Accountability or merely "good words"? An analysis of tribal consultation under the National Environmental Policy Act and the National Historic Preservation Act

Matthew J. Rowe, Judson Byrd Finley, and Elizabeth Baldwin[1]

Abstract

The Dakota Access Pipeline (DAPL) brought issues of environmental justice, energy development, and Native American sovereignty to worldwide attention. Central to this dispute was the definition of "meaningful" consultation within the context of the National Environmental Policy Act (1969) and the National Historic Preservation Act (1966). Many cases document the failure of the consultation process during NEPA and NHPA review, but this line of research does little to propose actions to mitigate these failures. This paper compares three projects involving Tribal governments that underwent NEPA and NHPA review and resulted in three different outcomes. Based on these projects, we find that a lack of transparency during the consultation process is a common factor among failed consultations. Additionally, we recognize that because the Administrative Procedure Act (APA) limits the court's review power and provides agencies significant discretion in their interpretation of statutory consultation obligations, judicial review has not provided much satisfaction to Tribes. We propose that review mechanisms that grade levels of transparency and stakeholder participation in the review processes can improve accountability and the effectiveness of consultations. The Environmental Protection Agency (EPA) reviews Environmental Impact Statements (EISs) for the quality of the scientific research. Expanding this mechanism to include review of consultation and public participation would provide agencies with incentives to improve consultation practices. Ultimately, meaningful consultation conducted on a government-to-government basis can balance development and preservation goals and help fulfill the noble intentions of NEPA and NHPA.

[1] Dr. Matthew J. Rowe, RPA#33599753, is a Curatorial Assistant at the Arizona State Museum and a Lecturer in the School of Anthropology at the University of Arizona. Rowe originally presented a version of this work at the *Environmental Justice in the Anthropocene* conference, at Colorado State University in Fort Collins, Colorado on April 25, 2017. Dr. Judson B. Finley is an Assistant Professor, Co-Director of Graduate Program, and Program Coordinator of Native American Studies Minor in the School of Sociology, Social Work and Anthropology at Utah State University. Dr. Elizabeth Baldwin, J.D., is an Assistant Professor at the University of Arizona's School of Government and Public Policy.

Introduction

It was a hot and silent afternoon in Indian Country as we stood next to the pit, roughly the size of an Olympic swimming pool, and watched cows defecate on the pile of sun-bleached bison bones. Ancestors of Plains Indians had killed and butchered the bison, then buried the bones with artifacts and offerings more than 3,000 years ago. Several days earlier in our archaeological field school, we had lectured on the mechanisms that the National Environmental Policy Act of 1969 (NEPA)[2] and the National Historic Preservation Act of 1966 (NHPA)[3] employ to protect our nation's natural and cultural resources. We had walked our students through the scoping process, the steps in the review process, and emphasized how consultation with stakeholders was integral to the decision-making process.[4] Standing there that hot afternoon, our students demanded to know why these provisions had failed to prevent the nearly complete destruction of this Late Archaic site located on the Crow reservation.

Surrounded by our very angry students – Apsáalooke (Crow) and Northern Cheyenne tribal members – we found ourselves trying, unsuccessfully, to explain the legal intricacies of the tribal consultation requirements mandated by NEPA and NHPA. We later found out that few people on the Crow or Northern Cheyenne Reservation or in the archaeological community knew anything about the devastation of the bonebed until after it had already happened. Something had gone horribly wrong during the NEPA and NHPA review for the Sarpy Mine Expansion[5] and it was clear to all that both laws had failed to protect this potential World Heritage site.[6]

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[2] National Environmental Policy Act 42 U.S.C. §§ 4321-4347 (2012).
[3] National Historic Preservation Act 16 U.S.C. § 470 (2012).
[4] Matthew J. Rowe *et al.*, *Putting America's Cultural Resources to Work*, 14 SAA ARCHAEOLOGICAL RECORD 34 (2014).
[5] Leslie Macmillan, *Bison Bones, a Backhoe, and a Crow Curse*, OUTSIDE ONLINE (Nov. 10, 2012), https://www.outsideonline.com/1910586/bison-bones-backhoe-and-crow-curse?page=all (last visited Oct. 25, 2017).
[6] The site was a massive bonebed resulting from the butchery of hundreds, if not thousands, of buffalo. Scanty evidence from the hand-excavated portion of the site suggests that artifacts and red ochre were placed on top of bison bones and may have been part of a ceremony or ritual closure of the site. The size of the bonebed alone should

