPA that emphasizes cultural resources protection will include a declaration of such in the policy statement, include detailed and robust definitions of what constitutes a cultural resources, and establish a standard of review for all actions that meets a tribal standard of meaningful consultation and resources protection in project planning and developments. TEPAs can include provisions in support of tribally issued permits for all major activities on the reservation with the potential to impact specific resources, including cultural resources. Conversely, routine activities that have been determined to not have a significant impact on those resources, or have established procedures under separate tribal management plans or agreements can be categorically excluded from TEPA review in the same way that federal agencies are allowed to categorically exclude routine actions determined to have no significant impact on the environment.

A tribal government should give significant time and consideration of the definition of "cultural resources" used in TEPA definitions. The definition developed should be as comprehensive and descriptive as possible. If it is the tribe's belief that all land, air, and water on which the tribe subsists are cultural resources, then the definition should say so. The definition section of a TEPA is

where the tribe has the greatest ability to assert not only its sovereignty but also its cultural and environmental values. Definitions should be robust, bold, provocative, expansive, and inclusive. When and where possible, these definitions should be linked to the health and welfare of the tribal community and the culture. This is where the TEPA and the NEPA framework provide tribal governments with the opportunity to establish culturally appropriate terminology and definitions for criteria and conditions to be assessed in the review process. As with most environmental laws, the definitions will be the most important section of the law in terms of scope and strength of protection it provides.

A permitting authority and process is one way for tribal governments to exercise and enhance their sovereignty through environmental regulation. This issuance of water quality permits under provisions for the Clean Water Act for tribes with TAS authority is one example of tribal environmental permitting that is currently conducted by some tribal governments. Permitted activities can be those the tribal government deems subject to review and permitting under its tribal authority to regulate tribal lands. First, permits are considered to be consensual and contractual documents and agreements and as such are construed to recognize the authority of the party that is permitting the activity. Second, permitting processes can require environmental review of the activity prior to its implementation. This provides a tribal program the opportunity to review and if necessary propose mitigation requirements on a permit that protect cultural resources beyond other existing laws. Permitting can serve as a pre-emptive form of resources protection,

by enabling project review prior to any damage being done and providing the tribe to put conditions on a permit for the purpose of protecting those resources of significance to the tribe in a manner determined by the tribe.

TEPAs can either duplicate NEPA standards or establish a tribal standard for environmental review. Tribal standards can include the qualifications of those who can conduct the studies and methods of data collection and analysis (Mittelstaedt *et al.* 2000:233). It may also establish an Environmental Review Committee within the tribe to serve as an advisory body for TEPA implementation. Professional and tribal standards for level of review for environmental justice analyses, socio-economic impact assessments, cultural resources impact assessments, and cumulative effects analyses can be set to ensure high quality, culturally appropriate, and tribally-based environmental reviews are conducted for all TEPAs and NEPAs that have the potential to impact tribal trust resources. In this area tribal governments have the ability to develop a holistic environmental review process and standard that includes the consideration of cultural resources beyond historic preservation.

Resources considered under a TEPA can include view sheds and vistas, sacred and cultural geography, contemporary ceremonial and resource use areas, traditional subsistence resources, gathering areas, natural resource areas, streams, rivers, watersheds and water bodies, geological features, mythological associations, cultural landscapes, resource use areas. Methods of analysis may include cultural geography, oral history and ethnography, primary records and

archival research, ethnobotany, demonstration, documentation, protection, and restoration. Impact assessments may include assessments in socio-economics, environmental justice, traditional and reservation economies, cumulative cultural, social, and economic impacts, tribal trust resources, and treaty rights. In this way, a TEPA can establish the parameters for review and assessment of impacts to cultural resources. This maximizes the tribal government's participation in the entire process by ensuring that those conducting reviews under TEPA are designated to do so by the tribal government.

**6. Considerations and Components for a TEPA**

As part of my research on TEPAs, I have looked for examples of TEPAs that have been developed and passed by tribal governments. The first publication I have located that uses the term was prepared by Mittelstaedt *et al.* in 2000. While I have found a variety of environmental codes and ordinances, I have only located two actual copies of TEPAs. These are provided in Appendix A and B. It is important to note that many tribes have passed environmental codes, ordinances, and laws that are clearly tribal efforts to assert some level of tribal regulatory authority on their reservations. Some examples include:

- Jicarilla Apache Environmental Protection Tribal Code (1984) (Appendix C);

- St. Regis Mohawk Memorandum of Agreement on Implementation of Environmental Standards and Regulations (1989) (Appendix D) ; and
- The Rosebud Sioux Environmental Protection Law and Order Code (1991).

The first TEPA I located is the 1990 Environmental Policy Act adopted by the Campo Band of Kumeyaay. This TEPA follows the basic outline of both NEPA and that provided in the above section. In its policy declaration the TEPA makes three primary statements that reflect the tribe's purpose and intent for adopting the TEPA:

> (a) The federal government, through its various agencies and departments, cannot provide adequate protection for the land, air, and water resources of the Reservation.
>
> (b) Current, past, and proposed future uses of the natural resources of the Reservation have created or may create a threat to the environment and to the health and welfare of the residents of the Reservation.
>
> (c) The Campo Band of Mission Indians (the "Campo Band"), pursuant to its inherent sovereignty and federal law, the authority to provide for the comprehensive regulation of environmental quality within the exterior boundaries of the Reservation.

Most importantly, the TEPA makes a direct link to the provisions and requirements of the "Montana Test" by asserting that environmental management and regulation by the tribe is essential to protecting the health and welfare of its members:

> Section 103. Declaration of Policy. To promote the health and welfare of the residents of the Reservation and in furtherance of the sovereign right of self-governance of the Campo Band, the General Council declares its commitment to the establishment and

> maintenance of the highest attainable standards of environmental quality within the exterior boundaries of the Reservation.

The second example of a TEPA is one passed by the Swinomish Tribe in 2003. The Swinomish Tribe serves as an excellent example of modeling a NEPA approach in the development of a TEPA, its implementing regulations, and establishing a process of TEPA review and compliance. The declaration of purpose, scope, and authority are clearly delineated:

> (A) The primary purpose of this Act is to promote the general welfare of tribal members and others living on Reservation lands, by creating and maintaining conditions under which humanity and nature can exist in productive and enjoyable harmony.
>
> (B) Specific goals are:
>
> (1) To ensure that the Reservation is safe, healthful, productive, and aesthetically and culturally pleasing;
>
> (2) To preserve areas of historic, archeological and cultural significance;
>
> (3) To ensure an environment that is compatible with the desired Swinomish lifestyle - present and future; and
>
> (4) To attain the widest range of beneficial uses of the environment without degradation, risk to health and safety, or other undesirable and unintended consequences.

The Swinomish TEPA has clearly been developed by persons with significant knowledge of both NEPA requirements and federal Indian law. This is demonstrated in the single sentence on jurisdiction:

> Jurisdiction over the people and property subject to this Chapter shall be to the maximum extent permitted by law.

In other words, the Swinomish Tribe is exerting its sovereignty to maximum extent allowable under law, and provides for that authority to be increased and expanded in the future. This 2003 TEPA is not the first attempt to regulate its reservation environment. In fact, the tribe passed a comparable law and accompanying ordinances in 1977, making it one of the first to assert its regulatory authority over its reservation. In its TEPA Environmental Checklist, the Swinomish Tribe models the typical NEPA checklist utilized by federal agencies, but it is notable in its inclusion of elements of the environment and aesthetic considerations that are clearly tribal in nature, and reflect the cultural and environmental values of the Swinomish people.

Another example of tribal regulation of the environment is the Model Tribal Environmental Code (MTEC) developed in 1980 by the Native American Rights Fund with funding from the Administration for Native Americans (ANA) (Echo Hawk and Bird Bear 1980). The MTEC was developed in consultation with the Environmental Protection Agency (EPA) and this is evident in its structure and scope encompassing water pollution, waste management, underground solid waste, air pollution, radiation, and noise control ordinances. These are all areas of regulation and enforcement of EPA, an existing federal agency tasked with environmental regulation and protection through enforcement and remediation. These are legitimate areas for environmental management, and serious environmental issues exist on many Indian reservations throughout the US, but these are not the only environmental concerns that tribal government must

consider and the MTEC is not really a TEPA but a set of codes and ordinances for environmental protection under the mandates and protections of the EPA.

In my experience of working with tribal communities, I have observed that tribal values and ethics associated with environmental management are deeply rooted in stewardship and reciprocity with the environment and the resources that sustain the community, culturally, spiritually, physically, and economically. It is for this reason that tribal communities express significant concerns over the health of cultural, subsistence, and natural resources and activities that have the potential to impact or disrupt the relationship between the community and the environment that sustains them.

A TEPA should include policy and regulation for the environmental resources of cultural significance of the tribe. A TEPA should be written to include the following components:

- Declaration of a Tribal Environmental Policy (Vision Statement);
- Definitions of relevant terms;
- Creation of a Tribal Environmental Committee and delegation of advisory and implementation role in developing regulations;
- Creation of a permitting authority and process for the purpose of environmental regulation; and
- Identification of the enforcement mechanism and authority for any ordinances or regulations resulting from the TEPA.

A TEPA that is written to include a tribal definition of "cultural resources" will likely include types of resources beyond those defined and covered by existing federal historic preservation laws. This is also true for the definition of "environmental resources". The importance of clear, unambiguous definitions in writing any law or regulation cannot be understated. It is for this reason that one of the most important components of drafting a TEPA (or any regulation) is community and tribal government cooperation in identifying the important concepts to be included through the processes of scoping and consultation. This process may include extensive community consultation within the tribe. A community-based approach is important if the effort is to produce a tribal environmental regulatory framework that is both responsive to the needs and concerns of the tribal community and tribal government and establishes a functional process for review, compliance, and mitigation in a way that meets tribal goals of environmental protection.

A TEPA document should begin with a tribal declaration on environmental policy. This is the vision statement, for the reservation, and future of the Tribe. A policy statement should make direct links with tribal treaties, tribal constitutions, other tribal law, tribal history, ancestral and reservation territories, tribal trust resources, and include a clear declaration on the goals and vision of the Tribe for the present and future management of tribal lands, reservation lands, ancestral lands, and the culturally significant and tribal trust resources throughout those lands.

A TEPA document should also clearly establish a process for environmental quality that can serve as the same process used for NEPA review. Tribal governments may want to establish a tribal equivalent of the Council on Environmental Quality (CEQ), or a Tribal Environmental Committee (TEC) that works with tribal environmental program staff to develop environmental regulations and ordinances, establish a TEPA equivalent for EA and EIS documents required under NEPA, and advise the development of the permitting process for regulated activities covered under the TEPA, its regulations, or ordinances. A TEC will work with tribal staff, the tribal community, and make recommendations to the tribal governmental authority, or Council, on all aspects of compliance, enforcement, and implementation of the TEPA and its regulations. Tribal courts and tribal councils will develop the process for enforcement and adjudication of disputes or challenges to the TEPA, its regulations, or ordinances. A TEC would serve an advisory role to the Council and tribal courts in any disputes or hearings.

