Tribal Consultation and Collaborative Governance: Environmental and Cultural Justice through the Lens of the National Environmental Policy Act (1969) and the National Historic Preservation Act (1966)

Matthew J. Rowe, Judson Byrd Finley, Elizabeth Baldwin,
and Rashail DeMinck

Do Not Cite in Any Context without Authors' Permission

Matthew J. Rowe, PhD, RPA, School of Anthropology, University of Arizona, Tucson AZ, majrowe@email.arizona. edu

Judson Byrd Finley, PhD, Department of Sociology and Anthropology, Utah State University, Logan UT

Elizabeth Baldwin, PhD, School of Governance and Public Policy, University of Arizona, Tucson AZ

Rashail DeMinck, Undergraduate Research Associate, Department of Sociology and Anthropology, Utah State University, Logan UT

I. Introduction

Environmental justice problems are by now well-documented, demonstrating that minority and low-income communities experience disproportionate exposure to environmental harms such as toxic waste sites and pollution-emitting facilities (e.g., Bullard 2000; Ringquist 2005). While scholars and activists often focus on inequitable distribution of environmental harms, environmental justice also requires that communities should be meaningfully involved in decisions that affect their well-being. The U.S. Environmental Protection Agency, for example, defines environmental justice to include "meaningful involvement of all people . . . with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." (USEPA 2017). In 1994, President Clinton issued Executive Order 12898 requiring federal agencies to identify and address environmental justice problems. One response to Clinton's executive order was new guidance on the implementation of the National Environmental Policy Act (NEPA) (1969) to emphasize greater community inclusion in decision making about projects with significant environmental impact.

Recently, the Dakota Access Pipeline (DAPL) brought national attention to the environmental justice concerns of the Standing Rock Sioux, including threats to the tribe's water quality and the destruction of cultural resources. However, DAPL also raises environmental justice concerns because the Standing Rock Sioux claim to have had little opportunity to participate in the planning process for a project with significant environmental impact on tribal land, water, and cultural resources. Moreover, while DAPL is highly visible, it is not a singular example. Indeed, DAPL is just one of many ongoing interactions between tribes and the federal government governed by the tangled assessment process mandated by NEPA (1969) and the National Historic Preservation Act (NHPA) (1966 as amended).

Cultural justice is a nested concept within environmental justice. We define "cultural justice"[1] as the fair treatment, representation, and participation of all people in the implementation of cultural resource laws and cultural resource preservation programs. Cultural resources include tangible remains such as archaeological sites, artifacts, and architecture, but may also include less well-defined resources like culturally important plants and animals, and traditional cultural properties (King 2004). Destruction of these resources is problematic for minority communities because it can remove the evidence of a people's history, effectually erasing them from our shared national story, which may delegitimize their claims to ancestral or historic lands, or allow the majority to vastly misappropriate their history (Atalay 2006; Ferguson 1996). Additionally, this loss significantly undermines efforts by minority cultures to

[1] The term "cultural justice" is often employed in reference to the role of a majority inhibiting the cultural practice of a minority, or used to refer to the variation in cultural perceptions of the definition of justice within legal contexts (e.g. Comaroff and Comaroff 2004; Maddox 2009; O'Neil 2000). Our definition of cultural justice does not conflict with previous use, rather it focuses more specifically on the devastating injury the majority can inflict on the minority by destroying or appropriating archaeological resources and landscapes relevant to the minority culture.

preserve and maintain traditional knowledge, histories, and customs for future generations, which ultimately may contribute to extinction of the culture. In this sense, control of cultural resources and research allows the majority to decide how, and if, the minority culture fits within the nationalistic story of the majority (McIntosh et al. 2006). While cultural justice problems are not unique to indigenous communities,[2] the problem is particularly acute among Native American tribes, many of whom are at the forefront of the current Western energy boom.

We also note that there are important similarities between natural and cultural resources, strengthening the connection between environmental and cultural justice. Cultural and natural resources are similar in their intrinsic characteristics, their importance to communities and stakeholders, and in the federal laws that protect and preserve them. Like wildernesses, parks, or recreation areas, archaeological sites and historic structures can be economically valuable to communities as tourist destinations and attractions. Both natural resources and cultural resources such as pottery, basketry, jewelry and other artifacts carry significant monetary values (Brent 2006; Hollowell 2006). Additionally, as with certain natural resources, cultural resources are non-renewable. Perhaps the most significant similarity is that congress determined that both natural and cultural resources contribute to the overall environmental quality and distinct feeling of place important to local communities and cultures, which brings them both under the umbrella of NEPA and NHPA.

In this paper, we ask: how do federal agencies and project developers consult with tribes under NEPA and NHPA, and do these practices support environmental justice and cultural justice? While tribal members and applied anthropologists have identified best practices for meaningful tribal consultation and public participation in policy decision making, we know little about whether and how agencies' actual approaches to NEPA and NHPA implementation adhere to these standards, or their implications for environmental and cultural justice. Methodologically, our approach is a comparative case study of three instances of tribal consultation under NEPA and NHPA, selected because they range from inclusive and frequent consultation (in the case of the proposed Tongue River Railroad Company expansion) to limited and no consultation (in the case of DAPL and the Absaloka Mine Expansion). All three cases involve tribes at the forefront of the western energy boom. In this preliminary study, we draw primarily on archived documents of the NEPA and NHPA processes to analyze the range of approaches used, comparing strategies across the cases and discussing their implications for environmental and cultural justice.

[2] Malaga Island, ME off the coast of Phippsburg is one example of an African American community that until recently had its history co-opted by the majority. In 1912, the state government forcibly evicted a mixed race community from the island. Descendants of those families suffered ridicule and persecution for their association with Malaga Island, and until recently accurate stories of Malaga Island's history and people remained untold (Mosher 1991).

In the following sections, we review tribal government and applied anthropologists' views on meaningful tribal consultation. We also summarize the basic "on-paper" consultation requirements under NEPA and NHPA. We then draw on NEPA and NHPA compliance documents to describe consultation as it actually happened in our three cases before discussing variation across the papers and identifying implications for environmental and cultural justice. We find that when agencies employ consultation strategies that include early notification, involvement of a diverse group of stakeholders with experience and comparable levels of funding, well-defined stakeholder roles, and clearly include stakeholder modification to final proposals, NEPA and NHPA are effective tools for Environmental and Cultural Justice. This finding comports well with other published examples of "best practices" in consultation (e.g. Hutt and Lavallee 2005; Stoffle et al. 2001), but we also find that perhaps the most expedient way to evaluate the commitment to the consultation process is by reviewing the transparency of the process. Thus, we hypothesize that additions to NEPA and NHPA that define transparency requirements and standardize operational guidelines during consultation are necessary to insure routine fulfillment of congressional intent regarding environmental and cultural justice goals.

II. Legal Requirements for Consultation in Cultural and Environmental Laws and Resources

NEPA and NHPA are often characterized as "stop, look, and listen" laws (CEQ and ACHP 2013) that are invoked when a planned federal action – including federal agencies' issuance of permits – would have significant environmental impact. As a practical matter, this includes a wide array of projects that may occur on tribal lands, from communications infrastructure to road building to expansions in mineral extraction to energy pipelines such as DAPL. Before a federal agency can embark on or approve such a project, NEPA and NHPA require that the agency must conduct basic scientific research on the environmental and cultural impacts of the projects, as well as explore alternatives that might mitigate those impacts. In addition, NEPA and NHPA require consultation with relevant tribal communities and opportunities for the public and other stakeholders to comment on proposed plans. While these laws do not mandate that federal agencies choose the least harmful options, they do ensure that environmental and cultural impacts will be considered as part of the decision making process, and ensure that communities have an opportunity to engage with decision makers before projects are implemented.