In 2016, four years later, as we watched the widespread protests in response to the Dakota Access Pipeline project in South Dakota, it was abundantly clear that conversations about consultation, preservation, and Native American sovereignty had not gotten easier. Members of the Standing Rock Sioux occupied a remote construction site to protest the planned crude oil pipeline that would cross the Missouri River just upstream from their reservation and intakes for their drinking water system.[7] Principally among the tribe's grounds for protest was the claim that they had not been properly or meaningfully consulted about the project, as required by NEPA and NHPA.[8] As a result, the project design did not address the tribe's concerns about water quality, protection of archeological resources, and other impacts to their immediate environment. The United States Army Corps of Engineers (USACE), however, claimed that they had made a good faith effort and had followed all legally required consultation requirements.[9]

In this Article, we recognize that consultation mandates are one of the primary policy instruments that help mitigate environmental and cultural justice concerns. We argue that the intentions of the tribal consultation processes mandated by NEPA and NHPA are undermined by a lack of transparency and insufficient accountability mechanisms, and that the use of a wider range of accountability instruments would improve the effectiveness of these statutes. In making this argument, we look beyond judicial remedies and consider a wider range of ways that politicians, citizens, and other stakeholders might hold federal agencies accountable for their

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have made it eligible for consideration for the National Register of Historic Places, but evidence of ritual closer makes the site incredibly unique. *See* Adrian Jawort, *Sacred Bison Honoring Site Destroyed for Coal Underneath*, INDIAN COUNTRY TODAY (Oct. 30, 2012), https://indiancountrymedianetwork.com/news/sacred-bison-honoring-site-destroyed-for-coal-underneath/ (last visited Oct. 25, 2017); *see also* NATIONAL WILDLIFE FOUNDATION, *2,000-year-old Bison Bone Bed Destroyed on Crow Reservation* (Oct. 24, 2012), available at http://blog.nwf.org/2012/10/2000-year-old-bison-bone-bed-destroyed-on-crow-reservation/.

[7] Robinson Meyer, *The Legal Case for Blocking the Dakota Access Pipeline*, THE ATLANTIC (Sept. 9, 2016), https://www.theatlantic.com/technology/archive/2016/09/dapl-dakota-sitting-rock-sioux/499178/ (last visited Oct. 25, 2017).

[8] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77 (D.C. Dist. Ct. 2016).

[9] *See infra* notes 181 – 185 and accompanying text.

actions. We identify increased transparency in the consultation process as a key to improved accountability, and recommend the development of a system to assess the quality of agencies' public participation and tribal consultation practices under NEPA and NHPA, akin to the system that EPA currently uses to assess the scientific quality of EISs prepared under NEPA.[10] Such a system would draw the attention of agency officials, scholars, and stakeholders to successes and failures in the implementation of tribal consultation and enable these actors to push for improved consultation practices.

Most major infrastructure projects in the U.S., like those discussed above, are subject to federal tribal consultation requirements.[11] NEPA and NHPA require federal agencies to assess environmental and cultural impacts and consult with tribes, the public, and other stakeholders before initiating major federal actions, including building infrastructure or issuing permits to the private sector.[12] These laws have the noble goal of ensuring that impacts to environmental resources and important historic and cultural sites are considered in the development process,[13] as well as ensuring that those affected by development have an opportunity to participate in

[10] *See generally* Kelly Tzoumis & Linda Finegold, *Looking at the Quality of Draft Environmental Impact Statements Over Time in the United States: Have Ratings Improved?* 20 ENVIRONMENTAL IMPACT ASSESSMENT REVIEW 557 (2000); Kelly Tzoumis, *Comparing the quality of draft environmental impact statements by agencies in the United States since 1998 to 2004*, 27 ENVIRONMENTAL IMPACT ASSESSMENT REVIEW 26 (2007).