Like, NEPA, a TEPA should be a fairly simple document that establishes the intent, purpose, process, and scope of the law. Once the TEPA is passed, tribal staff will work with the tribal community the tribal government authority, or Council, legal counsel, tribal departments, and the TEC to draft implementing regulations for the TEPA. These will be the tribal equivalent to the Code of Federal Regulations (CFRs) and will identify standards of review, requirements for assessment and mitigation of impacts, and instructions on how the TEPA review

and permitting process should be developed and implemented. Implementing regulations serve as the detailed directives for achieving the goals established in the TEPA. For this reason, extensive consultation must occur in the drafting and developing of the implementing regulations for any TEPA. If the TEPA is the vision statement and policy declaration on environmental values and goals for management, the implementing regulations are the means to that end. It is important to remember that a TEPA must be compatible with NEPA review requirements. For this reason, the implementing regulations must be developed to ensure that TEPA standards for review meet the minimum of those required under NEPA review. Furthermore, TEPA standards can't conflict with applicable federal, state, and local environmental laws considered in the same NEPA review process. A TEPA can establish new and higher standards of review within a NEPA process, but it cannot ignore existing requirements under NEPA or attempt to avoid those requirements through a TEPA.

Implementing regulations should also clearly establish the permitting authority and process established in the TEPA. The creation and use of a permitting process is one of the most significant benefits of a TEPA for enhancing tribal sovereignty and regulatory authority over reservation and tribal lands. In 1981 the US Supreme Court ruled in *Montana v United States* (450 US 544) that tribal governments cannot regulate the activities of non-tribal member residents or landowners on reservation lands unless two exceptions are met. These exceptions are known as the "Montana Test". The Montana Test exceptions are considered

met if the tribe can demonstrate that the activities in question have the potential to harm the "health and welfare" of the Tribe; or if the non-tribal member resident or landowner in question has entered into a contractual or consensual agreement that recognizes the Tribe's regulatory authority over the reservation. For this reason, the permitting process is important to tribal sovereignty and the implementation of a TEPA because it is the process through which a tribal government regulates and authorizes specific activities on the reservation.

Once the implementing regulations have been developed and adopted, tribal governments would be ready to review and revise existing environmental ordinances to comply with the TEPA and its regulations, and draft and adopt new and additional environmental ordinances to expand tribal regulatory authority and meet the new environmental standards and guidelines established in the implementing regulations. Tribal ordinances will be specific to resource types and management concerns the tribal government has a responsibility to manage. Priorities for ordinances need to be developed in close consultation with all aspects of the tribal community and tribal government. Ordinances from a TEPA will likely include those that would fall into EPA categories, but also include aspects that are specific to each tribe and reservation as identified in the TEPA.

One approach to the development of environmental ordinances for the TEPA is to establish broad categories for regulation, permitting, and enforcement. For example:

- water quality and resources;

- air quality and resources;
- land quality and resources;
- subsistence resources;
- solid and hazardous waste;
- pesticides and toxins; and
- cultural resources.

Ordinances can be developed within each of the resource categories and may include additional definitions and terms, conditions and processes for review and permitting, and penalties for violations. Ordinances may include conditions that expand tribal regulatory authority through the permitting process and also by establishing penalties and a means for enforcement against violators. Tribal courts will utilize the TEPA, the implementing regulations, and the ordinance provisions when interpreting the law and assessing penalties under the law, and this is an important benefit of taking the time to develop a TEPA before adopting and enforcing environmental ordinances.

A TEPA and its implementing regulations can serve as documents in support of the Tribe's assertion of its sovereignty and its regulatory authority. In the absence of such documents and tribal laws, courts often have difficulty both interpreting tribal ordinances and supporting a Tribe's assertion of its regulatory authority over the reservation, unless it clearly meets one of the two exceptions to the Montana Test. Tribal ordinances provide the tribal government to consider and adopt non punitive alternatives to fines or punishment for violators as well as

imposing a penalty and fine system. The choice is up to the tribal government in how it wants to enforce any ordinance.

# VI. Conclusion

Findings from my research on Tribal CRM are presented in this section. A few key findings from this study include:

- Tribal values and concerns over CRM are holistic in nature and are intrinsically linked to the environment, natural world and reflect a worldview that is not easily or readily understood by western society.

- The dominant approach to CRM within the US is deeply rooted in historic preservation and archeology.

- Most federal and state historic preservation and cultural resources laws are not reflective of an American Indian perspective towards cultural or natural resources, and only NAGPRA was prepared and written with active tribal participation.

- Tribal and American Indian worldviews are often articulated in concepts and studies in cultural geography, but these views are not currently or adequately incorporated in mainstream CRM, NHPA, or NEPA compliance or studies conducted for those purposes.

- The concepts of tribal trust and the federal trust responsibility to tribal governments, particularly in regards to the protection of resources and rights of continued use and access are poorly defined and even less understood by many of the federal agencies that hold this responsibility to tribes. The trust concept is evolving as legal challenges and court rulings define the trust concept and its implications, and legislative and executive decisions are made.

- There is very little published literature available on Tribal CRM, and much of what is available are case studies on tribal incorporation and application of the NHPA and historic preservation approaches; often rooted in the practice of archeology.

- Tribal governments and individual American Indians continue to be actively engaged in efforts to advocate for a more tribally-oriented approach to CRM and the protection of culturally significant resources.

- NEPA actually requires a much more holistic and comprehensive approach to evaluating and mitigating potential impacts to the human environment than NHPA.

- NHPA compliance within a NEPA process is often accepted as adequate consideration of potential impacts, but this biased interpretation of NEPA mandates is inaccurate and results in the lack of consideration given to tribal concerns within a typical NEPA process.

- Tribal entities can enhance the role of tribal views and cultural resource concerns by refusing to accept NHPA compliance as equivalent to NEPA compliance with the treatment of culturally significant resources.

- The development of a TEPA is one of the most effective ways a tribal government can influence the treatment and consideration of culturally significant resources within the NEPA process.

The goal of most Tribal CRM programs is to carry out the directives of the tribal government in the protection and management of culturally significant and tribal trust resources for the benefit or current and future generations of the tribe. One of the most important rights of tribal governments is the right to define what constitutes a cultural resource under the values and beliefs of each tribe. Defining the term is the first step in exercising sovereignty over such resources and enhancing the tribal role in the management of these resources. A TEPA provides the mechanism for tribal governments to develop and define the specific terms and criteria to be used in the development of a Tribal CRM regulations and ordinance.

Establishing standards of review for assessing impacts to identified cultural resources is another important component of a TEPA, and again, serves to enhance the sovereignty of a tribal government.

The existing framework of historic preservation, and its emphasis on compliance archaeology, is entrenched and deeply-embedded in the practice of CRM outside of tribal governments, but the influence of tribal governments and tribal attitudes about appropriate cultural resources management is having a growing impact on how federal agencies and federal land managers carry out their trust responsibilities and consultation obligations with tribal governments. As a result, tribal values are gaining increasing influence on how cultural resources are managed on federal lands. This growing influence has exposed and even highlighted the inadequacies of an historic preservation approach to the management and protection of culturally significant and tribal trust resources.

In spite of the dominance of historic preservation in the practice of CRM, Tribal CRM programs are developing innovative and holistic approaches for the consideration and assessment of potential impacts on culturally significant resources and the development of mitigation measures that actually promote resource protection, rather than merely provide an opportunity for conducting compliance archaeology. As the tribal trust relationship is defined, federal legislation is moving toward more tribal inclusion and more recognition of tribal values.

A TEPA provides tribal governments with the opportunity to define and establish criteria, develop and require standards for review and assessment, establish permitting requirements with conditions for mitigation measures, and elevates the level of compliance required under NEPA processes to meet a tribal threshold of environmental review and protection. The degree of authority assumed by a tribal government in a TEPA is determined by the tribal governmental body and can range from duplicating the NEPA standards and process to maximizing tribal regulatory authority and sovereignty (Mittelstaedt *et al.* 2000).

All phases of the TEPA, its development and its implementation, are under the complete control of the tribal governmental authority. For these reasons, TEPAs should be developed in close consultation with the tribe's legal counsel and the tribal membership to ensure that sovereignty is protected and enhanced in the development of environmental regulations and ordinance resulting from the TEPA. Each tribal government must evaluate and consider its own unique legal, jurisdictional, cultural, and environmental challenges in developing an environmental policy, permitting authority and requirements, and review and assessment standards and mitigation requirements.

The benefits to a tribal government include not only a high standard of internal review and protection of reservation lands and resources, but also for all federal actions in which the tribe may have an interest or rights to consultation subject to NEPA review. This can enable the tribal government to assert a more

significant and influential role in how the NEPA process is completed, even for projects occurring outside of tribal lands.

For Tribal CRM efforts, an enhanced NEPA role provides tribal governments with the opportunity to remind federal agency officials and land managers that NEPA actually mandates for the protection of cultural resources beyond NHPA compliance and historic preservation. It is through this enhanced role that tribal values are beginning to inform both policy and decision making by federal agencies within the NEPA process in ways that more accurately and adequately address impacts and consider mitigation measures to resources that are of primary cultural importance to tribal governments and the tribal values they are entrusted to protect.

A NEPA-inspired approach that is incorporated into a TEPA policy and TEPA review process will enhance tribal governmental ability to proactively protect cultural resources in project planning and implementation. Furthermore, a TEPA will also to strengthen the tribe's ability to prioritize resource for review and protection and require culturally adequate and appropriate resources protection as part of the NEPA and TEPA compliance and mitigations. It is through this expanded role, increased opportunity for meaningful input and participation, and through compliance with the standards and requirements developed by a tribal government and codified in a TEPA, that tribal governments have the opportunity to both exercise and enhance their tribal sovereignty and regulatory authority for the management of culturally significant resources.

I have proposed that a TEPA is a better approach to achieving the goals and objectives of Tribal CRM than one that is exclusively or heavily relies on a framework of historic preservation. I have asserted that a TEPA approach is more holistic and provides tribal governments and tribal communities a lead role in defining and determining what constitutes cultural resources and cultural resources management. I have also asserted that a TEPA provides for both compliance with NEPA and NHPA requirements, but also expands how tribes can influence how the impacts of "federal actions" on tribal trust resources and reservations are evaluated, assessed, and mitigated under the NEPA process. Finally, I have asserted that by following a three step process (TEPA, implementing regulations, and ordinances) to developing an environmental framework for a tribal government, a tribe can enhance not only the protection of all culturally significant resources but also enhance its sovereignty through increased regulatory authority. Most importantly a TEPA allows tribal governments to expand and elevate the consideration of project impacts on cultural resources and increase the level of reviews and assessments required for federal undertakings, beyond NHPA limitations, and beyond historic preservation.

Many established Tribal CRM programs have been actively involved in compliance archaeology, historic preservation, NHPA, NAGPRA, and even ARPA compliance. Many NHPA reviews are conducted as part of a mandated NEPA review and compliance process. The purpose of this study has not been to criticize existing Tribal CRM programs that may be heavily committed to an historic

preservation program, a THPO, or even a contract archaeology program. Rather, it is my conclusion that the most effective way to strengthen, enhance, and coordinate these historic preservation and archaeological resources laws is by folding them into a tribally developed and designed TEPA framework that provides the expanded and increased ability to define terms, identify resources, establish standards and reporting requirements used in assessments, and support tribal regulations and ordinances that include the protection of these resources.