NEPA and NHPA also illustrate the difference between tribal consultation practices as described in legal documents and as practiced on the ground. Under both laws, the statute, along with subsequent litigation and other guidance, provides agencies with a minimum framework for the consultation process. Within this framework, however, agencies often develop their own internal practices and approaches to tribal consultation. As a result, we would expect to see different practices and approaches to tribal consultation used by different agencies. Together, these two laws provide the primary legal mechanisms for consultation with tribal entities as part of a major federal undertaking. We are primarily focused on

consultation obligations concerned with environmental or cultural resource impacts through development, and do not intend this to be complete review of the tribal consultation literature, legislation, or directives issued by individual agencies (see Hutt and Lavallee 2005 and WH-IAEWG and CACAG 2009 for a more complete listing). We understand that consultation is mandated under other federal laws, and that executive orders, memos, and agency directives also drive tribal consultation, and that these mandates may also be invoked during the NEPA and NHPA review process. Furthermore, because variation exists within the different laws in regards to who may be consulted and under what circumstances consultation should be initiated, they may affect the consultation process under NEPA and NHPA. For example, NAGPRA 1990 initiates consultation with tribal governments as part of the repatriation or inadvertent discovery of human remains and objects of cultural patrimony and AIRFA 1979 defines a consultation role for spiritual practitioners outside of the formal Tribal Government (Sebastian and Lipe 2009).

NHPA Overview and Consultation Requirements:

The National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 *et seq.* is the central law protecting cultural resources, which includes places associated with important events or people, unique or important craftsmanship, and sites with the potential to build knowledge and understanding of the past. Adopting an approach similar to previous statutes such as the Antiquity Act of 1906 and the Historic Sites Act of 1935, NHPA requires all federal agencies to engage in historic preservation, with the result that implementation is not just within a single agency (Sebastian and Lipe 2009). NHPA's Section 106 establishes the stop, look and listen requirement, mandating federal agencies to consider their impact on cultural resources before embarking on or authorizing major projects. 36 CFR Part 800 regulates implementation procedures by identifying the obligations of key players and outlining the process including consultation. The Advisory Council on Historic Preservation (ACHP), an interdisciplinary group of presidentially appointed preservation specialists, provides guidance, advice and oversight of the Section 106 process. Prior to 1992, federal agencies implemented Section 106 primarily by coordinating with State Historic Preservation Offices (SHPOs), but 1992 Amendments to NHPA authorize tribes to create their own Tribal Historic Preservation Offices (THPOs). As a result, some tribes now have THPOs authorized to consult with federal agencies, on a government-to-government basis, on projects within their reservation and treaty lands. The 1992 Amendment reinforces NHPA's consultation requirements, as well as establish Traditional Cultural Properties (TCPs) as eligible for the National Register of Historic Places (NRHP) (Sebastian and Lipe 2009). The 1992 amendment significantly elevated the participation of tribal governments in the planning process on reservation lands by defining a decision-making role for THPOs within their jurisdiction that is equivalent to SHPO's role on state lands. Additionally, including TCPs as eligible for listing on the NRHP incorporated native perspectives on culturally important resources that are less congruent with definitions contained in NHPA prior to 1992.

36 CFR § 800.2 also mandates early tribal consultation by federal agencies when projects might impact tribal lands. While consultation is not fully defined in the statute and the legal requirements remain somewhat ambiguous, the term has gained meaning over time through the 1992 amendment, litigation, and directives from the Secretary of the Interior. Consultation must go beyond simple notification that an agency is reviewing a project proposal or a letter from the lead agency requesting relevant information from the tribe (Sebastian and Lipe 2009). The 1992 amendment greatly increases the role of tribal governments in the decision making process by specifying points when tribes must be consulted within the Section 106 process such as identifying the government-to-government relationship in the consultation process, creating THPOs that take the lead role in decision making on tribal lands, and defining the process for consultation on affected places off-reservation but within historic or treaty lands (Stanfill 1999). Additional provisions on consultation within the NHPA process include Section 110, Section 101 (d)(6), and ACHP policy statements that outline principles for the 106 process.

NEPA Overview and Consultation Requirements*:*

The National Environmental Policy Act (NEPA) 42 U.S.C. *§§* 4321-4347 is another stop, look, and listen law, which requires federal agencies to gather information about potential negative impacts to the environment from major federal undertakings and to provide that information to stakeholders and public officials prior to the action (40 CFR Part 1500.1b). This requirement is replicated from NHPA, but expands federal responsibility to consider and evaluate the impacts of major undertakings on both the environmental and cultural resources within the project area, defined as the 'Area of Potential Effect (APE).' Specifically, NEPA, Sec. 101 [42 USC § 4331] part b, states that government responsibilities include assuring, "for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings" and to "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". The primary instrument employed by NEPA is the preparation of an Environmental Assessment, or, in some cases, a more detailed Environmental Impact Statement (EIS). It is intended that completion of the NEPA process, whether an EA or EIS, legally fulfills federal responsibilities for review and consideration of adverse effects from federal undertakings to both environmental and cultural resources under NEPA 1969 and NHPA 1966, as well as a host of other environmental protection laws.

NEPA differs somewhat from NHPA in that its emphasis on consultation and participation focuses on the public and other federal agencies, rather than on tribes. NEPA mandates consultation with relevant federal agencies, and agencies are to "make diligent efforts" to involve the public in NEPA implementation (Wood 2003). Agencies are specifically required to make all NEPA documents, hearings, and meetings open and available to the public, and Council on Environmental Quality (CEQ) regulations specify that the public should be involved in all steps of the NEPA process – including determining the

appropriate scope of NEPA, the preparation of (and comment on) draft and final EISs, and on monitoring results after decisions are made and projects implemented (Wood 2003). Because there are no specific enforcement mechanisms, transparent processes and public engagement are seen as crucial to ensuring that the NEPA process is meaningful, because public involvement allows stakeholders to hold agencies accountable for their actions either politically or potentially through the courts (Wood 2003). CEQ also instructs agencies to consider environmental justice as part of the NEPA process, specifically by examining whether community characteristics – such as demographics and historical factors – and examining whether there exists potential for disproportionate risk, as well as community involvement in decision making (Outka 2006). NEPA does not impose specific requirements for tribal consultation separate from the general obligation to consult with the public and with relevant federal agencies (Miles 2006). In practice, each federal agency develops its own formal guidance on how to do NEPA, based on factors such as agency mission, past experience with NEPA and subsequent litigation, and agency interpretation of best practice (Stern et al. 2009).

III. Tribal Government and Applied Anthropology Views on Consultation

Currently, an estimated 90% of archaeological research in the United States falls somewhere under NEPA, NHPA, and other historic preservation laws (King 2004), making consultation and collaboration with tribes an important and mandated part of modern archaeological practice. The archaeological community has spent significant time establishing ethical guidelines and frameworks for "de-colonizing" archaeological research (e.g. Atalay 2006; Scarre and Scarre 2006; Vitelli and Colwell-Chanthaphonh 2006). The Society for American Archaeology, The American Anthropological Association, and the Register of Professional Archaeologists have all issued ethical guidelines that stress inclusivity and multi-vocal perspectives in archaeological practice with the understanding that in the words of Jeremy Sabloff (2008) "*Archaeology Matters.*" These efforts represent a distinct and growing understanding that historically archaeologists have not been great allies to tribes and in many cases removed, stolen, and destroyed irreplaceable sites and artifacts central to native cultures. In other words, archaeologists have long been on the wrong side of cultural justice, but that is changing (Stottman 2011). The following section reviews three sources from applied archaeological literature, which illustrate examples or agreed upon "best practices" in tribal consultation as a comparative lens through which we examine our case studies.

In 2005, the National Association of Tribal Historic Preservation Officers (NATHPO) released guidelines for best practices in tribal consultation within the historic preservation context (Hutt and Lavallee 2005). The goal of this effort was to outline a "best practices" model for practitioners working with THPOs within the Section 106 consultation framework. The project's methodology included interviews with the project's advisory committee, the ACHP, and historic preservation practitioners, and

voluntary surveys of consultation participants. Results of the NATHPO efforts identified common themes of successful consultation, which are often shared between tribal and agency officials (Hutt and Lavallee 2005). Early contact and communication is critical to successful consultation, and it is important that all parties be well informed about the scope of the project and the potential impacts. Respondents indicated that site visits with agency and tribal officials greatly increase the success of the consultation process. Respondents also indicate that employment of a tribal liaison and presence of a THPO also greatly increase successful consultation. As might be expected, evidence of mutual respect, such as locating meetings in a convenient location or paying travel costs for tribal officials is one of the most important criteria for success, but interestingly they find that this need not rely on a single impassioned agency representative. Instead, they find that ongoing and long-term interactions between agencies and tribes can institutionalize an atmosphere of respect. Another interesting finding from this study is that when evaluating the success of a consultation, the outcome of the project is less important than the process and that when the consultation process is conducted respectfully, disagreement is not generally considered a failure in the process.