[11] *See generally* Collette Routel & Jeffrey Hoth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J. L. REFORM 417 (2013). However, there are mechanisms to reduce oversight and limit the review process for certain project categories. These include categorical exclusions, which exempt entire classes of projects from NEPA review. *See generally* Ken Moriarty, *Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, 79 N.Y.U. L. REV. 2312 (2004). Other mechanisms include Nationwide Permits, including the Army Corps of Engineers' Nationwide Permit 12, which specifically focuses on linear infrastructure like utility lines and crude oil pipelines and states that permit applicants meeting conditions specified in Nationwide Permit 12 regulations are exempt from the full environmental review process. *See* ARMY CORPS OF ENGINEERS, DECISION DOCUMENT NATIONWIDE PERMIT 12 (2012), http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP_12_2012.pdf (last visited Oct. 25, 2017).

[12] 40 C.F.R. Part 1500.1b (2016). *See also* Randy J. Sutton, *Jurisdiction of Federal Court in Action Under National Environmental Policy Act (NEPA), 42 U.S.C.A. §§ 4321 to 4347, as Determined by Whether Federal Defendants Have Undertaken "Major Federal Action,"* 53 A.L.R. FED. 2d 489, at 1-3 (2011).

[13] COUNCIL ON ENVTL. QUALITY AND ADVISORY COUNCIL ON HISTORIC PRESERVATION, NEPA AND NHPA: A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106, at 4 (2013); *see also* CHRISTOPHER WOOD, ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW (Routledge 2003).

decision-making.[14] They also give tribes substantial authority to shape and steer projects on tribal lands, given that NHPA authorizes the formation of Tribal Historic Preservation Offices that sign off – or refuse to sign off – on projects before they can commence.[15] All too often, however, tribal authority granted under NHPA are merely "good words"[16] that exist on paper rather than in practice. Despite the worthy goals of NEPA and NHPA, agency consultation practices have at times been found to violate both the letter and the spirit of agency consultation guidelines,[17] and there is a widespread perception among tribes and many legal scholars that consultation under NEPA and NHPA fails to adequately and substantively incorporate tribes' concerns in the planning process.[18]

Our argument is based on an analysis of consultation practices that goes beyond well-publicized failures and includes instances of successful consultations. While highly controversial examples such as DAPL bring much attention to the failures of NEPA and NHPA, exclusive focus on failures does little to advance the conversation towards meaningful policy and process changes that could help avoid similar conflicts in the future. In order to learn why consultations succeed or fail, it is important to look at examples of both success and failure. For instance, a few years before the Standing Rock incident, the Tongue River Railroad Company proposed

[14] *See* Nicholas A. Fromherz, *From Consultation to Consent: Community Approval as a Prerequisite to Environmentally Significant Projects*, 116 W. VA. L. REV. 109, 110.
[15] LYNE SEBASTIAN AND WILLIAM D. LIPE, ARCHAEOLOGY AND CULTURAL RESOURCE MANAGEMENT: VISIONS FOR THE FUTURE, 175-76 (School for Advanced Research Press 2009); Alan L. Stanfill, *Native American Participation in Federal Programs Under the National Historic Preservation Act*, 44 PLAINS ANTHROPOLOGIST 65, 65-66 (1999).
[16] Young (Chief) Joseph, *An Indian's View of Indian Affairs*, 128 N. AM. REV. 269 (1879). Joseph states: "I am tired of all the talk that comes to nothing. It makes my heart sick when I remember all the good words and all the broken promises." *Id.* at 432.
[17] Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame*? 24 AM. IND. L. REV 21, 49 (1999); Dean Suagee, *Consulting with Tribes on Off-Reservation Projects*, 25 NAT. RES. &ENV'T 54.
[18] E.g., Haskew, *supra* note 17, at 47-50; Routel and Hoth, *supra* note 11, at 448; *See also* Kurt E. Dongoske, Theresa Pasqual, and Thomas F. King, *Environmental Reviews and Case Studies: The National Environmental Policy Act (NEPA) and the Silencing of Native American Worldviews*, 17 ENVIRONMENTAL PRACTICE 36 (2015).

construction of a rail line to transport Montana coal to ports along the west coast.[19] The Northern Cheyenne Tribe had expressed concerns, similar to those of the Standing Rock Sioux, that infrastructure to transport fossil fuels might harm important natural and cultural resources.[20] Specifically, tribal members were concerned that the project's proponents had not adequately identified potentially impacted archaeological resources.[21] Unlike the Standing Rock Sioux, however, the Northern Cheyenne did not rise up in public protest. They did not need to, because they were able to participate in a meaningful consultation process in which the Tongue River Railroad Company was prepared to recognize and address the tribe's concerns before moving forward with the project.[22]