The common thread in all Tribal CRM efforts is one of resource protection and stewardship. I propose that a TEPA framework that includes explicit language that links cultural resources to the health and welfare of the tribe and the reservation environment provides a better mechanism for promoting and achieving meaningful participation and management of culturally significant resources as a more effective strategy than attempting to rely upon or cobble together a system that is based on historic preservation. For many tribes, the entire reservation is a cultural resource. A TEPA can be the vehicle that allows tribal governments to make those types of declarations and set goals, priorities, and management regulations accordingly. Within this tribally developed process for environmental management, tribes can better achieve their own self-determined goals for the protection, continued use, and access to culturally significant resources throughout their reservation, tribal, and even ancestral lands.

Tribal CRM has evolved out of necessity and commitment of tribal governments, and as a result of expanding tribal sovereignty and restored rights to

self-determination. In large part Tribal CRM has evolved out of a growing concern over the dominance of archeology in CRM, and a sustained desire to protect aspects of the environment that are of profound cultural and spiritual significance to tribal communities. The growing influence of tribal governments and tribal values on the practice of CRM, particularly on federal lands has resulted in a shift of emphasis from resource extraction, to protection in place and resource restoration.

The relatively recent mandates outlined in a series of Executive Orders in the 1990s has strengthened the ability of tribal governments to promote these values with the federal agencies and land managers that have trust responsibilities to tribes to protect these resources on federal lands. Compliance archeology will always likely have a role in this new form of CRM, but that role will become increasingly more limited and the emphasis will shift towards a true form of stewardship and protection, rather than data recovery and analysis of archeological materials. As tribes become savvier in both historic preservation law and its inherent limitations, they may choose to embrace the more holistic approach that NEPA provides for, beyond NHPA compliance.

CRM professionals, archeologists, and most importantly academic institutions that train these professionals need to shift their emphasis from traditional compliance archeology for NHPA, an academic approach heavily rooted in excavation archeology, to an approach that reflects the interdisciplinary requirements of NEPA. Courses in NEPA and environmental resources

management should become required components of Anthropology programs in Universities and include extensive training in cultural and environmental law and policy, beyond historic preservation. Tribal governments continue to inspire new and innovative approaches to the practice of CRM due to their unwavering commitment to these issues and their own tribal values and responsibilities.

And for those CRM and archeological professionals who might wince, or fear the consequences of what is surely an inevitable evolution within the discipline and profession, I would offer some assurances from a person who has spent the past five years practicing Tribal CRM: the practice of Tribal CRM and a holistic and NEPA driven approach to CRM is far more challenging, interesting, and rewarding than compliance archeology and mainstream CRM. The interdisciplinary approaches required guarantee continual opportunities to try new ideas, learn new and exciting information about humans, their environment, and the importance of culture and cultural values. These things are, after all, what anthropology is all about. Archeologists and CRM professionals are first and foremost students of human history in its broadest and most comprehensive sense.

## VII. References Cited

Adler, M. A.
1996 Land Tenure, Archaeology, and the Ancestral Pueblo Social Landscape. *Journal of Anthropological Archaeology*, 15: 337-371.

Ahern, Katherine, Leslie H. Blythe and Robert R. Page, Editors.
1992 *Cultural Landscape Bibliography: and Annotated Bibliography on Resources In the National Park System.* United States Department of the Interior, National Park Service, Park Historic Architecture Division, Cultural Landscape Program, Washington, DC

Alanen, Arnold R., and Melnick, Robert Z., Editors.
2000 *Preserving Cultural Landscapes in America.* The John Hopkins University Press. Baltimore, MD and London, England.

Allison, John
1999 Self-determination in cultural resources management: indigenous peoples' interpretation of history and of places and landscapes. In, *The Archeology and Anthropology of Landscape,* Peter J. Ucko and Robert Layton, editors. Routeledge, London, UK.

Alvesson, Mats
2003 Methodology for close up studies-struggling with closeness and closure. *Higher Education*, 46: 167-193.

Anderson, M. Kat, and Barbour, Michael G.
2003 Simulated Indigenous Management: A New Model for Ecological Restoration in National Parks. *Ecological Restoration*, 21(4): 269-277.

Anschuetz, Kurt F., Richard H. Wilshusen, and Cherie L. Scheik
2001 An Archaeology of Landscapes: Perspectives and Directions. *Journal of Archaeological Research,* 9(2): 157-211.

Anyon, Roger, Ferguson, T. J., and Welch, John R.
2000 Heritage Management by American Indian tribes in the Southwestern United States. In, *Cultural Resource Management In Contemporary Society: Perspectives in Managing the Past*, Francis P McManamon and Alf Hatton, Editors. Routledge, London, England.

Atalay, Sonya
2006 Indigenous Archaeology as Decolonizing Practice. *American Indian Quarterly,* 30(3 and 4): 280-310.

Ball, Martin
2000 Sacred Mountains, Religious Paradigms, and Identity Among the Mescalero Apache. *Worldviews*, 4: 264-282.

Basso, Keith H.
1996 *Wisdom Sits in Places: Landscapes and Language Among the Western Apache.* University of New Mexico Press. Albuquerque, NM.

Berlo, Janet Catherine and Phillips, Ruth B.

1995 Our (Museum) World Turned Upside Down: Re-Presenting Native American Arts. *Art Bulletin*, 77(1):6-11.

Birnbaum, Charles A.
1994 *Preservation Brief 36: Protecting Cultural Landscapes: Planning, Treatment, and Management of Historic Landscapes.* United States Department of the Interior, National Park Service, Washington, DC.

Birnbaum, Charles A., Christine Capella Peters, and Kathleen J. Madigain
1996 *The Secretary of the Interior's Standards for the Treatment of Historic Properties: with Guidelines for the Treatment of Cultural Landscapes.* United States Department of the Interior, National Park Service, Cultural Resources Stewardship and Partnerships, Heritage Preservation Services, Historic Landscape Initiative, Washington, DC.

Birnbaum, Charles A., and Wagner, Cheryl
1994 *Making Educated Decisions: A Landscape Preservation Bibliography.* United States Department of the Interior, National Park Service, Cultural Resources, Preservation Assistance Division, Historic Landscape Initiative, Washington, DC.

Boggs, James P.
1991 NEPA in the Domain of Federal Indian Policy: Social Knowledge and the Negotiation of Meaning. *Boston College Environmental Affairs Law Review,* 19(1): 31-73.

Bordewich, Fergus M.

1996 *Killing the White Man's Indian*. Doubleday Publishing, New York, NY.

Bowser, Brenda J.
2004 Prologue: Toward an Archaeology of Place. *Journal of Archaeological Method and Theory,* 11(1):1-3.

Brown, Dee
1970 *Bury My Heart as Wounded Knee: An Indian History of the West.* Holt Rinehart and Winston, New York, NY.

Canby, William C., Jr.
1998 *American Indian Law In a Nutshell, Third Edition*. West Group, St. Paul, MN.

Carr, Anna
2004 Mountain Places, Cultural Spaces: The Interpretation of Culturally Significant Landscapes. *Journal of Sustainable Tourism*, 12(5):432-459.

Carrol, Alex K., Zedeno, M. Nieves, and Stoffle, Richard W.
2004 Landscapes of the Ghost Dance: A Cartography of Numic Ritual. *Journal of Archaeological Method and Theory*, 11(2):127-156.

Cochran, Stuart
1995 The Ethnic Implications of Stories, Spirits, and the Land in Native American Pueblo and Aztlán Writing. *MELUS*, 20(2): 69-91.

Council on Environmental Quality (CEQ)
1997 *Considering Cumulative Effects Under the National Environmental Policy Act*. Guidance from the Council on Environmental Quality, Executive Office of the President. Washington, DC.

1997 *Environmental Justice: Guidance under the National Environmental Policy Act.* Executive Office of the President. Washington, DC.

Echo-Hawk, Roger .C.
2000 Ancient History in the New World: Integrating Oral Traditions and the Archaeological Record. *American Antiquity*, 65: 267-290.

Echo-Hawk, Roger C. and Echo-Hawk, Walter R.
1994 *Battlefields and Burial Grounds: The Indian Struggle to Protect Ancestral Graves in the United States.* Lerner Publications Company, Minneapolis, MN.

Echo-Hawk, Roger C. and Zimmerman, Larry J.
2006 Beyond Racism: Some Opinions about Racialism and American Archaeology. *American Indian Quarterly*, 30(3 and 4): 461-485.

Egan, Dave.

2003 Defining Cultural and Ethnographic Landscapes. *Ecological Restoration*, 21(4): 258-260.

Environmental Protection Agency
2007 Tribal Resources Guide. Training materials prepared by the American Indian Environmental Organization of the Environmental Protection Agency. Accessed online February 1, 2007 at http://www.epa.gov/indian/resource/resource.htm

Espeland, Wendy
1994 Legally Mediated Identity: The National Environmental Policy Act and the Bureaucratic Construction of Interests. *Law and Society Review*, 28(5):1149-1179.

2001 Bureaucrats and Indians in a Contemporary Colonial Encounter. *Law and Social Inquiry*, pp: 403-433.

Feldman, Alice
2002 Making Sense at the Nations' Table: mapping the transformative geographies of the international indigenous peoples' movement. *Social Movement Studies*, 1(1): 31-46.

Ferguson, T.J.
1999 A: Changing the Role of Native Americans in the Archaeological Study of the Past. *Society for American Archaeology Bulletin*, 17(1):33-37.

Ferguson, T.J., Kurt Dongoske, Leigh Jenkins, MikesYeatts, and Eric Polingyouma
1994 Working Together: The Roles of Archeology and Ethnohistory in Hopi Cultural Preservation. *Cultural Resource Management*, 16: 27- 37.

Fowler, Catherine S., Pauline Esteves, Grace Goad, Bill Helmer and Ken Watterson.
2003 Caring for the Trees: Restoring Timbisha Shoshone Land Management Practices in Death Valley National Park. *Ecological Restoration*, 21(4): 302-307.

Francaviglia, Richard V.
1971 The Cemetery as an Evolving Cultural Landscape. *Annals of the Association of American Geographers*, September 1971: 501-509. Blackwell Publishing Limited.

Gibbon, Kate Fitz, Editor
2005 *Who Owns The Past? Cultural Policy, Cultural Property, and the Law.* American Council for Cultural Policy, Marquand Books, Inc., Seattle, WA.

Gonzalez, Sara L., Darren Modzelewski, Lee M. Panich, and Tim D. Schneider
2006 Archaeology for the Seventh Generaton. *American Indian Quarterly*, 30(3 and 4): 388-415.

Green, William and Doershuk, John F.
1998 Cultural Resource Management and American Archaeology. *Journal of Archaeological Research,* 6(2): 121-167.

Harlan, Lynne

1996 Museum Perspectives from Within: A Native View. In *Mending the Circle: A Native American Repatriation Guide*, edited by Barbara Meister. American Indian Ritual Object Repatriation Foundation, New York, NY.

Hill, Richard S.

1997 Reflections of a Native Repatriator. In *Mending the Circle: A Native American Repatriation Guide*, edited by Barbara Meister. American Indian Ritual Object Repatriation Foundation, New York, NY.

Holland, Peter
2000 Cultural Landscapes as Biogeographical Experiments: A New Zealand Perspective. *Journal of Biogeography*, 27:39-43.

Hunn, Eugene S.
1990 *Nch'I-Wana "The Big River": Mid-Columbia Indians and Their Land.* University of Washington Press, Seattle, WA.