Stoffle et al. (2001) published a model for consultation based on programmatic interactions between the United States Department of Energy Nevada Operations Office (DOE/NV) and the Consolidated Group of Tribes and Organizations (CGTO) regarding the Nevada Test Site (NTS). The CGTO represents 17 tribes and other official Indian organizations with cultural ties to the NTS in southern Nevada. Although published four years before the NATHPO guidelines, the project embraces many of the recommended guidelines. For example, Stoffle et al. (2001) suggest that non-recognized tribes and pan-Indian organizations be included in the consultation as interested parties to insure inclusion of cultural groups not formally recognized by the federal government, yet may have connections to the effected resources. This effectively expands the group of stakeholders participating in the consultation process beyond the legal requirements of NEPA or NHPA. Another similarity is that Stoffle et al. (2001) suggest forming a consultation committee consisting of tribal members who act as a liaison between tribal governments and agency officials. They also note the importance of early contact and the provision of as much information about the project as possible when requesting consultation with a tribe. As with the NATHPO guidelines, open lines of communication and trust are critical to a successful consultation. To this end, a single letter requesting consultation is insufficient and instead should be followed up with telephone calls and face-to-face meetings with tribal representatives. Additionally, reflecting the NATHPO findings, Stoffle et al. (2001) find that trust can be institutionalized with a robust commitment to a consultation program and continuous communication between the DOE/NV and CGTO.

Stoffle et al. (2001) also make a useful distinction between *general consultation* and *project specific* consultation. General consultation is an ongoing permanent relationship between the agency and

the affiliated tribes. The goal of general consultation is to continuously build information and knowledge of natural and cultural resources within the agencies purview. Through this information collection and exchange, permanent relationships are built, which may form the foundation for successful project specific consultations. Project specific consultations are focused on the effects of an action and are limited in scope by the legislation with which the agency must comply (Stoffle et al. 2001). This form of consultation is constantly ongoing due to the consultation requirements under NEPA, NHPA, and other cultural resource laws. The NTV case demonstrates that project specific consultations easily occur within the context of a general consultation and that underlying foundations of trust and respect built through general consultation help insure a successful process prior to specific undertakings.

More recently, DOI, DOJ, and DOA released a 2016 Framing Paper titled "Federal Consultation with Tribes Regarding Infrastructure Decision Making" to help define "meaningful" consultation. Rather than constructing a model for meaningful consultation, Roberts (2016) defines three principles for meaningful consultation:

1. "Accountability for Federal agencies to identify potential impacts on Tribes"
2. "Providing timely and complete notice to Tribes"
3. "Working collaboratively with Tribes to address their concerns or mitigate effects"

Roberts (2016) then highlights the Desert Renewable Energy Conservation Plan (DRECP) as an example of meaningful engagement with local tribes. Consultation for the DRECP included two summits between tribes and agencies, which focused on the impact of energy development on traditional use areas, a formal three-year consultation period that included meetings with 40 federally recognized tribes, and a series of conferences and workshops to provide information and access to executive level federal management resources (Roberts 2016). Most importantly, the DRECP consultation and information exchange incorporated tribal voices into shaping the final project during the development and planning process.

While this review of best practices in tribal consultation is limited, it does identify some basic, shared principles for meaningful consultation from the perspectives of tribal representatives, agency officials, and cultural preservation practitioners. All parties in these cases see that meaningful consultation clearly goes beyond information provision and the seeking of approval or disapproval from tribal governments. Instead, both the NTV and the DRECP established long-term relationships with a broad set of tribal stakeholders that extend beyond the legal requirements to consult only federally recognized tribes. Tribes in both examples serve defined roles and significant information about the proposed project and potential impacts. Additionally, tribal representatives are clearly involved early in the process, so tribes have a voice in the scoping process, the seeking of alternatives, and in mitigation

decisions. Relationships in both cases are ongoing and long term, and the consultation process leans more towards a general consultation with project specific consultations conducted when necessary. These examples illustrate situations where agencies and tribes have committed to long-term, respectful relationships built on trust, tribes have a strong influence beginning in the early stages of the process, and information is readily available and free flowing. Perhaps most importantly, these projects maintain a high degree of transparency throughout the process. As we will see in the following section, these projects go beyond the letter of the law and instead seek to fulfill the intent of the law as well.

IV. Methods

This preliminary study is based on a comparison of three cases that illustrate differing levels of engagement and commitment to consultation between Native American Tribes, federal agencies, and private companies: the Absaloka Mine Expansion, proposed by Westmoreland Resource Inc. on the Crow reservation in eastern Montana; a railroad expansion proposed by the Tongue River Railroad Company on the Northern Cheyenne reservation, also located in eastern Montana; and the Dakota Access Pipeline Project near the Standing Rock Sioux reservation in western North Dakota. We selected these cases because they illustrate different approaches to consultation and engagement: the Tongue River project offers an example of extensive consultation, the DAPL offers an example of minimal tribal consultation, and the Absaloka Mine case illustrates a consultation process that abided by the letter- but perhaps not the spirit – of the law. We make no claims that these cases are representative of federal-tribal consultation practices – rather, they are illustrative of the range of practices that federal agencies might use, and by comparing across the three cases we are able to hypothesize about how variation in consultation practices might affect environmental and cultural justice.

We use information available in draft and final environmental assessments (DEA/FEA) and environmental impact statements (DEIS/FEIS) specific to each project. Where available we use supporting documents prepared as part of the NEPA analysis including correspondence between key players and transcripts of public meetings held during the 60-day DEA/DEIS open comment period. We also use newspaper reporting as a supplemental source to elaborate on decisions and final outcomes that may have not been clear in official documents but where participants commented on the process after the fact. Within this framework, we use a comparative, qualitative approach, we illustrate variations within the implementation of consultation requirements in our three case studies and seek to identify meaningful variation within the consultation process. The projects demonstrate a range of engagement in and documentation of the consultation process. Public participation was variable from virtually none to intensive, and the project outcomes received commensurate media attention as a consequence. The diverse nature of the projects covered in our case studies (e.g., pipelines, railways, and coalmines) and the different actors and agencies leading the projects complicates the task of isolating meaningful variation in

the consultation process, some characteristics are clearly associated with greater commitment to the intent of the consultation requirement. In a system that is ultimately driven by process, we find that consistency in implementation and transparency in communication during the consultation process are most important in reaching best decisions.

V. Case Studies

Echoes from Crow Country: Absaloka Mine Expansion

In 2004, recognizing the imminent production decline, Westmoreland Resource Inc. (WRI) entered into negotiations with tribal leadership to expand the Absaloka Mine onto a 3,660 acre section of the Crow Indian Reservation triggering NEPA analysis of the Absaloka Mine Crow Reservation South Extension (WWC Engineering 2008a). The one reservation coalmine, Absaloka Mine, has been in operation since 1974. Coal has long been an economic mainstay in Crow Country where unemployment rates are as high as 47% and median household income is barely $27,000. Crow tribal members make up nearly 70% of the mine workforce (totaling nearly 170 employees) who earn on average $66,000 annually (Old Coyote 2015). Coal royalties and tax revenues fund the tribal government, and provide an annual "per capita" payout of approximately $1,000 paid to each tribal member.