Moreover, the success or failure of tribal consultations under NEPA and NHPA has important implications for environmental and cultural justice. The EPA defines environmental justice as "fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[23] The NEPA and NHPA processes explicitly ask federal agencies to consider environmental justice implications of proposed projects, although examples like the DAPL case suggest that this inquiry is sometimes cursory at best.[24] In this Article, we expand our consideration of environmental justice to include cultural justice.[25] We

[19] *See infra* note 137 and accompanying text.
[20] *See infra* notes 151-153 and accompanying text.
[21] *Id.*
[22] *See infra* notes 142-145 and accompanying text.
[23] U.S. EPA, EJ 2020 Action Agenda: The U.S. EPA's Environmental Justice Strategic Plan for 2016-2020, at 1.
[24] In response to Executive Order 12898, the Council on Environmental Quality has issued guidance for federal agencies to consider environmental justice issues as part of the NEPA process. *See generally* Council on Environmental Quality, *Environmental Justice: Guidance Under the National Environmental Policy Act* (CEQ, https://www.epa.gov/environmentaljustice/ceq-environmental-justice-guidance-under-national-environmental-policy-act (last visited Oct. 25, 2017); *see also* Council on Environmental Quality and Advisory Council on Historic Preservation, *supra* note 13, at 14-15.
[25] The term "cultural justice" typically refers to a majority inhibiting the cultural practice of a minority, or to the variation in cultural perceptions of the definition of justice within legal contexts. *See* John L. Comaroff and Jean Comaroff, *Criminal Justice, Cultural Justice: The Limits of Liberalism and the Pragmatics of Difference in the New*

define cultural justice as the fair treatment and meaningful involvement of all people with respect to the implementation of laws and policies intended to protect and preserve cultural artifacts, including archaeological resources and affiliated cultural sites. We argue that cultural justice is a crucial, but overlooked aspect of environmental justice.[26] Whereas environmental justice seeks to prevent race- and class-based inequities in exposure to environmental harms, cultural justice seeks to prevent race- and class-based inequities in the respect, protection, and preservation of cultural history.

Environmental and cultural justice are particularly sensitive issues on tribal lands, where historic interactions between tribes and the federal government are wrought with examples of broken treaties[27] and federal policies intended to weaken or destroy Native sovereignty.[28] Given this fraught relationship, effective government-to-government[29] interactions, including mandated consultations, require tacit acknowledgment of this history and the institutional racism embedded in federal Indian policies.[30] All too often, however, consultation practices used by federal

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South Africa, 31 AMERICAN ETHNOLOGIST 188, 188-90; *see also* Marion Maddox, *Cultural Justice 90-91in* INSTITUTIONAL ISSUES INVOLVING ETHICS AND JUSTICE: V. 1 (R. C. Elliot, ed., EOLSS Publishers Co. Ltd. 2009). Our definition of cultural justice 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.

[26] Elizabeth Ann Kronk Warner, *Environmental Justice: A Necessary Lens to Effectively View Environmental Threats to Indigenous Survival*, 26 TRANSNAT'L L. & CONTEMP. PROBS 343, 350 (207); Joel Brady, *Land Is Itself a Sacred, Living Being: Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of Bear Lodge*, 24 AMERICAN INDIAN LAW REVIEW 153, 154; Dean B. Suagee & Peter Bungart, *Taking Care of Native American Cultural Landscapes*, 27 NATURAL RESOURCES AND ENVIRONMENT 23, 23 (2013).

[27] *See generally* VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES (Univ. of Tex. Press 1974); *see also* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"-How Long a Time Is That?*, 63 CAL. L. REV. 601, 610 (1975).

[28] For example, special government relationships grant Tribes direct control over reservation lands, but much of this control is filtered through the legacy of the General Allotment Act of 1887, otherwise known as the Dawes Act, that breaks jurisdiction on reservations. The Dawes Act, Statutes at Large 24, 388-91 (1887). Section 5 provides for the sale of tribal lands to agriculture to non-native settlers, thus creating the current situation where Indian and non-Indian landowners coexist within reservation boundaries and eroding tribal sovereignty within reservation borders. *See also* Allison M. Dussias, *Jurisprudence: Heeding the Demands of Justice Blackmun's Indian Law Opinions*, 71 N. D. L. REV. 41, 49, 111 (1995); Joseph Singer, *Legal Theory: Sovereignty and Property*, 86 NW. U. L. REV. 1, 9.