Hurt, Douglas A.
2003 Defining American Homelands: A Creek Nation Example, 1828-1907. *Journal of Cultural Geography,* 21(1):19-43.

Ishiyama, Noriko
2003 Environmental Justice and American Indian Tribal Sovereignty: Case Study of a Land-Use Conflict in Skull Valley, Utah. *Antipode*, pp:120-139.

Jackson, Helen Hunt
1881 *A Century of Dishonor: The Classic Expose of the Plight of the Native Americans*. Dover Publications, Inc. Mineola, NY.

Jackson, John Brinkerhoff
1984 *Discovering the Vernacular Landscape*. Yale University Press. New Haven, MA.

Keeley, Jon E.
2002 Native American impacts on fire regimes of the California coastal ranges. *Journal of Biography*, 29:303-320.

King, Thomas F.
2000 *Federal Planning and Historic Places: The Section 106 Process.* AltaMira Press, Walnut Creek, CA.

2002 *Thinking About Cultural Resources Management: Essays from the Edge*. AltaMira Press, Walnut Creek, CA.

2003 Considering the Cultural Importance of Natural Landscapes in NEPA Review: The Mishgigagamongsebe Example. *Environmental Practice*, 5(4): 298-301.

2004 *Cultural Resource Law and Practice.* AltaMira Press, Walnut Creek, CA.

2005 *Doing Archaeology: A Cultural Resource Management Perspective.* Left Coast Press, Inc., Walnut Creek, CA.

Kuwanwisiwma, Leigh J. and Ferguson, T.J.
2004 Ang Kuktota: Hopi Ancestral Sites and Cultural Landscapes. *Expedition*, 46(2): 24-29.

Leonard, Louis G., III
1997 Sovereignty, Self-Determination, and Environmental Justice in the Mescalero Apache's Decision to Store Nuclear Waste. *Environmental Affairs Law Review*, 24(3): 651-688.

Lewis, H.T., and Anderson, M. Kat, Editors
2002 Introduction. In, *Forgotten Fires: Native Americans and the Transient Wilderness.* University of Oklahoma Press. Norman, OK.

Lippert, Dorothy
2006 Building a Bridge to Cross a Thousand Years. *American Indian Quarterly*, 30(3 and 4):431-440.

Loud, Charles P. and Shutkin, William A.

1994 Environmental Justice and the Use of History. *Boston College Environmental Affairs Law Review,* 22(1):1-27.

Mandleco, Sara M.
2002 Surviving a State's Challenge to the EPA's Grant of "Treatment as State" Status Under the Clean Water Act: One Tribe's Story: State of Wisconsin v. EPA and Sokaogon Chippewa Community. *Wisconsin Environmental Law Journal,* 8: 197-223, Summer 2002.

Martin, Rena
2001 Native Connection to Place: Politics and Play. *American Indian Quarterly.* 25(1): 35-41.

Martinez, Desiree Renee
2006 Overcoming Hindrances to Our Enduring Responsibilities to the Ancestors, *American Indian Quarterly*, 30(3 and 4): 486-503.

McClelland, Linda Flint, J. Timothy Keller, Genevieve P. Keller, and Robert Z. Melnick
1999 *Guidelines for Evaluation and Documenting Rural Historic Landscapes.* United States Department of the Interior, National Park Service and Land and Community Associates.

McManamon, Francis P. and Hatton, Alf, Editors
2000 *Cultural Resources Management in Contemporary Society: Perspectives on Managing and Presenting the Past.* Routledge, London, England.

Melnick, Robert Z., Daniel Sponn, and Emma Jane Saxe
1984 *Cultural Landscapes: Rural Historic Districts in the National Park System*. United States Department of the Interior, National Park Service, Washington, DC.

Memmott, Paul and Long, Stephen
2002 Place Theory and Place Maintenance in Indigenous Australia. *Urban Policy and Research,* 20(1): 39-56.

Mihesuah, Devon A., Editor.
2000 Repatriation Reader: Who Owns American Indian Remains? University of Nebraska Press. Lincoln, NE.

Mittelstaedt, Gillian, Dean Suagee, and Libby Halpin Nelson
2000 Particpating in the National Environmental Policy Act, Developing a Tribal Environmental Policy Act: A comprehensive Guide for American Indian

and Alaska Native Communities. Report prepared by the Tulalip Tribes of Washington.

Monroe, Dan L.

1998 The Politics of Repatriation, In *American Indian Studies: An Interdisciplinary Approach to Contemporary Issues*, edited by Dan Morrison. Peter Lang Publishing, Inc. New York, NY.

Naranjo, Tessie

1996 Musing on Two World Views. In *Mending the Circle: A Native American Repatriation Guide*, edited by Barbara Meister. American Indian Ritual Object Repatriation Foundation, New York, NY.

National Association of Tribal Historic Preservation Officers (NATHPO)
2007 About THPOs. Accessed online April 14, 2007. http://www.nathpo.org

National Park Service
1989 *How to Nominate and Evaluate Historic Designed Landscapes.* United States Department of the Interior, National Park Service. Washington, DC.

1994 *National Park Service Bulletin 28*. Washington DC.

1996 *Guidelines for the Treatment of Cultural Landscapes*. United States Department of the Interior, National Park Service. Washington, DC.

1997a *Cultural Resource Management Guideline.* United States Department of the Interior, National Park Service, Washington, DC.

1997b *Caring for the Past: Landscapes, Battlefields, Landmarks, Federal Preservation.* National Center for Cultural Resource Stewardship and Partnerships: Heritage Preservation Services Preservation Initiatives. United States Department of the Interior, National Park Service, Washington, DC.

1999 *National Register Bulletin: Guidelines for Evaluating and Documenting Rural Historic Landscapes.* United States Department of the Interior. National Park Service. Washington, DC.

Native American Rights Fund
1980 Model Tribal Environmental Code. Prepared by John E. Echo Hawk and Duane T. Bird Bear with funding by the Administration for Native Americans.

Neuman, Thomas W. and Sanford, Robert
2001 *Cultural Resources Archaeology.* AltaMira Presss, Walnut Creek, CA.

Nicholas, George P.
2006 Decolonizing the Archaeological Landscape: The Practice and Politics of Archaeology in British Columbia. *American Indian Quarterly*, 30(3 and 4): 353-380.

Page, Robert R., Cathy A. Gilbert and Susan A. Dolan
1998 *A Guide To Cultural Landscape Reports: Contents, Process, and Techniques.* United States Department of the Interior, National Park Service, Cultural Resource Stewardship and Partnerships, Park Historic Structures and Cultural Landscapes Program. Washington, DC.

Palmer, Lisa
2004 Bushwalking in Kakadu: A Study of Cultural Borderlands. *Social & Cultural Geography*, 5(1):109-127.

Parker, Patricia L., and King, Thomas F.
1990 *Guidelines for Evaluating and Documenting Traditional Cultural Properties.* National Register Bulletin 38. United States Department of the Interior, National Park Service. Washington DC. [Revised 1992 and 1998].

Pevar, Stephen L.
1992 *Rights of Indians and Tribes: the Basic ACLU Guide to Indian and Tribal Rights, Second Edition.* Norman Dorsen, Editor, ACLU. Southern Illinois University Press, Carbondale , IL.

Powell, Judith
2000 Expanding Horizons: Environmental and Cultural Values Within Natural Boundaries. *International Journal of Heritage Studies,* 6(1):49-65.

Ramakrishnan, P.S.
2003 The Sacred Ganga River-based Cultural Landscape. *Museum,* 55(2):7-17.

Reinke, Danny, Ph.D. and Swartz, Lucinda Low, Editors
1999 *The NEPA Reference Guide.* Battelle Press, Columbus, OH.

Richman, Jennifer R. and Marion Forsyth, Editors
2004 *Legal Perspectives on Cultural Resources.* AltaMira Press, Walnut Creek, CA.

Robertson, Iain and Richards, Penny Editors.
2003 *Studying Cultural Landscapes.* Hodder Arnold. London and Oxford University Press Inc. New York, NY.

Robyn, Linda
2002 Indigenous Knowledge and Technology. *American Indian Quarterly*, 26(2): 198-220.

Ruppert, David E.
2001 New Tribe/Park Partnerships: The Use of Ethnobotany in the Restoration of Indigenous Landscapes. *Cultural Resource Management,* 24(5): 45-49.

Sauer, Carl O.
1925 The Morphology of Landscape. *University of California Publications in Geography,* 2(2):19-53.

Senate Committee on Indian Affairs

2000 FDCH Congressional Testimony by Katherine H. Stevenson, United States Department of the Interior, July 25, 2000.

Smith, Claire and Jackson, Gary
2006 Decolonizing Indigenous Archaeology: Developments from Down Under. *American Indian Quarterly*, 30(3 and 4): 311-349.

Snead, James E.
2002 Ancestral Pueblo Trails and the Cultural Landscape of the Pajarito Plateau, New Mexico. *Antiquity,* 76: 756-765.

Stapp, Darby C. and Burney, Michael S.
2001 *Tribal Cultural Resources Management: The Full Circle to Stewardship.* AltaMira Press, Walnut Creek, CA.

Stewart, Omer C.
2002 Forgotten Fires: Native Americans and the Transient Wilderness. H.T. Lewis and M.K Anderson, Editors. University of Oklahoma Press. Norman, OK.

Stewart, Andrew M., Darren Keith, and Joan Scottie

2004 Caribou Crossings and Cultural Meanings: Placing Traditional Knowledge and Archaeology in Context in an Inuit Landscape. *Journal of Archaeological Method and Theory*, 11(2):183-211.

Stoffle, Richard W. and Evans, Michael J.
1990 Holistic Conservation and Cultural Triage: American Indian Perspectives on Cultural Resources. *Human Organization*, 49(2): 91-99.

Stoffle, Richard W., David B. Halmo and Diane E. Austin
1997 Cultural Landscapes and Traditional Cultural Properties: A Southern Paiute View of the Grand Canyon and Colorado River. *American Indian Quarterly*, 21(2): 229-250.

Stoffle, Richard W., Lawrence Loendorf, , Diane E. Austin, David B. Halmo and Angela Bulletts
2000 Ghost Dancing the Grand Canyon: Southern Paiute Rock Art, Ceremony, and Cultural Landscapes. *Current Anthropology*, 41(1):11-38.

Suagee, Dean B., and Parenteau, Patrick A.
1997 Fashioning a Comprehensive Environmental Review Code for Tribal Governments: Institutions and Processes. In, *American Indian Law Review* 21: 297-328.

Sundstrom, Linea
1996 Mirror of Heaven: Cross-Cultural Transference of the Sacred Geography of the Black Hills. *World Archaeology*, 28(2): 177-189.

Swidler, Nina, Kurt E. Dongoske, Roger Anyon and Alan Downer

1997 *Native Americans and Archaeologists: Stepping Stones to Common Ground.* Alta Mira Press, Walnut Creek, CA.

Thornton, Russell

2001 Who Owns the Past? In *Native American Voices: A Reader*, edited by Susan Lobo and Steve Talbot. Prentice Hall, Inc. Upper Saddle River, NJ.

Torrence, Robin.
2002 Cultural Landscapes on Garua Island, Papua New Guinea. *Antiquity*,76: 766-776.

Trope, Jack, Esq.