Preparation of the DEIS began, and included initiation of the NHPA Section 106 process identifying and evaluating important cultural resources, which was completed in 2004 and 2005 (Meyer 2004; Meyer and Munson 2004). Details of the project scoping plan are contained in the FEIS (WWC Engineering 2008b:4-1). A Notice of Intent to prepare an EIS and Notice of Scoping were published in the *Federal Register* on November 28, 2006. Advertisements of public meetings were published over four separate days in two different local newspapers. Public meetings were held on two occasions in a single location at the Big Horn county courthouse in Hardin, Montana. Besides agency representatives, eight private citizens attended the first meeting; none attended the second. The Northern Cheyenne Tribe's Air Quality Division and two private citizens provided written comments. Work was completed and the DEIS was made available on March 21, 2008 initiating a 46-day comment period. Public hearing notices were published in the *Federal Register* on April 2, 2008 and again over two days in the same local newspapers. A single public hearing was held at the Big Horn county courthouse at 7:00 pm, April 23, 2008. Besides agency and tribal officials, only three members of the general public attended; no written comments were received in regards to the public meeting. The DEIS elicited written comments from only two agencies and two individual citizens, none of which were from Crow tribal officials or Crow tribal members and none of which concerned cultural resources. A Record of Decision (ROD) was issued in October 2008 effectively ending the NEPA analysis in a fairly straight-forward, no-incident process.

Real problems arose with the project in subsequent years as cultural resource specialists continued the Section 106 compliance, particularly resolution of adverse effects identified during the

NEPA analysis. The adoption of the proposed action meant total destruction of all archaeological sites during surface mining. Testing and data recovery at identified archaeological sites continued until 2012. Consultation responsibilities shifted to those specified under the NHPA (36 CFR Part 800.2) and included archaeologists from the Bureau of Indian Affairs (BIA) and Office of Surface Mining Reclamation and Enforcement (OSM), as well as the Crow THPO and WRI officials. At stake was a massive, 3000-year-old bison-hunting site referred to as the Sarpy Creek Bison Kill (Macmillan 2012), a site type considered the hallmark of northern Plains archaeology (Kornfeld et al. 2009; Davis and Reeves 1990). Given the centrality of bison to Plains tribal cultural identity, the antiquity of the kill, and the uncertainties of cultural affiliation, consultation with potentially affiliated tribes was even more imperative. Here the consultation process broke down: with no apparent notification outside of the Crow THPO and following a short archaeological testing period, the site was "excavated" with a backhoe as part of an approved "data recovery" plan. In an effort at timely excavation the plan effectively destroyed one of the most culturally and scientifically valuable archaeological sites found on the northern Plains in recent decades. Diagnostic spear points and selected identifying skeletal remains were collected from an automated screen; otherwise, the scientifically rich bison remains were heaped on the ground, exposed to the elements, and trampled by grazing cattle.

In a scene of destruction reminiscence of the late 19th and early 20th Century bison "mines" for phosphate fertilizer production (Davis 1978), the excavation of the Sarpy Creek Bison Kill barely echoed across the Crow Reservation and into Indian Country. Subsequent reporting would show that outside of a few agency, WRI, and Crow Tribal officials no one knew of the plan to excavate the site. The Crow Culture Committee and 107 Committee of Tribal Elders, designated consultation parties in the 2006 Memorandum of Agreement (MOA) establishing the Crow THPO, knew nothing of either the site or its imminent destruction. Likewise, potentially affiliated tribes such as the Northern Cheyenne, Blackfeet, Shoshone, and Arapahoe, all stakeholders in the site's future, were unaware of the decision. Even though the data recovery plan was completed according to regulations stipulated in NHPA 36 CFR Part 800, no documentation of consultation exists leaving outside observers to conclude that the decision was reached among the fewest possible participants in order to facilitate timely completion of Section 106 review. Shortly after the destruction of the Sarpy Creek Bison Kill was made public, Crow THPO Dale Old Horn was released from his duties, fired from the Crow Tribal Government, and arraigned on federal corruption charges related to racketeering and a double-billing scheme associated with archaeological services his office provided. While no connections have been made between Old Horn's corruption charges and the Sarpy Creek Bison Kill decision, questions remain about his office's intent to limit tribal consultation and participation in reaching the best-practice decision. While coal is king in Crow Country, culture is power, and power is money. But along with the power of Crow culture is a curse—the land must be cared for to

maintain cultural vitality (Macmillan 2012). By early 2013, coal production slowed to a halt as reserves were exhausted and the South Expansion had yet to begin. Today, the skeletons of several hundred bison killed on late fall day some 3,000 years ago remain exposed to the elements on a remote hillside near the edge of Crow Country. A civil violation of the Archaeological Resources Protection Act (ARPA) remains unresolved.

Cowboys, Indians, and Conservationists take on King Coal: Tongue River Railroad Expansion

2012 was a high-water year for coal in Montana Indian Country. During the first debate of the 2012 United States presidential election, candidate Mitt Romney set incumbent president Barrack Obama on his heels during his opening statement claiming to be a proponent of America's energy independence and a friend of clean coal. Besides WRI's Absaloka Mine South Extension, Cloud Peak Energy made plans to open the Big Metal coal mine on the Crow Reservation's southern edge while Arch Coal moved forward with plans for the Otter Creek coal mine in the Tongue River country east of the Northern Cheyenne Reservation. Even though the national conversation envisioned Otter Creek coals heading east, project opponents were quick to recognize that sodium composition of the bituminous ignimbrite exceeded national standards for consumption in Midwestern coal-fired energy plants. Farther to the west, all eyes were on the proposed Tongue River Railroad Expansion (TRRE) that would connect new mines to existing rail lines moving coal to newly proposed Pacific shipping terminals in Washington and Oregon. In spite of Romney's claims supporting America's energy independence, Otter Creek coal was destined for the Chinese market.

In October 2012, The Tongue River Railroad Company (TRRC) filed an application with the Surface Transportation Board (STB) for an 83-mile rail line connecting Miles City Montana with the Otter Creek mine and a second proposed Montco mine near Ashland, Montana. In December of the same year, TRRC settled on a 42-mile rail line that would connect the two proposed mines with Colstrip, Montana in the so-called 'Colstrip Alternative'. The STB established a website (http://www.tongueriverеis.com/) detailing the environmental planning, which serves as the primary data source in the current analysis. Pages contain links to all permits, project maps, planning documents, public informational materials, correspondence, and meeting transcripts. The website also details plans for public involvement including scoping plans and public meetings in response to comments on the DEIS and NHPA Section 106 consultation. On the surface, STB made all efforts to create and maintain an inclusive and transparent process.

In the TRRE case, the TRRC and STB began in good practice by triggering NEPA analysis early with the STB's Office of Environmental Analysis (OEA) serving as lead agency. STB officials made initial contact with tribal consulting parties, mostly the network of northern Plains tribes, in January 2012, months before an application had been filed. In October of 2012, the Montana State Historic Preservation

Office (MTSHPO) was invited to participate, and by mid-December, after settling on the Colstrip Alternative, numerous state and federal agencies and federally recognized tribes had been invited to participate. Nearly all notified parties agreed to participate. Ten public scoping meetings were organized and held in four local communities November 12-16, 2012 with the express goal of seeking public involvement in the project planning stages. The project plan followed the best-practice mantra, "Scope Early, Scope Often." Preparation of the DEIS took place over the next three years, making the DEIS available for public review and comment on April 17, 2015 (STB OEA 2015). The DEIS was available on the project website, as well as at several local, rural libraries. Plans were made for 10 public meetings in rural Montana communities, both on and off of the Northern Cheyenne Indian Reservation, June 8-12, 2015 with two meetings held each day at the designated location. The comment period also included two online public meetings facilitating participation from those not able to attend meetings in rural Montana. Informational materials were prepared in advance and delivered physically at meetings and electronically online. A court reporter was present making public meeting transcripts available for critical review. Even after the fact, the attention to detail in documentation by the STB as lead agency creates near absolute transparency in best-practice decision making incorporating the concerns of a diverse public.