[29] For an explanation of government-to-government relations, *see* Rudolph C. Ryser, *Between Indigenous Nations and the State: Self-Determination in the Balance*, 7 TULSA J. COMP. & INT'L L. 129, 138-39.

[30] *See* Raymond Cross & Elizabeth Brenneman, *Devils Tower at The Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century*, 18 PUBLIC LAND & RESOURCES L. REV. 5 (1997).

agencies fail to acknowledge the government-to-government relationship and instead revert to a patriarchal relationship where tribes are considered subjugated dependents.[31] This can result in miscommunication at best and a near total disregard of tribal voices and sovereignty at worst. These practices undermine NEPA and NHPA's legislative intent for consultation, fair representation, and participation. To fulfill this legislative intent in their interactions with tribes, federal agencies may need to go beyond the letter of the law and engage in practices that recognize the unique relationship between tribes and agencies.[32]

This Article proceeds as follows: Part I, discusses the legal development of agency duties to consult with tribes, exploring why Congress has directed agencies to consult with tribes under NEPA and NHPA, and summarizing agency duties under the law. Part II, through a review of proposed best practices in tribal consultation and a comparative analysis of three case studies, shows that actual consultation practices vary across and within agencies and often fails to achieve the substantive goals of NEPA and NHPA. Part III, argues that accountability mechanisms are crucial to effective tribal consultation, and recommends several changes to the NEPA and NHPA processes that would improve the effectiveness of these statutes through greater accountability.

[31] *See generally* Haskew, *supra* note 17.
[32] *See* Haskew, Section II Part C (p. 28) and Section III Part D (p. 40).

I. NEPA and NHPA (In Theory) Provide Stakeholders an Opportunity to Shape Federal Agency Decisions Affecting Cultural and Environmental Resources.

Congress passed the NHPA in 1966, and the NEPA just three years later in 1969.[33] Both acts explicitly recognize the public's interest in ensuring basic levels of environmental and historic protection and preservation.[34] The text of NHPA states that:

> historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency . . . 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.[35]

Similarly, the goal of NEPA is to assure "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."[36] Accordingly, both statutes recognize that economic development threatens cultural and environmental resources, and both statutes have a substantive goal of protecting and preserving these vulnerable resources.[37]

In practice, these statutes' lofty substantive goals are achieved through the process of "impact assessment," which requires participants to gather scientific information about the likely effects of a proposed project, as well as consult with communities and other affected parties.[38]

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[33] *NHPA Public Law 89-665*; 80 STAT.915; 16 U.S.C. 470 and *NEPA Public Law 91-190*; 83 STAT.852; 42 U.S.C. 4321.
[34] 42 U.S.C. § 4321; 54 U.S.C. § 100101.
[35] 16 U.S.C. 740, at (b) 3 -4.
[36] 42 USC § 4331.
[37] 42 U.S.C. § 4331; 54 U.S.C. § 100101.
[38] *See generally* Lynton K. Caldwell, *Analysis-Assessment-Decision: The Anatomy of Rational Policy Making*, 9 IMPACT ASSESSMENT 81 (1991).

Regulations promulgated by the Council on Environmental Quality (CEQ) and the Advisory Council on Historic Preservation (ACHP) provide detailed instructions on how agencies should proceed to analyze impacts of their proposed actions and engage with the public.[39] The underlying presumption is that federal agency decision makers – as rational actors – will take into consideration the environmental and cultural harms, and choose a course of action that fulfills the statutes' substantive mandates to balance environmental and historic preservation with development.[40] As a result, these statutes are often referred to as "stop, look, and listen" laws – they do not mandate or forbid particular actions, but they do require that agencies make informed decisions.[41] The requirements of both statutes are described briefly below.