1996 The Native American Graves Protection and Repatriation Act. In, *Mending the Circle: A Native American Repatriation Guide,* edited by Barbara Meister. American Indian Ritual Object Repatriation Foundation, New York, NY.

Two Bears, Davina R.
2006 Navajo Archaeologist is Not and Oxymoron. *American Indian Quarterly*, 30(3 and 4): 381-387.

Ucko, P.J., and Layton, R., Editors
1999 The Archaeology and Anthropology of Landscape: Shaping Your Landscape. Routledge, London, England.

United States Department of the Interior

1978 Code of Federal Regulations: NEPA

Title 43 FR 55990,

40CFR1500-1508.

United States Government Printing Office, Washington, DC.

1997 Code of Federal Regulations: ARPA

Title 43, Volume 1, Parts 1-999

United States Government Printing Office, 43CFR7

1999 Code of Federal Regulations: NAGPRA

Title 43, Volume 1, Parts 1-999.

United States Government Printing Office, 43CFR10.

2002 Code of Federal Regulations: NHPA
Procedures for State, Tribal, and Local Government Historic Preservation Programs. Proposed rule.
United States Government Printing Office: 36CFR61

2004 Code of Federal Regulations: NHPA
Protection of Historic Properties
United States Government Printing Office: 36CFR800.

United States Environmental Protection Agency
2007 American Indian Environmental Office (AIEO): Tribal Training Materials: Resource Guide. Accessed February 2, 2007: http://www.epa.gov

Vanderwerth, W.C.
1971 *Indian Oratory: Famous Speeches by Noted Indian Chieftans*. University of Oklahoma Press, OK.

Watkins, Joe
2000 *Indigenous Archaeology: American Indian Values and Scientific Practice*. AltaMira Press, Walnut Creek, CA.

Weeks, Kay D.; and Grimmer, Anne E.
1995 *The Secretary of the Interior's Standards for the Treatment of Historic Properties: with Guidelines for Preserving, Rehabilitation, Restoring & Reconstructing Historic Buildings.* United States Department of the Interior, National Park Service, Cultural Resource Stewardship and Partnerships, Heritage Preservation Services, Washington, DC.

Wernham, Aaron
2007 Health Impact Assessment within the EIS Process: New strategies to protect community health and well-being under the National Environmental Policy Act. Paper presented on behalf of the Alaska Inter-Tribal Council at the National Tribal Environmental Council Conference, April 30, 2007, Albuquerque, NM.

Wickersham, Jay
2004 Sacred Landscapes and Profane Structures: How Offshore Wind Power Challenges the Environmental Impact Process. *Environmental Affairs*, 31: 325-347.

World Health Organization
2007 Health Impact Assessments. Online resource.
Accessed April 30, 2007 http://www.who.int/hia/en/

Works, Martha and Hadley, Keith

2004 The Cultural Context of Forest Degradation in Adjacent Purepechan Communities, Michoacan, Mexico. *The Geographical Journal*, 170(1):22-38.

Wray, Jacilee, and Anderson, M. Kat
2003 Restoring Indian-Set Fires to Prairie Ecosystems on the Olympic Peninsula. *Ecological Restoration*, 21(4): 296-301.

Zaferatos, Nicholas Christos
2004 Developing an Effective Approach to Strategic Planning for Native Americans Indian Reservation. *Space and Polity*, 8(1): 87-104.

# VII. Appendices

A. Tribal Environmental Policy Act: Campo Band of Kumeyaay

B. Tribal Environmental Policy Act: Swinomish Tribe

C. Jicarilla Apache Environmental Protection Tribal Code (1984)

D. St. Regis Mohawk Memorandum of Agreement on Implementation of Environmental Standards and Regulations (1989)

A. Tribal Environmental Policy Act: Campo Band of Kumeyaay

09-09-90

CAMPO BAND OF MISSION INDIANS

ENVIRONMENTAL POLICY ACT OF 1990

TITLE I

SHORT TITLE; FINDINGS; DECLARATION OF POLICY

Section 101. Short Title. This Act shall be known as the Campo Band of Missions Indians Environmental Policy Act of 1990 (the "Act").

Section 102. General Council Findings and Declarations. The General Council of the Campo Band of Mission Indians (the "General Council"), after careful review of the quality of the natural environment of the Campo Indian Reservation (the "Reservation") and the federal laws and policies relating to environmental regulation,
finds and declares as follows:

(a) The federal government, through its various agencies and departments, cannot provide adequate protection for the land, air, and water resources of the Reservation.

(b) Current, past, and proposed future uses of the natural resources of the Reservation have created or may create a threat to the environment and to the health and welfare of the residents of the Reservation.

(c) The Campo Band of Mission Indians (the "Campo Band"), pursuant to its inherent sovereignty and federal law, possesses the authority to provide for the comprehensive regulation of environmental quality within the exterior boundaries of the Reservation.

Section 103. Declaration of Policy. To promote the health and welfare of the residents of the Reservation and in furtherance of the sovereign right of self-governance of the Campo Band, the General Council declares its commitment to the establishment and maintenance of the highest attainable standards of environmental quality within the exterior boundaries of the Reservation.

TITLE II

CAMPO ENVIRONMENTAL PROTECTION AGENCY

Section 201. Establishment. There is hereby established the Campo Environmental Protection Agency ("CEPA").

Section 202. Governing Body: Appointment; Terms; Vacancies. CEPA shall be governed by a Board of Commissioners (the "Board"),which shall be composed of three (3) Commissioners, all of whom shall be members of the Campo Band. The Commissioners shall be appointed by the Chairman of the Campo Band with the advice and consent of the General Council. Each Commissioner shall serve for a term of four (4) years, provided that, in order to stagger the terms of office, one of the original Commissioners shall be appointed for a term of two (2) years, one for a term of three (3) years, and one for a term of four (4) years. A vacancy on the Board, howsoever caused, will be filled by the appointment procedure set forth in this Section, provided that any appointment that does not begin coincident with the staggered terms will be shortened as necessary to maintain the staggered terms.

Section 203. Chairman; Quorum, Meetings. The Commissioners shall elect a Chairman from among themselves. The business of the Board will be conducted at meetings of the Board duly called and noticed and at which a quorum is present.

A quorum shall consist of two (2) Commissioners. Any substantive action of the Board must be taken by the affirmative votes of at least two (2) Commissioners and must be
recorded in a written resolution of the Board. The Board shall meet at such places and times as may be necessary for the discharge of its duties. Meetings of the Board may be called by the Chairman or by two (2) of the Commissioners. Any meeting of the Board shall be preceded by at least five (5) days notice to the Commissioners.

Section 204. Duties and Powers of the Board. The Board is hereby authorized and empowered to:

(a) Develop environmental codes and accompanying regulations and procedures to protect the environment and promote the quality of the land, air, and water resources of the Reservation, and to propose such codes and regulations for adoption by the General Council.

(b) Issue, modify, and revoke permits and establish terms and conditions for any discharge into or upon the land, air, or water of the Reservation.

(c) Conduct hearings and receive testimony and documentary evidence of any nature relating to the quality of the environment on the Reservation.

(d) Establish rules and procedures for the conduct of the business of the Board.

(e) Establish rules and procedures to ensure the maximum public participation in the decisions of the Board, consistent with applicable Tribal and federal laws.

(f) Establish rules and procedures to protect the confidentiality of information that is proprietary in nature.

(g) Hire such staff and enter into such contracts for services as may be necessary and appropriate for maintaining and enforcing Tribal environmental codes and regulations and for the furtherance of the work of CEPA.

(h) With the approval of the General Council, apply for and

receive financial assistance for the purpose of promoting and protecting the quality of the environment.

(i) Appoint one or more hearing officers to assist the Board in the resolution of disputes and the acquisition of information.

(j) Participate as a cooperating agency in the preparation of Environmental Impact Statements pursuant to the National Environmental Policy Act, 42 U.S.C. 4321-370a ("NEPA").

(k) Serve as the lead Tribal agency for purposes of federal environmental laws and, with the approval of the General Council, assume primary enforcement responsibility under such laws.

(l) Establish and assess fees and conditions for the issuance, continuance, modification, and revocation of any permit.

(m) With the approval of the General Council, establish a

system of civil fines, sanctions, and penalties for violations of Tribal environmental codes and regulations, provided, however, that no fine or penalty shall exceed $5000 per day per violation, and provided further, that no fine or penalty shall be imposed without notice and an opportunity for a hearing before the Campo Band Environmental Court.

TITLE III

MISCELLANEOUS PROVISIONS

Section 301. Review of Commission Actions.

(a) There hereby is established the Campo Band Environmental Court ("Environmental Court"). The Environmental Court shall hear appeals from final actions and decisions of the Board in accordance with such rules and procedures as CEPA may establish by regulation. Any affected party may seek review of any final action or decision of the Board by filing an appeal in the Environmental Court within thirty (30)

days of the entry of the final action or decision from which the appeal is taken. The Environmental Court shall hear appeals from the final actions or decision only after exhaustion of all administrative remedies provided by CEPA. The Environmental Court shall, upon the petition of an affected party, conduct a review of the record of the proceedings of CEPA but shall not take new evidence; it may modify or reverse a decision or action of CEPA only where such action or decision is not supported by law or is clearly arbitrary and capricious. CEPA, upon request of the Environmental Court, shall provide to the Environmental Court a certified copy of all documents, records, transcripts, or other information that formed the basis for any action or decision as to which an affected party seeks review. The action of the Environmental Court on appeal shall be final.

(b) The Campo Band, acting by and through the General Council, shall have standing to object to any final action or decision of CEPA and may appeal such final action or decision in the Environmental Court, subject

to the provisions of this Section.

Section 302. Waiver of Immunity. The General Council hereby waives the sovereign immunity of CEPA for the express and sole purpose of allowing reviews of CEPA by the Environmental Court under 301, provided that any such appeal must be timely and properly filed, and provided further, that such waiver is made only to the extent
necessary to subject CEPA to suit for the sole purpose of declaring and adjudging rights and obligations under the environmental codes and regulations of the Campo Band. This waiver is strictly limited, specifically does not waive CEPA's immunity from suit for monetary damages, and specifically does not waive the sovereign immunity of the General Council, the Campo Band, or any officer, employee, or agent
thereof.

Section 303. Unlawful Acts.

(a) It is prohibited for any person:

(1) Forcibly, or by bribe, threat, or other corrupt practice, to obstruct or impede the activities of CEPA and the Board;

(2) To commit fraud, or knowingly to assist another in the commission of fraud, with the intent to evade or defeat Tribal environmental codes or regulations; or

(3) With knowledge and intent, falsely to verify by written declaration any report, application for permit, or any other document submitted to or requested by CEPA.

(b) Any person who commits any of the above prohibited acts may be subject to criminal penalties and also be liable for any civil damages caused by the commission of such acts and may be excluded from the Reservation.

(c) Any person who commits any of the above prohibited acts or whose employees or agents in the course of their employment or agency commit any of the above prohibited acts, may have its rights to engage in activities on the Reservation suspended or terminated.

(d) The damages and sanctions for violation of this Section may be enforced in the Environmental Court by CEPA under such rules and procedures as CEPA may establish by regulation.

# Appendix B. Tribal Environmental Policy Act: Swinomish Tribe

SWINOMISH TRIBE
ENVIRONMENTAL POLICY ACT

Title 19 – Environmental Protection

Chapter 1 – Environmental Policy Act

Section:

Legislative History:

Enacted: Environmental Protection, Ord. 177 (9/5/03), BIA (10/28/03).