A review of written comments and transcripts from public meetings shows a public unified in opposition echoing parallel yet somewhat different concerns. The Rosebud County, Montana population is an interesting demographic mix of rural native descendant communities and multi-generation ranching families with often intertwined histories. Their common values focus on cultural preservation that embraces traditional culture: hunting, plant gathering, religious practice, and cattle ranching. Environmental concerns lie primarily in the noise generated by the 7.4 coal trains estimated to travel the 42-mile Colstrip Alternative daily. These concerns were repeated in the more than 200 written and oral comments made in the 60 days of the DEIS review. Comments from online participants took a different tone. Public officials from Washington and Oregon communities, including major cities of Seattle, Spokane, and Olympia, identified "downline effects" as their central concern. These participants were quick to note that contrary to the stated Midwestern destination of Otter Creek coal, it would in fact be delivered to China as part of an estimated 37 coal trains each day connecting Montana and Wyoming coal mines to Pacific Northwest shipping terminals. Changes to traffic patterns, greater noise levels, concerns with toxic coal dust, and questions about declining coal markets and community CO_2 footprints were simply non-starters to the conversation. The civic engagement of these communities in the NEPA process and the procedural transparency initiated by the STB as lead agency facilitated this open and meaningful dialogue in the DEIS review regardless of the inevitable outcome of the FEIS and ROD.

At stake were the findings of an inventory and evaluation for archaeological sites conducted as part of the NHPA Section 106 review. As with other areas of the NEPA analysis, the Section 106 process

was transparent. Survey teams included tribal members from representative groups who worked alongside professional archaeologists. Teams surveyed some 8,600 acres among all alternative routes and were unable to access another 3,300 acres because of landowner restrictions. The survey reported 350 archaeological sites and 36 tribal resources; 58 total cultural resources were identified along the Colstrip Alternative. NRHP eligibility was not provided in the cultural resources chapter of the DEIS. Even though these findings read like business as usual, the Northern Cheyenne Tribe, in collaboration with the Sierra Club, the landowners' group, and Chris Finley, a retired National Park Service archaeologist, called into question the report findings raising issues of due diligence and good faith efforts in the Colstrip Alternative cultural resource survey. Tasked by the Sierra Club and landowners' group, Finley evaluated a sample of the OEA survey area conducting fieldwork with a native crew April 12-19, 2015. His findings suggested that standards of due diligence and good faith efforts had, in fact, not been met by the OEA survey. In a letter to STB lead Ken Blodgett, dated October 30, 2015, Northern Cheyenne Tribal President, Llevando Fisher, called into question the validity of the DEIS citing Finley's report as failing to meet the reasonable and good faith effort of NHPA Section 106 36 CFR Part 800. Decision making deteriorated during subsequent Section 106 consultation meetings as the monkey wrench this effective team threw into the system ground the Tongue River Railroad to a halt. On January 11, 2016 project proponent, Arch Coal, filed for bankruptcy, and by late March 2016 the two largest Powder River Basin coal companies began laying off employees as coal market shares fell. On April 26, 2016 the STB dismissed the TRRE without prejudice effectively stopping the project in its tracks. On June 16, 2016, members of the Lummi Indian Nation of Washington who had fought the TRRE from the West Coast shipping terminal, delivered a 22-foot tipi pole to the Northern Cheyenne Tribal Headquarters in Lame Deer, Montana. The tribes celebrated a war victory over King Coal; cultural resources were the sharp weapon.

The Dakota Access Pipeline Project

Dakota Access, LLC proposed construction of a 1,134 mile long pipeline to pump approximately 450,000 barrels of crude oil per day from the Bakkan and Three Forks production areas in North Dakota to Midwest and Gulf Coast markets (USACE Omaha District EA). Dakota Access dismissed trucking, rail transport and other alternatives for transporting the crude oil to market due to safety concerns and costs. Unlike a natural gas pipeline, there are no requirements for a general permit to construct a crude oil pipeline as long as it does not cross international boundaries; therefore, permitting for the majority of the pipeline construction occurs at the state level, which does not generally trigger NEPA or NHPA (ACRA 2016). Furthermore, both the Nation Wide Permit 12 and USACE regulations on Section 106 (33 CFR Part 325, Appendix C) narrow federal jurisdiction and oversight of petroleum pipelines and utility lines in

general. The Public Service Commission issues construction permits for the pipeline in North Dakota, and other similar commissions in South Dakota, Iowa, and Illinois issue construction permits for those states.

Dakota Access LLC announced its intent to construct the pipeline in June 2014 and proceeds with the planning process by coordinating with USFWS to identify potentially impacted easements along the proposed route. In the Final EA Dakota Access LLC outlines the route criteria, emphasizing the desire to avoid National Parks, historic properties, and reservation lands. The final EA documents significant consultation with USFWS in the route planning. According to *The Standing Rock Sioux et al. v United States Army Corps of Engineers et al.* (Civil Action 16-1534 JEB) Dakota Access LLC initiated consultation with the SRST on Sep. 30th 2014. In December 2014, Dakota Access LLC submits formal applications to begin construction of the pipeline. Ultimately, USFWS issues their Final EA and approval in May 2016, USACE Omaha District in July 2016, and USACE St Louis District in August of 2016.

DAPL triggered NEPA and NHPA review in two different contexts. First, the project requested permits to run across grassland and wetland easements managed by the United States Fish and Wildlife Service. Second, DAPL requested permits from the USACE for water crossings, triggering NEPA and NHPA review under the Rivers and Harbors Act and the Clean Water Act. The primary actors remain the same (e.g. Dakota Access LLC, USFWS, and the USACE), but the lead agency shifts based on the particular action being evaluated, but because most actions were water crossings, USACE took the primary lead role. The project crosses two wetland management districts in North Dakota and four in South Dakota. The Sand Lake wetland management district took the lead on DAPL for the USFWS in North and South Dakota. Jurisdiction for the USACE is split between two districts. The Omaha District is the lead for the North Dakota and South Dakota portions of the pipeline while the St Louis District is the lead for the Iowa and Illinois portions. The USFWS, and both USACE districts issued individual EAs for the project and apparently approached their consultation processes separately, focused within their narrow jurisdiction.

The Dakota Access Pipeline: USFWS

Dakota Access, LLC, initiated contact with the USFWS in July 2014 to begin gathering information about grassland and wetland easements affected by the proposed project corridor in North and South Dakota. In September 2014, Dakota Access submitted an initial proposal for routing to USFWS for review and comment about grassland and wetland easement crossings. This proposal for the Route Alternative 1 underwent intensive review in October 2014, and the lead USFWS Sandy Lake Wetland Management District makes recommendations, which are incorporated into the route to help avoid impacts to easements. This new route avoids easements in North Dakota, but crosses 112 easements in South Dakota, although in February 2015, updated data identifies six new easements in North Dakota, that Dakota Access was unable to avoid. Route Alternative 1 impacts 118 easements in North and South

Dakota. There is clear evidence that Dakota Access coordinated with USFWS early in the project design phase to help mitigate impacts to grassland and wetland easements.

The USFWS final EA suggests that the agency sent letters to 21 tribes requesting consultation regarding historic properties within the impacted easements on October 23, 2015. Furthermore, USFWS sent letters to the SHPO, ACHP, and USACE on October 29th, 2015 requesting information and consultation in regards to the pipeline project. Results from Class II/III cultural resource report necessary for NHPA compliance in North Dakota was submitted for review on May 5, 2015 and the Class III report for South Dakota was submitted on May 6, 2015. Revised reports were submitted on October 27, 2015. No information is provided in the final EA regarding the nature of the consultation or whether any of the 21 tribes responded to the letters or replied with an affirmative request to enter the consultation process.

Dakota Access Pipeline Project: USACE Omaha District

The Mitigated FONSI suggests 250 documented government-to-government interactions with Tribes, THPOs, SHPOs, ACHP, and Interested Parties beginning in September 2014. In October 2014 an information letter sent regarding preliminary geotesting of Lake Oahe crossing alignment-soliciting information relevant to proposed action (DAPL fEA Omaha District). The fEA states another letter sent on March 30, 2015 to interested parties as defined by corps, followed by a letter on July 2015 with information about pipeline installation and request for pertinent information about potentially sensitive sites within the Area of Potential Effect. On Dec 8, 2015 the USACE publishes the Draft EA on their website and opens a public commentary period from Jan 8, 2016 to Jan 11, 2016. On April 26, 2016 the North Dakota SHPO concurs with the USACE finding that the project will not adversely impact historic properties, although this is disputed by the ACHP on June 2, 2016. In response to the ACHP the Assistant Secretary of the Army Civil Works, sends a letter to the ACHP on July 25, 2016 affirming the USACE finding of no significant disturbance. That same day, the USACE publishes the FONSI for the Dakota Access crossings.