A. NEPA and NHPA Require Agencies to Make Informed Decisions About Impacts to Environmental and Cultural Resources.

NEPA applies to all federal agencies and is triggered when an agency plans a "major Federal action significantly affecting the quality of the human environment."[42] These actions include major federal infrastructure, such as highways or communication towers, as well as the issuance of permits on federal lands.[43] When NEPA is triggered, agencies must undertake an Environmental Assessment (EA), which analyzes the proposed project's environmental and cultural impacts.[44] Based on the information in the EA, agencies may issue a Finding of No Significant Impact (FONSI), allowing the project to move forward with no further environmental review.[45] If the assessment identifies potential significant environmental impacts, agencies will

[39] Council on Envtl. Quality and Advisory Council on Historic Preservation, *supra* note 13.
[40] *See* Caldwell, *supra* note 34.
[41] Council on Envtl. Quality and Advisory Council on Historic Preservation, *supra* note 13. *See also* Jamison Colburn, *The Risk in Discretion: Substantive NEPA's Significance*, 41 COLUM. J. ENVTL. L. 1, 1-2 (2016).
[42] 36 C.F.R. § 800.8(a)(1).
[43] *See* 40 C.F.R. § 1508.18 for definitions of major federal actions.
[44] 40 C.F.R. §1501.3.
[45] 40 C.F.R. Part 6.

need to prepare a full EIS.[46] An EIS includes an initial scoping process to identify the extent of the analysis; the development and analysis of multiple project alternatives, including the "no action" alternative; the issuance of a DEIS; and the preparation of a final EIS.[47] The agency planning the proposed action or permit issuance is considered the lead agency, but is often required to consult with other federal agencies. For example, the US Fish and Wildlife Service (USFWS) is typically asked to issue a Biological Opinion analyzing potential harms to wildlife.[48] Agencies are also required to provide the public with an opportunity to comment on the DEIS before it is finalized and a record of decision (ROD) is published in the Federal Register.[49]

NHPA is the central law protecting cultural resources in the U.S., including places associated with important events or people, unique or important craftsmanship, and sites with the potential to build knowledge and understanding of the past.[50] Section 106 of the NHPA establishes the essential "stop, look and listen" requirement, mandating federal agencies to consider their impact on cultural resources before embarking on or authorizing major projects.[51] 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.[52] Like NEPA, the Section 106 process begins with scoping to identify stakeholders and affected communities.[53] Field assessments then identify cultural resources, evaluate their eligibility for inclusion on the National Register of Historic Places (NRHP), and

[46] 40 C.F.R. § 1508.9.
[47] 40 C.F.R. Part 1502.
[48] 42 USC § 4332.
[49] 40 C.F.R. Part 1503.
[50] 36 C.F.R. Part 60.4
[51] 36 C.F.R. Part 800; Section 106-16 U.S.C. § 470f.
[52] 54 U.S.C § 304101.
[53] Michael C. Blumm & Andrea Lang, *Shared Sovereignty: The Role of Expert Agencies in Environmental Law*, 42 ECOLOGY L. Q. 609, 613 (2015).

identify adverse effects of the proposed action on properties listed on, or eligible for inclusion to, the NRHP.[54] Resolution of adverse effects—often through avoidance or large-scale data recovery—is determined through consultation with stakeholders, including State Historic Preservation Offices (SHPOs) and Tribal Historic Preservation Offices (THPOs).[55] The relevant SHPO or THPO is expected to issue a finding summarizing the project's impacts on historic and cultural resources, and to assist in developing a mitigation plan in cases where cultural resources are adversely impacted.[56] These plans are implemented with final approval from the ACHP.[57] Like NEPA, NHPA does not forbid actions that harm cultural resources, nor mandate that the least damaging action must be taken, but does require the relevant SHPO or THPO to issue a finding before a project can proceed.[58] While NEPA and NHPA are technically separate statutes, in practice they are undertaken jointly, and consultation with SHPOs and THPOs is done as part of the EA and EIS process.[59]

B. Effective Impact Assessment Includes Participation by Affected Parties

A key aspect of both statutes is the requirement that stakeholders who are affected by agency decisions should be included in agency decision-making processes. For example, NEPA requires public participation: at a minimum, the public must be notified of the DEIS and allowed to comment before the EIS becomes final.[60] CEQ also instructs agencies to consider environmental justice as part of the NEPA process, specifically by gathering data on community