Repealed or Superseded:

Tribal Environmental Policy Act, Ord. 168 (6/3/03), BIA (6/12/03) (repealing Ord. 43A).

Amending Ord. 58, Ord. unnumbered (7/12/89), Enacting Res. 89-7-65.

Establishing the Swinomish Cultural and Environmental Protection Agency, Ord. 58,

Enacting Res. 88-4-18 (5/5/88).

Environmental Policy Act, Ord. 43A (11/3/77), BIA (2/3/78).

19-01.010 Title.

This Chapter shall be referred to as the Tribal Environmental Policy Act.

Title 19, Chapter 1

19-01.020 Purpose and Scope.

(A) The primary purpose of this Act is to promote the general welfare of tribal members and others living on Reservation lands, by creating and maintaining conditions under which humanity and nature can exist in productive and enjoyable harmony.

(B) Specific goals are:

(1) To ensure that the Reservation is safe, healthful, productive, and aesthetically and culturally pleasing;

(2) To preserve areas of historic, archeological and cultural significance;

(3) To ensure an environment that is compatible with the desired Swinomish

lifestyle - present and future; and

(4) To attain the widest range of beneficial uses of the environment without degradation, risk to health and safety, or other undesirable and unintended consequences.

19-01.030 Authority.

This Chapter is enacted in accordance with Article VI, Section 1(k), (l) and (r), of the
Constitution of the Swinomish Indian Tribal Community.

19-01.040 Jurisdiction.

Jurisdiction over the people and property subject to this Chapter shall be to the maximum extent permitted by law.

19-01.050 Findings.

[Reserved]

19-01.060 Construction.

[Reserved]

19-01.070 Definitions.

(A) “Planning Commission” means the Swinomish Planning Commission or its designee, except in Section 19-01.140, where it only means the Swinomish Planning Commission.

(B) “Planning Department” means the Office of Planning and Community Development of the Swinomish Indian Tribal Community.

19-01.080 Action Significantly Affecting the Quality of the Environment.

(A) The Planning Commission shall write or cause to be written a detailed statement for every action significantly affecting the quality of the environment. The statement shall include:

(1) The environmental impact of the proposed action;

(2) Any adverse environmental effects which cannot be avoided should the proposal be implemented;

(3) Alternatives to the proposed action;

(4) The relationship between local short-term uses of the environment and the

maintenance and enhancement of long-term productivity; and

(5) Any irreversible and irretrievable commitments of resources that would be

involved in the proposed action should it be implemented.

(B) The Planning Commission shall utilize a systematic, interdisciplinary approach, which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making that may have an impact on the environment.

(C) The Planning Commission shall identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical

considerations. Federal or jointly developed federal-tribal environmental review documents may be considered in fulfillment of the requirements of this Chapter.

(D) The Planning Commission may require proponents of an action to provide information or reports to assist in the determination of the environmental impacts and significance of such actions.

(E) The Planning Commission shall study, develop and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources.

(F) The Planning Commission may develop a list of activities with no appreciable impact on the environment that are exempt from the requirements of this Chapter. The Planning Department may require the proponent of the action to submit information regarding the proposed action to determine whether the proposed action fits within one of the exemptions on the list.

19-01.090 Preliminary Determination of Significance.

(A) The Planning Commission shall identify actions significantly affecting the quality of the environment.

(B) In making this preliminary determination, the Planning Commission shall consider:

(1) Whether the action is highly controversial;

(2) Whether an otherwise minor action will have cumulatively significant impact;

(3) Any secondary effects;

(4) The nature of the setting where the proposed action would be taken;

(5) Any mitigation requirements, which will reduce the environmental effects of the proposed action; and

(6) All known and probable beneficial and detrimental environmental effects. Even if on balance the Planning Commission believes that the

effect will be beneficial, the action may still have a significant effect on the environment.

19-01.100 Use of Preliminary Determination.

(A) If the Planning Commission determines:

(1) That the action does not significantly affect the quality of the environment, it shall prepare a declaration of non-significance, which shall be located in the

Tribal Office and published in a local newspaper of suitable size and general

circulation. No action shall be taken for ten (10) days following publication of

such declaration of non-significance; or

(2) That the action has a significant effect on the quality of the environment; it shall prepare a declaration of significance, which shall be marked and designated as such and filed in the Planning Department.

(B) If the Planning Department issues a declaration of significance, the proposed action shall not proceed until the Planning Department issues an Environmental Impact Statement (EIS).

19-01.110 Draft EIS Preparation and Content.

(A) When an EIS is required, the Planning Commission shall prepare a draft EIS which shall satisfy, to the fullest extent possible, the requirements of Section 19-01.080.

(B) The draft EIS shall include the following:

(1) A description of the proposed action, its purposes and the environment, which will be affected;

(2) A description of any effect it may have on population or growth;

(3) The relationship of the proposed action to land use plans for the affected area;

(4) The positive and negative, known and probable, effects of the proposed action on the environment. This should include secondary as well as primary effects;

(5) Alternatives to the proposed action that might reduce or eliminate adverse

impacts including sufficient analysis of the environmental benefits, costs and

risks of such alternatives;

(6) A brief section summarizing those environmental effects discussed in Section 19-01.110(B)(4) that are adverse and unavoidable;

(7) A brief discussion of the extent to which the proposed action involves tradeoffs between short-term gains at the expense of long-term environmental losses, or vice-versa; and

(8) A description of those impacts discussed in Section 19-01.110(B)(6) that irreversibly curtail the range of potential uses of the environment.

19-01.120 Agencies with Special Expertise.

In preparing the draft EIS, the Planning Commission may consult with, and obtain comments from, agencies with special expertise.

19-01.130 Circulation of Draft EIS.

(A) Copies of the draft EIS shall be kept in the Tribal Office for public inspection.
(B) Copies of the draft EIS shall be sent to those agencies consulted during preparation of the draft EIS.
(C) Any person may request copies of the draft EIS from the Planning Commission. Copies shall be provided at no more than the cost of printing and mailing.
(D) A notice announcing the availability of the draft EIS shall be published in a local

newspaper of suitable size and general circulation.

(E) Agencies and the public shall have thirty (30) days to comment on the proposed action. The Planning Commission may grant a fifteen (15) day extension when it believes such an extension is necessary.

(F) Copies of all the comments shall be kept in the Tribal Office for public inspection.

19-01.140 Public Hearing.

(A) After publication of the draft EIS, the Swinomish Planning Commission shall hold a public hearing, whenever appropriate, for the consideration of environmental aspects of the proposed action and to provide the public with relevant information.

(B) In determining whether a public hearing is appropriate, the Swinomish Planning

Commission shall consider such factors as the magnitude of the proposed action, the

degree of interest in it, the complexity of the issues, and the extent to which the public

has already been involved.

(C) Ten (10) days prior to the hearing, the Swinomish Planning Commission or its designee shall cause to be published a notice of the time and place of the hearing in a local newspaper of suitable size and general circulation in Skagit County.

19-01.150 Preparation and Circulation of Final EIS.

(A) The Planning Commission shall review the environmental effects of the proposed action in light of the opposing views and responsible opinions that were brought to the
Planning Commission's attention during the thirty (30) day comment period.
(B) The Planning Commission should make meaningful reference in the final EIS to any responsible opposing view not adequately discussed in the draft EIS and should indicate the Planning Commission's response to the issues raised.
(C) The revised EIS, together with substantive comments received on the draft EIS (or
summaries thereof) shall be circulated in the same manner as the draft EIS.
(D) If the Planning Commission determines that the draft EIS is sufficient and needs no revision, it shall circulate a statement to that effect. The draft EIS, together with the
statement, shall constitute the final EIS.

19-01.160 Planning Commission Decision.

The Planning Commission may not take action on the proposal for seven (7) days after
publication of availability of the final EIS.

19-01.170 Repealer.

This Chapter hereby repeals and supersedes Ordinances 168 and 43A.

19-01.180 Severability.

If any section, subsection, clause or phrase of this Chapter is for any reason determined to be invalid or unconstitutional, such determination shall not affect the validity or constitutionality of the remainder of this Chapter.

# Appendix C. Jicarilla Apache Environmental Protection Tribal Code (1984)

04-13-84

JICARILLA APACHE

TRIBAL CODE

# TITLE 14

# ENVIRONMENTAL PROTECTION

## TABLE OF CONTENTS

## TITLE 14

## ENVIRONMENTAL PROTECTION

### Chapter 1. General Provisions.

SECTION 1. Purpose. The purpose of this Title is to insure that proper and meaningful consideration of environmental, cultural, historical, and ecological factors is made by any person, the BIA or the Tribal Council prior to its approval of activities on the Jicarilla Apache Reservation which may significantly affect that environment in whole or in part.

SECTION 2. Administration. The Tribal Council shall assign a person or agency to carry out the day-to-day functions under this Title.

SECTION 3. Effective Date. This Title became effective on April 13, 1984, the date of approval by the Area Director of the Bureau of Indian Affairs, the authorized representative of the Secretary of the Interior. It was enacted by the Jicarilla Apache Tribal Council as Ordinance No. 84-0-235, the "Jicarilla Apache Environmental Protection Ordinance," on January 20, 1984.

SECTION 4. Repeal. Environmental Protection Ordinance No. 78-0-53, enacted August 15, 1977, is hereby repealed as of the effective date hereof.

SECTION 5. Business or Operator's Permit. Every person seeking Tribal Council action hereunder shall obtain a Business or Operator's Permit from the Tribe if so required by the Ordinances of the Tribe or federal laws or regulations. Any violation of this Title shall be grounds for suspension or revocation of a person's Business or Operator's Permit.

SECTION 6. Definitions.

(A) Activity. Any industrial or commercial development project, any development project involving the disturbance of more than one (1) acre of land surface, any development activity in a part of the Reservation designated environmentally sensitive, or any research project, other than activity connected with oil and gas operations.

(B) Applicant. The person requesting a permit to conduct activities on the Reservation which are regulated by this Title, other than oil and gas activity.

(C) Operator's Permit. An Operator's Permit issued by the Tribe required by the Ordinances of the Tribe.

(D) Council. The elected governing body of the Jicarilla Apache Tribe.

(E) Development project. Any activity which directly or indirectly seeks to develop, use or modify Reservation resources.

(F) Environmentally sensitive area. A part of the Reservation considered by the Council to be so subject to environmental disturbance

as to warrant special rules to govern resource development.

(G) Federal regulations. Regulations adopted by an agency of the United States government and published as a part of the Code of Federal Regulations.

(H) Non-compliance. Any neglect, failure or refusal to do or perform an act set forth in this Title.

(I) Oil and gas activity. Any activity on tribal lands engaged in pursuant to leases entered into under the Indian Mineral Leasing Act of 1938, 25 U.S.C. SECTIONS 396a-396g; land subject to development contracts issued pursuant to the Indian Mineral Development Act of 1982, P.L. 97-382, 25 U.S.C. SECTIONS 2101-2108; or activities undertaken solely by the Tribe.

(J) Oil and gas lessee. A person holding rights to explore, develop or operate on tribal lands for oil and gas under a lease issued pursuant to the Indian Mineral Leasing Act of 1938, supra, or the Indian Mineral Development Act of 1982, supra.