Documentation for the consultation process is limited within the fEA issued by the USACE Omaha District. Within the comment section, it is clear that there were interactions between the SRST and USACE (e.g. a site visit by two Army Corps archaeologists on March 7th, 2016), but the fEA makes the consultation process seem much smoother and in some ways less interactive than other sources seem to suggest. A timeline of the DAPL case constructed by Brandon Howard (2017) from the Chicago Tribune provides a letter dated February 17, 2015 sent to the SRST THPO requesting information and consultation about the project. Howard (2017) also provides a response from the THPO dated February 25, 2015 identifying cultural resources that may be impacted by the project and requesting a full EIS and Class III Cultural Resource Survey. The Memorandum of Opinion from *The Standing Rock Sioux et al. v United States Army Corps of Engineers et al.* (Civil Action 16-1534 JEB) documents the SRST THPOs

presence at a public meeting on September 30, 2014 and numerous contacts between the Dakota Access LLC archaeologist and the THPO after that meeting. The memo goes on to document numerous failed contact attempts by the USACE tribal liaison and several contacts by letter and email that received no response from the THPO. The memo continues to document failed attempts at multiple points in the consultation process until the spring of 2016 when several meetings and site visits occurred. Unfortunately, the decision in *United States Army Corps of Engineers et al.* (Civil Action 16-1534 JEB) is based entirely on USACE declarations and letters provided by the tribe. At the time of decision, the tribe had provided no declaration from the THPO. The memo contains much more detail on the consultation process between the USACE and the SRST than is provided here. Ultimately, the USACE sought to end the consultation process and issued a Determination of Effect, finding no eligible properties would be affected by the pipeline project. This finding is contested by the ACHP, but ultimately upheld by the USACE.

Dakota Access Pipeline Project: USACE St Louis District

The fEA published by the USACE St Louis District provides a more detailed picture of the consultation process. Phase I archaeological testing began in December of 2014 and continued through August of 2015. On September 3, 2015 the USACE St Louis district sent letters requesting formal consultation to over 70 tribes. On January 22, 2016 a second letter is sent to 28 tribes USACE St Louis consults with containing information about permit areas and asking if tribes want to enter into consultation. Consultation letter responses were received from January 29, 2016 to July 28, 2016. The fEA documents a letter dated February 3, 2016 received from the Osage Nation identifying some areas of concern, which are primarily mitigated by explanations of HDD, general avoidance of the sites, or sites by reassuring the tribe that the site is located outside project area. On March 2, 2016, the USACE St Louis district sends a third letter to all tribes asking which sites they would like to monitor and it is agreed that the Osage will monitor one site of concern and they verbally agree that they would not enter into consultation process. On April 4, 2016 the Illinois Historic Preservation Agency agrees with the USACE St Louis district and Dakota Access LLC that no further work is necessary to comply with NHPA.

VI. Discussion-*What does this study tell us about NEPA and NHPA as EJ and CJ tools*

Fossil fuel extraction has been the main economic driver in the interior western United States for decades, and the same is true of tribal economies in the northern Plains states of Montana, North Dakota, and South Dakota. In fact, an estimated 30% of the nation's coal reserves and 20% of its oil and gas reserves west of the Mississippi River are found on tribal lands suggesting that energy development will continue to be at the center of many tribal consultations ( ). The most recent energy boom beginning in the late 1990s saw the establishment of many Tribal Historic Preservation Office (THPO) programs as

part of local tribal governments. Although tribal governments have long been players in regional energy development, including the regulatory NEPA compliance, THPO programs codified participation in Section 106 review of the NHPA. The northern Plains THPO network is a captivating collaboration among once traditional enemies and allies now participating in a web of cultural resource compliance as non-native developers seek revenues in Indian Country in extension of what is an otherwise Colonial enterprise. Cultural resource management writ large today encompasses a vast native history encoded in the landscape and recognized by many tribal members as central to the future of traditional culture. Yet in a rural environment faced with extreme poverty and little prospect for economic development, many tribal members recognize the need to balance energy extraction with cultural preservation. In this process, scoping and consultation becomes even more critical in finding and implementing the best-practice decision.

The Absaloka Mine Expansion:

During the Section 106 review process, sixty-two archaeological sites were reported: 41 were evaluated for National Register of Historic Places (NRHP) eligibility; 9 were found eligible for inclusion to the NRHP; and 21 sites were identified as requiring additional work prior to determining eligibility. Interestingly, the text of the DEIS states that of the 21 sites requiring additional work, "none of these would be effected by mining disturbances associated with the Proposed Action or Alternative 1 (WWC Engineering 2008a:3-159)." The proposed action of the surface mine would remove all overburden to the coal deposit surface effectively destroying all surface or near-surface archaeological sites. The DEIS indicates that at the time the lead coordinating agencies, the Bureau of Indian Affairs (BIA) and Montana Department of Environmental Quality (MDEQ), were in process of conducting "Native American consultation and coordination," although beyond mention of the Crow Tribe and other potential tribal stakeholders the consultation plan remained unstated.

When compared to the best practices, this consultation misses the mark. For example, practitioners, tribes, and agency officials agree that consultation is best when parties are well informed and participate early in the process. In the Absaloka Mine Expansion, the newly formed Crow THPO assumed the lead role midway through the Section 106 process. Westmoreland Inc. began negotiations with the tribe for the expansion in 2004 and the Crow THPO was not formed until October 2005. Up until the formation of the Crow THPO, the Montana SHPO would have served as the final decision maker. This means that plans were well established prior to the Crow THPO taking the lead role and that the THPO lacked both experience serving as the decision maker in the Section 106 process and presumably capacity to conduct Section 106 evaluations. Thus, within this process the Crow THPO became involved late in the process and a disparity in knowledge and information existed between the consulting parties.

Practitioners, tribes, and agency officials also agree that a broad definition of stakeholders should be used to incorporate diverse perspectives and voices within the planning process. Additionally, to meet this goal, multiple methods for contacting potentially interested parties should be employed. There is little evidence that WRI attempted to contact interested parties beyond a few public notices printed in local newspapers. Furthermore, there is evidence that the Crow THPO and WRI made efforts to limit the number of parties involved in the consultation process. Potentially affiliated tribes such as the Northern Cheyenne, Blackfeet, Shoshone, and Arapahoe were not contacted and even within the Crow Tribe, members of the Cultural Committee and the 107 Committee of Elders were not informed of the action. Documented public meetings were held at the courthouse in Harding, MT, instead of at Crow Agency, the seat of the Crow Tribal Government. Written comments were solicited from a very narrow group of people. Thus, if a key to successful consultation is broad participation of interested parties, WRI and the Crow THPO clearly failed.

Finally, the role of consultation is to ensure public participation and public voice in the planning decisions that affect a community. This is a critical aspect in environmental and cultural justice because it gives the community a role in the planning process and brings transparency to development decisions. Consultation and public participation are also supposed to help balance the power differentials between the community and the developer. In this case, public participation was virtually non-existent and a complete lack of records regarding the consultation and planning process makes the decision making opaque at best. Additionally, the role of coal royalties within the Crow Tribe at both personal household and administration levels mean WRI sits at the table with a virtual club. Circumvention and a lack of dedication to NHPA and NEPA resulted in a massive failure in cultural justice. As a direct result of this failure an entire tribe, the scientific community, and the nation as a whole was robbed of one of the most significant archaeological sites discovered on the high plains in the past few decades.

***Tongue River Railroad Expansion*:**

The TRRE case exemplifies the role of cultural resources and collaborative opposition in slowing, if not halting, the environmental review process. The Northern Cheyenne Tribe as a whole has long opposed coal mining on their reservation, resisting all efforts at proposed development and instead taking pride in reservation air quality. The Sierra Club, a leading non-profit conservation organization, has served as a watchdog of coal and energy development in the Montana and Wyoming Powder River Basin since early in the most recent energy boom. Local landowners have also diligently watched surface mining ruin reliable water sources and otherwise destroy grazing allotments. And close on the heels of news about the destruction of the Sarpy Creek Bison Kill, archaeologists were leery of agency "good-faith efforts" as practiced in NEPA review. Although often suspicious of each other's best intentions, this diverse interest group came together in effective opposition to the TRRE.