[54] Am. Council on Historic Preservation, *Section 106 Guidance*, http://www.achp.gov/docs/ACHP%20ARCHAEOLOGY%20GUIDANCE.pdf (last visited Oct. 29, 2017).
[55] 36 C.F.R. Part 800; § 106-16 U.S.C. § 470f. For an overview of the consultation process, *see also* S. Rheagan Alexander, *Tribal Consultation for Large-Scale Projects: The National Historic Preservation Act and Regulatory Review*, 32 PACE L. REV. 895 (2012).
[56] Am. Council on Historic Preservation. WORKING WITH SECTION 106 USERS GUIDE, http://www.achp.gov/flowexplain.html (last visited Oct. 25, 2017).
[57] *Id.*
[58] 36 C.F.R. § 800.6 (b).
[59] Council on Envtl. Quality and Advisory Council on Historic Preservation, *supra* note 13.
[60] 40 C.F.R. § 1503.4

characteristics – such as demographics and historical factors – and examining whether the project exposes underrepresented communities to disproportionate environmental risk.[61] In practice, these processes are not standardized and each agency has developed its own internal practices and norms for implementing NEPA and NHPA.[62] While some agencies routinely invite the public to comment early and often in the scoping process and periodically throughout the development of the EIS,[63] process details vary from agency to agency.

NHPA similarly requires lead agencies to inform the public about a proposed action and invite public input, usually as part of the NEPA process.[64] NHPA also places specific emphasis on tribal consultation, and requires lead agencies to provide affected tribes with a reasonable opportunity to provide input on the proposed action.[65] Additionally, NHPA requires agencies to identify tribes whose interests are likely to be impacted and initiate consultation with them.[66] Among tribes who have established a THPO under the 1992 NHPA amendments, consultation can be done through the THPO.[67] As with NEPA regulations, NHPA provides lead agencies with substantial flexibility to develop tribal consultation practices that are tailored to the size, scope, and location of the project, provided that the agency makes a good faith effort to consult with tribes and other stakeholders.[68]

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[61] Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENV. AFF. L. REV. 601, 606 (2006).
[62] For example, the Forest Service has developed its own internal guidelines to shape agencies' NEPA compliance procedures. *See* Marc Stern, *et al.*, *Visions of Success and Achievement in Recreation-Related USDA Forest Service NEPA processes.* 29 ENVTL. IMPACT ASSESSMENT REV. 220 (2009).
[63] Erica Morrell, *Public Comment Periods and Federal Environmental Impact Statements: Potential and Pitfalls from the American Experience*, 1 MICH. J. OF SUSTAINABILITY 93, 96 (2013).
[64] Alexander, *supra* note 51, at 918.
[65] 36 C.F.R. § 800.2(c)(ii).
[66] Alexander, *supra* note 51, at 897-898.
[67] The 1992 amendments authorize tribes to establish Tribal Historic Preservation Offices to act as consulting parties for purposes of NHPA. The program is administered by the National Park Service. *See* 54 U.S.C. § 302702 (2012).
[68] *See* 36 C.F.R. § 800.2(c); *see also* U.S.C. 54 § 302701.

NHPA is also similar to NEPA in that federal agencies develop their own internal approaches and procedures for public and tribal consultation.[69] The National Park Service (NPS), whose mission is "to preserve unimpaired the natural and cultural resources and values of the National Park System for the enjoyment, education, and inspiration of this and future generations,"[70] oversees the Tribal Historic Preservation Program, provides funding and support for THPOs, and builds strong partnerships and collaborations with tribal offices.[71] In contrast, the USACE inserted its own cultural preservation language into the code of Federal Regulations[72] and issued Nationwide Permits[73] that significantly narrowed the scope of its oversight and jurisdiction concerning projects within the agency's purview.