(K) Oil and gas contractor. A contractor with the Tribe under

contract negotiated pursuant to the Indian Mineral Development Act of 1982, supra; under joint exploration and development contract entered into with the Tribe prior to the effective date of the 1982 Act; or under contract to conduct activities on land operated by the Tribe outside of these Acts.

(L) Permit holder. The holder of a tribal environmental permit issued under this Title, except for oil and gas exploration and development.

(M) Person. Any individual, partnership, firm, public or private corporation, association, trust, estate, political subdivision or agency, or any other legal entity or its legal representatives, agents, or assigns.

(N) Pollutant. Any substance or energy entering the environment as a direct or indirect result of human activity which alters or has the potential to alter the physical, chemical, biological, cultural or aesthetic properties of the environment.

(O) Research project. A project or study conducted to gain knowledge about Reservation resources.

(P) Reservation. The Jicarilla Apache Reservation.

(Q) Reservation environment. The functioning system composed of all living and non-living entities and objects within the boundaries of the Reservation together with their interactions and the inputs to and outputs of that system.

(R) Reservation resources. The physical and biological resources of the Tribe within the boundaries of the Reservation, including but not limited to land, water, air, minerals, cultural or historical sites and objects, animal and plant life, and aesthetic values.

(S) Secretary. The Secretary of the Interior of the United States of America or his authorized delegate.

(T) State regulations. Regulations formally adopted by an agency of the State of New Mexico.

(U) Superintendent. The Superintendent of the Jicarilla Agency, BIA.

(V) Tribe. The Jicarilla Apache Tribe.

(W) Tribal environmental permit. A permit issued by the Tribe pursuant to this Environmental Protection Title to carry out an action covered by this Title.

(X) Violation. Breach of any right, duty, requirement or provision of this Environmental Protection Title.

Chapter 2. Compliance and Enforcement Procedures.

SECTION 1. Non-Compliance. Any person who fails to comply with any provision of this Title shall be subject to the penalties and other protective actions set forth herein. In the event of non-compliance, the person or agency designated by the Council to be responsible for enforcement shall serve the violator, in person or by mail, with a notice of non-compliance which shall specify non-compliance with the provisions of this Title or the terms of the plan of development submitted pursuant to this Title and shall specify the action which must be taken to correct such non-compliance, as well as the time limits within which such action shall be taken.

SECTION 2. Orders to Cease Activity. In the event of non-compliance with this Title, with any notice of non-compliance, or with any applicable federal law or regulation, the person or agency designated by the Council to be responsible for enforcement may order the cessation of such activity without additional notice to the violator if the non-compliance is not cured in five (5) calendar days. If deemed necessary, after the five (5) day period of non-compliance, vehicles and equipment may be impounded, or access restricted to an area or site until the non-compliance is cured. The violator shall be served, in the case of violation of this Title, with a statement of the reasons for the cessation order, and the actions needed to be taken before the order will be lifted. A copy of this cessation order and the statement of reasons for the order shall be delivered to the President of the Tribe and to the Superintendent.

SECTION 3. Enforcement By United States. The Secretary of the Interior, or his authorized delegate, including the Superintendent, Jicarilla Agency, Dulce, New Mexico, along with officials of the Bureau of Land Management, or agents or employees of these officials, are hereby requested and authorized to enforce the provisions of this Title and take any enforcement action authorized by this Title or federal laws or regulations which do not interfere with action being taken by

the Tribe.

Chapter 3. Remedies and Penalties.

SECTION 1. Remedies. In the event a violator fails to take action in accordance with the notice of non-compliance or cessation order served on him, pursuant hereto, the person or agency in charge of enforcement may continue its cessation actions or impoundment of vehicles and equipment; may request the Secretary to serve notice of intent to cancel the lease or mineral agreement, specifying the basis for notice; may request the Secretary to proceed as provided in the federal regulations, and to assess penalties as provided by these federal regulations; may assess civil penalties as set forth in SECTION 2 herein; and may take any other action deemed appropriate.

SECTION 2. Civil Penalties. In addition to the penalties provided by federal regulations, the violator shall pay to the Tribe a civil penalty of up to $5,000 per day for each day of such violation or continued violation of an order of non-compliance if such penalties are assessed by the person or agency designated by the Council to be responsible for enforcement of this Title. The person or agency in charge of enforcement shall serve the violator, in person or by mail,

with a notice of assessment of penalties which shall be due and payable to the Tribe within twenty (20) days of this notice. Failure to pay any penalties imposed shall be considered an additional violation of this Title.

Chapter 4. Regulations.

SECTION 1. Regulations. The Council shall establish regulations for the administration of this Title which shall be posted in one (1) or more public places on the Reservation and published in the Jicarilla Apache Chieftain. Such regulations shall provide for a process for Council approval of proposed activities, contact with land assignment holders, and permit issuance.

Chapter 5. Activities Other Than Oil and Gas Operations.

SECTION 1. Scope. This Chapter 5 shall be applicable to any person conducting activities on the Reservation or bringing before the Tribal Council, for its approval, any plan or activity to be performed upon the Reservation which may significantly affect the environment of the Jicarilla Apache Reservation, excepting oil and gas operations, which are covered under Chapter 6 hereof.

SECTION 2. Determination By The Tribal Council. Every proponent of an activity upon the Reservation, excepting oil and gas activity, appearing before the Tribal Council to gain its approval of a proposal shall include in the presentation of the proposal a statement outlining the environmental consequences of the activity. Should the Tribal Council feel that the activity may have a significant environmental effect, it shall require that a written statement be filed with the Tribal Council in accordance with SECTION 3 herein. The Tribal Council hereby reserves the power to delegate the function of reviewing the written statement for comments to aid the Tribal Council in its determination of the environmental consequences of the proposed activity.

A determination by the Tribal Council that a proposed activity may have a significant environmental effect shall be final.

SECTION 3. Statement To Be Submitted.

(A) In the event a written statement is required by the Tribal Council, it shall be submitted to the Tribal Council for review at least two (2) weeks prior to the Tribal Council meeting at which final approval of the proposed activity is sought.

(B) The written statement shall include the following inventory data as may be deemed pertinent by the Tribal Council or other authority delegated by the Council:

(1) A detailed baseline inventory of all plant and animal life observed in the area affected by the proposed activity.

(2) A discussion of the water quality and quantity in the area, including but not limited to, chemical and radiological analyses in selected wells and surface water courses, groundwater levels in selected wells, sediment transport, soil erosion and surface runoff indicators.

(3) A discussion of the air quality in the area, including but not limited to, background radiation study in selected areas, and a suspended particulate matter evaluation.

(4) A discussion of the soil properties in the area, including but not limited to, soil characteristics with respect to suitability for roads, cuts and fills and pipeline cover, background radiation in soils by topography and vegetation, slope porosity, permeability and

capillarity, texture, density and stratification.

(5) An assessment of the cultural properties and uses of the area, including but not limited to:

(a) Inventory of historic, religious and archaeological sites.

(b) Inventory of unique physical features and scenic features.

(c) Number of people living and working within the area.

(d) Inventory of the present land use within the area, including but not limited to, precipitation, air movement, temperatures and seasonal variation.

(6) An assessment of the general climatic conditions of the area, including but not limited to, precipitation, air movement, temperatures and seasonal variation.

(C) The written statement shall include considerations as to how the proposed activity will affect the inventoried area. To this end, the statement shall include an assessment of both the beneficial and

detrimental impacts of the proposed activity upon the following, if applicable:

(1) Social, political and economic structure of the area, both present and future.

(2) Cultural structure of the area, past, present and future.

(3) Physical characteristics of the area, both present and future, and including geographic, topographic, geologic, meteorlogic and hydrologic effects.

(4) Land use and water use within the area, both present and future.

(5) Resources of the area, including but not limited to, depletion, short and long term implications, possibility of recovery, recycling or restoration, and affect upon regional resource development, especially with regard to the Jicarilla Apache Reservation.

(D) If applicable, specific consideration shall be included

regarding possible detrimental impacts on the above five (5) area because of the following:

(1) Hazardous materials used in the proposed activity.

(2) Airborne emissions and effluents both in the construction and operational phases of the activity.

(3) Solid waste disposal, both in the construction and operational phases of the activity.

(4) Noise emissions, both in the construction and operational phases of the activity.

(5) Any other uncontrolled emissions or discharges, both in the construction and operational phases of the activity.

(E) The written statement shall include a discussion of all alternatives to the proposed activity, including both the short and long term benefits and detriments of each alternative, any adverse environmental and/or ecological impacts which cannot be avoided, and any irreversible and irretrievable commitments of resources.

(F) Non-classified baseline data and other environmental data previously prepared for the Tribe, may be made available to the applicant on request to the person or agency designated by the Tribal Council.

Chapter 6. Oil and Gas Activities.

SECTION 1. Purpose. This Chapter is designed to insure that proper consideration of environmental and ecological factors, and long-range planning is given by the Council prior to its approval of oil and gas leasing, contracting or operations on the Reservation. This Chapter shall further insure that all oil and gas operations on the Reservation shall be carried out in an environmentally sound manner, and that a procedure for enforcing such compliance shall be provided.

SECTION 2. Scope. This Chapter shall be applicable to any person conducting oil and gas operations on the Reservation, including those who bring before the Council for its approval any proposed oil and gas development plan or activity to be performed on the Reservation which may significantly affect the environment of the Jicarilla Apache Reservation. Federal agencies preparing environmental assessments or

environmental impact statements pursuant to the National Environmental Policy Act and regulations issued pursuant to the authority thereof are requested to cooperate in fulfilling the requirements of this Title as well as those of federal laws and regulations. Federal agencies are further requested to designate the Tribe as a cooperating agency whenever such designation is consistent with regulations issued pursuant to the National Environmental Policy Act.

SECTION 3. Planning. Prior to any operation on lands leased for oil and gas pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. SECTIONS 396a-396g, lands subject to development contracts pursuant to the Indian Mineral Development Act of 1982, P.L. 97-382, 25 U.S.C. SECTIONS 2101-2108, or operations conducted solely by the Tribe, the lessee, sublessee, assignee, contractor, subcontractor or operator, or agents or successors thereof, shall comply with applicable provisions of the National Environmental Policy Act 42 U.S.C. SECTIONS 4321-4347, applicable regulations promulgated by the Council on Environmental Quality, 40 C.F.R. 1508.9, Environmental Quality Handbook, 30 BIAM Supp.; National Historic Preservation Act, 16 U.S.C. SECTIONS 470, et seq., and regulations promulgated thereunder, 36 C.F.R. Parts 60, 63 and 800; and the Archaeological and Historic Preservation Act, 16 U.S.C. SECTIONS 469a-1, et. seq. Copies of all draft environmental

assessments, environmental impact statements, and reports required under the above statutes and regulations, shall be provided to the Council or the agency or the official delegated by the Tribal Council to review these documents, at least thirty (30) days prior to final review of the documents by the Secretary. A copy of all final environmental assessments, environmental impact statements or other similar requests shall be filed with the Tribe, regardless of by whom these documents were prepared.

SECTION 4. Plan of Development.