Contrary to the Absaloka Mine disaster, the consultation process fulfills nearly all of the agreed upon best-practices. Participants were informed of the project in January 2012, well before any applications were filed, and nearly all parties chose to participate in the process at the scoping stage. As illustrated in the best-practices, multiple attempts in different venues and media forms were employed to generate public participation. 10 public scoping meetings were held in four local communities to seek public participation in the planning process. This project prepared a full EIS over a three year period with full public participation, and public commentary of the DEIS was sought in June 2015 at 10 public meetings held both on and off the Northern Cheyenne reservation with two additional online meetings. Not only were stakeholders involved in the planning and scoping process, they were also involved in the data collection and research design employed during the preparation of the EIS. We also see in this example that the consulting parties had similar levels of knowledge and resources and that when a dispute developed between the OEA and the opposition coalition about the cultural resource surveys, that the coalition was able to counter effectively the agency.

Ultimately, the TRRE failed to move forward. This was in large part due to the falling market for coal, but as illustrated in the best practices, the outcome of a project is not necessarily the best gauge of the success of a consultation. In this case had the project gone forward, it is likely that much of the public input would have been incorporated into the final plans and that major concerns of the interested parties would have been mitigated. While the project itself incorporates many aspects of consultation best practices, there is one final quality that should be mentioned, and that is transparency. TRRE maintained a website from the beginning of the process where information about the project plans, maps, and permits were available for public access. Additionally, and perhaps most importantly, court reporters were present at all public meetings regarding the TRRE and transcripts from those meetings were made available through the website meaning the NEPA and NHPA process and the efforts and consultation and public participation were highly transparent.

Dakota Access Pipeline Discussion-

The DAPL project is a failure on multiple levels of governance. The SRST are primarily concerned about NHPA violations in the destruction of cultural resources due to a lack of government-to-government consultation and violations of treaty rights granted in the Fort Laramie Treaties of 1851 and 1868 in the form of potential water pollution. Dakota Access LLC and the USACE argue they fulfilled environmental and cultural review laws and that the SRST declined to participate in many opportunities for consultation. At the foundation of this conflict is the lack of an overarching federal law covering petroleum pipeline projects. The length of this project means it primarily crosses private lands, which without federal permitting does not trigger NEPA or NHPA review for most of the project. Instead, NEPA and NHPA are only triggered in very limited situations when the project requires a specific permit

to cross a federal easement or a waterbody. In both cases, the scope of the review process is limited to the federal agency's jurisdiction meaning most of the impacted route has no requirements for federal review. This is reinforced by USACE regulations on the Section 106 process, published in 33 CFR Part 325, Appendix C, section 1g.4, and because utility lines, including petroleum pipelines, are covered by NWP 12, meaning that each water crossing may be treated as an individual action without triggering oversite of the entire utility line. Because of this, even a robust consultation process may not have been sufficient to alleviate tribal concerns with all of the issues associated with this project because aside from the crossing and some limited easements, agencies had no jurisdiction and no compelling power over Dakota Access LLC. That being said, we can still learn much about the NEPA and NHPA consultation process by looking at DAPL more closely.

Consultation strategies in this case go against multiple agreed upon best practices. Best practices agreed upon by practitioners, tribes, and agencies state that consultation should be government-to-government and be conducted with trust and respect. They also state that consultation requests should not rely on a letter and that multiple methods, including a face-to-face meeting, should be employed when requesting a consultation. In the case of the USACE Omaha District, efforts at tribal consultation are problematic from the beginning. To begin with, the September 30, 2014 letter to the tribe invited them to a meeting with Dakota Access LLC representatives, meaning the initiation of consultation was not conducted on a government-to-government basis. Additionally, the February 17, 2015 letter to the THPO requesting information and consultation is addressed to "Mr. Young", the SRST THPO. While this may seem inconsequential, the SRST THPO "Mr. Young" is a woman. Thus, the USACE opened consultation with a boilerplate form letter and assumed that the THPO was a man. This mistake sends several messages, including consulting officials from USACE did not have a standing relationship with the SRST THPO and consulting officials didn't spend much time figuring out who was the THPO. Comments to the Draft EA from the SRST highlight failures in the consultation process. They note that consultation was initiated with form letters sent to tribes inviting them to meetings with representatives from Dakota Access LLC, not representatives of the USACE. They argue that this is an inappropriate strategy for consultation and does not fulfill government-to-government obligations. DAPL consultations also fail to engage stakeholders early in the planning process and the entire consultation process lacks transparency. Interestingly, comparison of the fEA from the Omaha District and the fEA from the St Louis District seem to highlight intra-agency differences in consultation approaches and levels of transparency

VII. Conclusions

Based on this study, we find that when agencies commit to a robust consultation process and follow some basic guidelines for consultation, that NEPA and NHPA are effective tools for environmental and cultural justice. We also find that NEPA and NHPA puts the lead federal agency in the

information gathering and provision role with the overall goal of informed decision-making, but there is significant variability in what constitutes compliance. Attached to the information gathering and provision role, consultation with stakeholders is an important and mandated, yet poorly defined activity under both NEPA and NHPA. This consultation process provides considerable opportunity to mitigate cultural and environmental justice concerns, but this may be undermined intentionally or unintentionally during implementation (Outka 2006). Some avenues that can undermine environmental and cultural justice goals include explicit adoption of regulations that limit jurisdiction and oversight of federal projects, limited commitment to the consultation process, outright subversion of the consultation process, and clumsy implementation of consultation processes that do not take into account the history of US/Indian relationships.

Federal Policy regarding Native American culture incorporates an explicitly racist foundation stemming from the understanding that Native American cultural practices were "barbaric and heathen cultural practices" that must be eradicated in direct conflict with the constitutional right to the freedom of religion (Cross and Brenneman 1997). This systemic racism continues to echo through interactions between tribes and the federal government and effective and meaningful consultation is critical to balancing these power discrepancies and mitigating the effects of hundreds of years of distrust and broken agreements (Haskew 1999/2000). Cultural resource laws are beginning to take steps to effectively repair relationships with tribes by incorporating provisions for Traditional Cultural Properties, thus protecting important resources as defined by tribes. Additionally, by creating provisions for the creation of THPOs, cultural resource laws are putting tribes into the primary decision making role and codifying consultation requirements for tribes that are geographically removed, but historically connected to sensitive areas. Thus, cultural preservation laws begin to both acknowledge the history of tribal displacement and recognize that tribes may be stakeholders in cultural resources thousands of miles away from their current reservation lands. Because of this, NHPA and other cultural resource laws are increasingly important tools for cultural justice in regards to indigenous tribes.

Ultimately, NEPA and NHPA provide opportunities for agencies to pursue a robust model of public participation and consultation. In cases where agencies commit to the process, they find meaningful partnerships become institutionalized and beneficial to the conduct of the agencies mission. In these cases, NEPA and NHPA are robust tools for environmental and cultural justice goals. There are clearly benefits when agency officials pursue the best practice model of consultation that includes very early contact, well-defined roles, and potential to modify the project plans to alleviate the greatest concerns (Palmer et al. 2005). Best practice case studies illustrate some benefits from the relationships formed through robust consultation approaches such as effective mission implementation, smoother

processes for regulatory compliance, better public relations, reduced incidents of litigation, and opportunities to build knowledge pools that lead to more efficient decision making.

Implementing robust consultation strategies also helps agencies meet the legislative intent within NEPA and NHPA for environmental and cultural justice goals, but few tools exist for the evaluation of the consultation process (see Baker and McLelland 2003 for exception). The consultation language in NEPA and NHPA provides agencies with significant freedom in the conduct of the consultation process. The official roles of the stakeholders are unclear outside of the THPO, SHPO, and ACHP. Consultation ranges from information delivery to full community based, participatory cultural preservation. Access requirements to the consultation and decision making process are undefined, and the lack of definition results in variation in communication models ranging from monthly in-house meetings to individual meetings located in inconvenient times and or locations. This variation suggests that the geography of the consultation process may be a revealing variable for assessing consultation quality, especially in rural sites and communities where travel distances to meeting places easily turn into hours. We find based on this initial study that understanding, and evaluating the consultation process is critical for understanding the effectiveness of NEPA and NHPA as environmental and cultural justice tools. We suggest that one approach to evaluating consultation is to develop a multimetric analytical tool that evaluates variables in consultation based on a ranked qualitative definitions similar to tools used to evaluate water quality though biological assessment (see Davis and Simon 1995; USEPA 1990). EPA already evaluates the quality of the EIS, but this does not incorporate public participation or quality of the consultation process.

NEPA and NHPA can be powerful environmental and cultural justice tools when agencies commit to a robust consultation and public participation process, but they cannot stand alone in the face of other governance failures or willful subversion or half-hearted attempts intended only to meet the letter of the law. Thus, based on this study, we find that formalization of transparency procedures and requirements in the consultation process and creating tools to evaluate and compare the consultation process in different environments will strengthen NHPA and NEPAs effectiveness as tools for cultural and environmental justice.

Works Cited:

ACRA

2016 American Cultural Resource Association: *Statement on the Dakota Access Pipeline Controversy*, September 28, 2016

Atalay, S.

2006 Archaeology as Decolonizing Practice. *American Indian Quarterly* 30(3/4):280-310.

Baker, D. C. and J. N. McLelland

2003 Evaluating the effectiveness of British Columbia's environmental assessment process for first nations' participation in mining development. *Environmental Impact Assessment Review* 23:581-603.

Brent, M.

2006 The Rape of Mali. In *Archaeological Ethics*, edited by K. D. Vitelli and C. Colwell-Chanthaphonh. 2 ed. Alta Mira Press.

Bullard, R

2000 *Dumping in Dixie: Race, Class and Environmental Quality*. Boulder: Westview Press

CEQ and ACHP

2013 *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106*, edited by Council on Environmental Quality and the Advisory Council on Historic Preservation.

Comaroff, J. L. and J. Comaroff

2004 Criminal Justice, Cultural Justice: The Limits of Liberalism and the Pragmatics of Difference in the New South Africa. *American Ethnologist* 31(2):188-204.

Cross, R. and E. Brenneman

1997 Devils Tower at The Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century. *Public Land & Resources Law Review* 18.

Davis, L. B. and B. O. K. Reeves (editors)

1990 *Hunters of the Recent Past*. Unwin Hyman, London.

Davis, W. S. and T. P. Simon

1995 *Biological Assessment and Criteria: Tools for Water Resource Planning and Decision Making*. Lewis Publishers, New York.

Ferguson, T. J.

1996 Native Americans and the Practice of Archaeology. *Annual Review of Anthropology* 25:63-79.

Haskew, D. C.

1999/2000 Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame? *American Indian Law Review* 24(1):21-74.

Hollowell, J

2006 When Artifacts are Commodities. In *Archaeological Ethics*, edited by K. D. Vitelli and C. Colwell-Chanthaphonh. 2 ed. Alta Mira Press.

Howard, B

2017 *Timeline: History of the Dakota Access pipeline*. Chicago Tribune, Jan 24, 2017.

Hutt, S. and J. Lavallee

2005 *Tribal Consultation: Best Practices in Historic Preservation*. National Park Service and the National Association of Tribal Historic Preservation Officers.

King, T. F.

2004 *Cultural Resource Laws and Practice (Heritage Resource Management Series).* Alta Mira Press

Kornfeld, M., G. Frison and M. L. Larson
2009 *Prehistoric Hunter-Gatherers of the High Plains and Rockies: Third Edition*. 3rd ed. Left Coast Press.
Maddox, M.
2009 Cultural Justice. In *Institutional Issues Involving Ethics and Justice: v. 1*, edited by R. C. Elliot. EOLSS Publishers Co Ltd.
Mcintosh, R. J., S. K. Mcintosh and T. Togola
2006 People without History. In *Archaeological Ethics*, edited by K. D. Vitelli and C. Colwell-Chanthaphonh. 2 ed. Alta Mira Press.
Macmillan, L,
2012 Bison Bones, a Backhoe, and a Crow Curse. Outside Online. Outside Magazine.
Meyer, G.
2004 *A Class III Cultural Resource Survey of Westmoreland Resources, Inc. Absaloka Mine Tract III South Addendum Area*. Prepared for Absaloka Mine, Westmoreland Resources, Inc., Hardin, Montana by GCM Services, Inc., Butte, Montana.
Meyer, G and G. Munson
2004 *A Class III Cultural Resource Survey of Westmoreland Resources, Inc. Absaloka Mine Tract III South*. Prepared for Absaloka Mine, Westmoreland Resources, Inc., Hardin, Montana by GCM Services, Inc., Butte, Montana.
Mosher, John,
1991 *No Greater Abomination: Ethnicity, Class, and Power Relations on Malaga Island, Maine, 1880-1912*, Masters Thesis, University of Southern Maine, American and New England Studies Program.
O'Neill, S.
2000 Cultural Justice and the Demands of Equal Citizenship: The Parading Dispute in Northern Ireland. *Theoria: A Journal of Social and Political Theory* (96):27-51.
Old Coyote
2015
Outka, U.
2006 NEPA and Environmental Justice: Integration, Implementation, and Judicial Review. *Environmental Affairs* 33(601).
Palmer et al.
2005
Ringquist, E. J.
2005 Assessing Evidence of Environmental Inequities: A Meta-Analysis. *Journal of Policy Analysis and Management* 24(2):223-247.
Roberts, L. S.
2016 Federal Consultation With Tribes Regarding Infrastructure Decision Making, Departments of the Interior, Justice, and Army.
Sabloff, J. A.
2008 *Archaeology Matters: action archaeology in the modern world*. Left Coast Press Inc., Walnut Creek, CA.
Scarre, C. and G. Scarre
2006 *The Ethics of Archaeology: Philosophical Perspectives on Archaeological Practice.* Cambridge University Press
Sebastian, L and W. D. Lipe
2009 *Archaeology and Cultural Resource Management: Visions for the Future.* School for Advanced Research Press
Stanfill, A. L.
1999 Native American Participation in Federal Programs Under the National Historic Preservation Act. *Plains Anthropologist* 44(170):65-70.

Stern, M. J., D.J. Blahna, L.K. Cerveny, and M.J. Mortimer
2009 Visions of success and achievement in recreation-related USDA Forest Service NEPA processes. *Environmental Impact Assessment Review* 29(4): 220-228.
Stoffle, R. W., M. N. Zedeño and D. B. Halmo
2001 *American Indians and the Nevada Test Site: A Model of Research and Consultation*. United States Department of Energy.
Stottman, M.J.
2011 *Archaeologists as Activists. Can Archaeology change the World?* University of Alabama Press. Tuscaloosa.
Suagee, D. B.
2010 Consulting with Tribes for Off-Reservation Projects. *Natural Resources & Environment* 25(1):54-56.
Turkewitz, Julie
2017 Tribes that live off coal hold tight to Trump's promises. *The New York Times* April 1, 2017.
USEPA.
1990 *Biological Criteria: National program guidance for surface waters (EPA 440/5-90-004)*. U.S. Environmental Protection Agency: Washington
USEPA
2017 USEPA Environmental Justice Website: https://www.epa.gov/environmentaljustice. Accessed 2017
Vitelli, K. D. and C. Colwell-Chanthaphonh
2006 *Archaeological Ethics*. Alta Mira Press, 2nd ed.
WH-IAEWG and CACAG
2009 *List of Federal Tribal Consultation Statutes, Orders, Regulation, Rules, Policies, Manuals, Protocols and Guidance*, edited by White House-Indian Affairs Executive Working Group (WH-IAEWG) and Consultation and Coordination Advisory Group (CACAG).
Wood, C
2003 *Environmental Impact Assessment: A Comparative Review.* Routledge, 2nd ed.
WWC Engineering
2008a DRAFT Environmental Impact Statement for the Absaloka Mine Crow Reservation South Extension Coal Lease Approval, Proposed Mine Development Plan, and Related Federal and State Permitting Actions .
WWC Engineering
2008b