(A) In addition to the environmental assessments and studies required by statutes and federal regulations, each lessee, sublessee, assignee, contractor, subcontractor or operator, or agents or successors thereof, as the case may be, shall file with the Tribe, with a copy to the Superintendent, a plan of development which shall indicate well locations, drilling schedule, pipeline locations, road locations and locations of other surface removal activity which shall be coordinated with development of adjacent tracts so that duplication of roads, pipelines and other clearing will be avoided. The Tribe may require that lessees, sublessees, assignees, contractors, subcontractors, interest holders or operators, or agents or successors

thereof, holding leases or contracts adjacent to lands being developed be required to plan road, pipeline and other clearing in conjunction with plans for development presented to the Council in accordance with this paragraph whether or not such persons or entities intend immediate development.

(B) It is an objective of this Chapter that lessee, sublessees, assignees, contractors, subcontractors, operators, or agents or successors thereof, and other holding leases or contracts for oil and gas development on the Reservation, or interests therein or rights thereto, develop the properties which they hold diligently and in accordance with approved drilling schedules.

(C) The lessee or contractor, or any other person submitting a development plan, may be required to appear before the Council or any other person or agency designated by the Council to review the plan of development required by this Section.

(D) The plan of development to be submitted under SECTION 4(A) above shall, when approved by the Council, be considered as an additional stipulation of the lease or contract involved, and the lessee, sublessee, assignee, contractor, subcontractor or operator, or

agents or successors thereof, shall comply with the conditions thereof unless waived by the Council. Upon approval of the plan or proposed activity, the Council shall authorize issuance of a Tribal Environmental Permit with such conditions and mitigation measures as the Council deems appropriate. The permit holder shall be subject to all provisions of this Title, including enforcement.

Chapter 7. Appeals.

SECTION 1. Appeals. Any person aggrieved by any action taken by a tribal official or person or agency designated by the Council to be responsible for enforcement of this Title, may appeal to the Council. An appeal shall not stay any order to cease activity, impound vehicles or equipment and/or restrict access to the site of any operation, or pay penalties unless a stay is granted by the Council.

(A) Any penalties paid by a person in violation of an order of non-compliance may be rebated by order of the Tribal Council upon hearing an appeal taken under this Section.

(B) The Tribal Council may affirm or reverse any decision of a tribal officer or person or agency designated to be responsible for

enforcement of this Title, or issue such other orders or take such action as it deems appropriate.

(C) The Tribal Council may allow such presentations, evidence or arguments as it deems appropriate.

(D) A decision of the Tribal Council shall be final.

Chapter 8. Severability.

If any part or application of this Title is held invalid, the remainder of the Title, or its application to other situations or persons, shall not be affected.

Appendix D. St. Regis Mohawk Memorandum of Agreement on Implementation of Environmental Standards and Regulations (1989)

03-28-89

# IMPLEMENTATION OF ENVIRONMENTAL STANDARDS AND REGULATIONS ON THE ST. REGIS MOHAWK RESERVATION

## MEMORANDUM OF AGREEMENT

## I. PARTIES

This MEMORANDUM OF AGREEMENT ("Agreement"), dated march 28, 1989,

between the St. Regis Mohawk Tribe, of Hogansburg, New York ("Tribe"), by and through the Tribal Council, and the United States Environmental Protection Agency ("EPA"), by and through the Regional Administrator of EPA Region II, concerns implementation of the environmental standards and regulations of the Tribe within the exterior boundaries of the St. Regis Mohawk Reservation ("Reservation") in New York State.

## II. PURPOSE AND INTENT

A. The Tribe and the EPA agree to work together toward the development of a comprehensive set of environmental regulations and measures to be implemented on the Reservation. It is understood by both parties that this Agreement in no way waives or affects the existing authority of either of the parties involved, but rather promotes a spirit of cooperation between the parties. Through this cooperative effort, the parties desire to further Tribal self-government, and the special government-to-government relationship between the Tribal government and the federal government. The development of this program is expected to result in a multi-media approach toward protecting the environmental quality of the Reservation environment.

B. In furtherance of these mutual goals and policies, this Agreement:

* establishes a framework for intergovernmental cooperation and coordination between the Tribe and EPA;

* seeks to minimize duplicative efforts and, thereby, conserve Tribal and EPA monetary and program resources; and

* facilitates the development of a separate agreement(s) between the Tribe, EPA, New York State, and other interested public and private entities regarding protection of the Reservation.

1. Tribal Health and Welfare: The parties desire to protect the health and welfare of the Reservation population and the property, wildlife, and natural resources of the Reservation. Pollution from sources located both on and off the Reservation may: pose a threat to public health and/or welfare; damage natural resources; pose a threat to livestock; impair beneficial uses of surface and ground waters; and adversely affect air quality.

2. Tribal Economic Development: The parties desire to protect the Tribe's interest in protecting the environmental quality of the Reservation so that the opportunity for attracting job producing businesses to the Reservation will be preserved. In addition, the Tribe desires to protect its reserved ownership right in the quality of living and non-living resources which comprise the Reservation environment.

III. OBJECTIVES

The following objectives have been established for the first two years of work under this Agreement. Unless modified by the parties, the following objectives shall remain in force and effect beyond the initial two year term of this Agreement.

A. To develop and implement programs, as appropriate, to address Tribal environmental concerns in the following areas: hazardous waste sites, solid waste, air quality, ground and surface water quality management, underground storage tanks, pesticides, public water supplies, and sewage treatment.

B. To develop Tribal capability for participation in remediation efforts at sites under investigation pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act/Superfund Amendments and Reauthorization Act (CERCLA/SARA), including the development of appropriate remedial cleanup standards. The parties are currently negotiating one or more separate agreements under CERCLA/SARA with regard to the Tribe's specific role under that statute.

C. To provide assistance in the development of appropriate Tribal regulatory programs under federal law, such as, but not limited to: water quality management, public water supply, and air quality management.

D. To assist the Tribe in further development of its support staff and governmental infrastructure to provide for enforcement of Tribal environmental ordinances and the resolution of such conflicts as may arise in the enforcement of such Tribal laws.

E. To take initial steps in carrying out actual program implementation activities under the programs developed and adopted by the Tribe.

F. To develop future programming and funding plans.

IV. TERMS OF AGREEMENT

A. General Obligations

In order to implement the purpose, intent, and obligations of

this Agreement set forth in Sections II and III above, the parties agree to the following terms:

1. Coverage: This Agreement covers programs and technical/financial assistance authorized by the Clean Water Act (CWA), the Clean Air Act (CAA), the Resource Conservation and Recovery Act (RCRA), the Safe Drinking Water Act (SDWA), the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the Toxic Substances Control Act (TSCA), and CERCLA/SARA.

2. Cooperation: Each party shall cooperate to the greatest extent possible with the other party in fulfilling the purposes of this Agreement. At the written request of the Tribe and to the extent permitted by available resources and applicable law, EPA will provide the Tribe with technical and financial support to carry out the activities identified in this Agreement.

3. Timely Notification: Each party shall act in a timely manner to provide the other with environmental documentation for proposed actions (e.g., analyses,

assessments, or impact statements) of interest to the other party. When the proposed action of a party may directly affect the programs or property of the other party, the proponent of such action shall solicit input from the affected party. Furthermore, EPA shall provide the Tribe with timely notice of proposed actions which may affect either the quality of the Reservation environment or the fishery resources of the Tribe.

4. Quality Assurance Review: The Tribe understands that all applications for assistance awards involving environmental related measures for data generation must include a Quality Assurance Plan acceptable to the awarding official in accordance with applicable federal regulations. Nevertheless, the Tribe is free to explore innovative methods of solving environmental problems which may be of benefit. All results will be subject to evaluation and acceptance by both parties.

5. Compliance: EPA retains responsibility for assuring that the actions of the parties hereunder comply with applicable federal environmental law.

6. Funding: During the term of this Agreement, EPA shall assist the Tribe in applying for available program development and implementation funds for which the Tribe may be eligible. EPA reserves the right to make the final determination whether funding shall be provided, and under what conditions.

7. Annual Report: At the end of one year, a report will be prepared by each of the parties' representatives on the Review Committee established in Section VI.B of this Agreement. Such evaluation shall include an evaluation of this Agreement, accomplishments during that year, and recommendations for use by the Tribe and EPA.

B. Review Committee

In order to facilitate implementation of this Agreement, and further the relationship between the Tribe and EPA, and EPA-Tribal Review Committee is hereby established. The Review Committee shall also promote communication and coordination between the parties. The Review Committee shall initially

consist of two (2) members designated by the Tribal Chiefs, and two (2) members designated by the EPA Region II Regional Administrator. Additional members may be added as deemed necessary by the original committee.

1. Actions: For the purpose of conducting business, a quorum of the Review Committee shall consist of four (4) members. The Review Committee shall take action by affirmative vote of three (3) members. The Review Committee is advisory in nature, and its actions are not binding on either party to this Agreement.

2. Officers: The Chairman of the Review Committee shall be designated by the Tribe and the Vice-Chairman shall be designated by EPA. The Chairman and Vice-Chairman shall each serve at the pleasure of the party whom he or she represents.

3. Ex-officio Members: All members of the Tribal Council not members of the Review Committee; the Director of the Eastern Area Office of the Bureau of Indian Affairs (BIA), or his or her designee; the Regional Administrator of EPA

Region II, or his or her designee; a representative from the Mohawk Council of Chiefs, or his or her designee; a representative from the Mohawk Nation Council of Chiefs, or his or her designee; the Director of the Nashville Area Office of the Indian Health Service (IHS), or his or her designee; the Director of the Office of Indian Programs of the Department of Housing and Urban Development (HUD), or his or her designee; the Commissioner of the New York State Department of Environmental Conservation, or his or her designee; and the Commissioner of the New York State Department of Health, or his or her designee, shall be entitled to serve as ex-officio (non-voting) members of the Review Committee.

4. Meetings: The Chairman or any two members of the Review Committee may, upon reasonable notice, call a regular meeting of the Committee to be conducted either in person or by telephone conference call. Such meetings shall initially be held quarterly, unless the parties agree otherwise. At all meetings the members of the Review Committee may invite their respective staffs or attorneys to attend.

5. Dispute Resolution: The Review Committee shall also be the forum for discussing any disputes which may arise between the parties regarding implementation of this Agreement and the Committee may make non-binding recommendations to both parties of this agreement regarding the resolution of such disputes.

C. Revisions/Amendments

This Agreement may be amended at any time except as limited by applicable regulations or laws. Amendments shall be made by supplemental Agreements executed in writing by the parties hereto, as required in order to carry out any of the provisions of this Agreement or for any other purpose in furtherance of this Agreement. This Agreement may be revised or amended to incorporate Agreements with the IHS, BIA, HUD, and any Federal, Tribal, State, or County governments as appropriate.

D. Written Communication

Written communications pursuant to the provisions of this Agreement shall be delivered or mailed as follows:

1. To the Tribe: Chief Harold Tarbell, St. Regis Mohawk Tribe, Hogansburg, New York 13655, with a copy to the Director of the St. Regis Environmental Health Department.

2. To the EPA: Regional Administrator, EPA Region II, 26 Federal Plaza, New York, New York 10278, with a copy to the Indian Coordinator, EPA, Region II.

V. TERMINATION

This Agreement shall continue in effect until either terminated by joint agreement of the parties, or either party terminates its participation in this Agreement upon thirty (30) days written notice to the other party. Such termination, however, shall not relieve any party of responsibilities otherwise prescribed by law or regulation.

VI. EXECUTION

This Agreement shall be effective when executed by all parties.