C. The NEPA and NHPA Duty to Consult with Tribes is Part of a Larger Trust Relationship.

NEPA and NHPA's tribal consultation requirements are part of the broader relationship between tribes and the federal government.[74] At their core, federal-tribal relationships are shaped by the federal trust responsibility. The trust responsibility has shifted over time in response to political changes and changes in statutory and judicial law, but it generally requires federal officials to protect tribal resources and sovereignty.[75] Traditionally, the Bureau of Indian Affairs (BIA) was primarily responsible for carrying out the trust responsibility.[76] However, in recent

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[69] U.S.C. 54 § 302303 (b).
[70] *See* NATIONAL PARK SERVICE,, https://www.nps.gov/aboutus/index.htm (last visited .
[71] *See* 54 U.S.C. § 302702 (2014).
[72] 33 C.F.R. § 325. These regulations have been criticized for circumventing the tribal consultation process. *See, e.g.*, Melissa Lorentz, Note, *Why the Army Corps of Engineers' Section 106 Regulations are Invalid* , 40 WM. MITCHELL L. REV. 1580 (2014).
[73] ARMY CORPS, *supra* note 11.
[74] Routel & Holth, *supra* note 11. *See also* Exec Order No.13,175, 3 C.F.R. § 13175 (2000); Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV 327 (1995).
[75] Routel & Holth, *supra* note 11, at 418-20.
[76] Mary Ann King, *Co-Management or Contracting-Agreements between Native American Tribes and the US National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENVTL. L. REV 475, 477 (2007).

decades, statutes and executive orders have given individual federal agencies greater responsibility to engage with tribes in ways that respect tribal sovereignty and treat consultations as government-to-government interactions.[77] For example, in 2000, President Clinton issued Executive Order 13175, mandating that agencies develop processes to ensure that tribal officials have an opportunity to provide input on regulatory policies that would impact tribes.[78]

It is unclear, however, whether agencies have undertaken this obligation in good faith. On November 5, 2009, President Obama issued Memoranda to heads of Executive Departments asking them to submit a plan detailing how they intended to implement Executive Order 13175.[79] In 2012, the National Congress of American Indians (NCAI) determined that of 36 departments covered by the Memoranda, nearly one-third had no policy in place.[80] The NCAI report also raised doubt about tribes' ability to use judicial remedies as an accountability mechanism, given that many agencies expressly disavowed a cause of action for tribes over improper consultation.[81] A review of NHPA related case law from 1995 to the present identifies inadequacy of consultation as one of the major grounds for litigation in cases where plaintiffs challenge agency decisions under NHPA, suggesting that agency disavowal of consultation as a cause of action may have a significant quelling effect on tribes' ability to bring suit to remedy poor consultation practices.[82]

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[77] *Id.; See also* Michael Eitner, *Meaningful consultation with tribal governments: A uniform standard to guarantee that federal agencies properly consider their concerns*, 85 U. COLO. L. REV. 867 (2014); Routel & Holth, *supra* note 11.
[78] Eitner, *supra* note 73, at 875 – 876.
[79] *Id.*
[80] *Id.* at 876-77.
[81] *Id.*
[82] Andrea Ferster, *Twenty Years of Case Law Interpreting the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 et seq.1995 to the present,* http://www.law.georgetown.edu/cle/materials/PreservationLaw/2015/01%20PreservationontheFederalLevel/Ferster%20-%20NHPA%20Case%20Summary%202015.pdf (last visited Oct. 27, 2017).

Since the 1990s, Congress has placed particular emphasis on agencies' duties to consult with tribes over matters that affect natural and cultural resources.[83] The 1992 amendments to NHPA, which authorized tribes to form THPOs and take on the role of the consulting party in the NHPA process, is one example of recent Congressional efforts to expand tribal sovereignty.[84] Another example is the 1994 Tribal Self-Governance Act, which further enlarged tribes' authority to shape federal land management activities by compelling agencies to negotiate with tribes over activities on or near reservations.[85] The Congressional committees' intent stated, "any activities performed by any division or agency of the Interior Department on or near the reservation were negotiable items for self-governance tribes."[86] Despite these official proclamations of tribal sovereignty and federal agencies' duty to consult on a government-to-government basis, tribes and scholars have repeatedly argued actual consultation practices provide tribes with limited ability to substantively impact agency decisions.[87] The NCAI identifies a lack of "early and meaningful consultation" as a "recurring theme" of Native American participation in historic preservation programs.[88]

D. Effective Consultation is Crucial to NEPA and NHPA's Substantive Goals.

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[83] *See* Dean B. Suagee and Karen J. Funk, *Cultural Resources Conservation in Indian Country*, 7 NAT. RES. & ENV'T, 4, 31-33, 61-63 (1993).

[84] *See* Dean B. Suagee, *The Supreme Court's "Whack-A-Mole" Game Theory in Federal Indiana Law, a Theory that Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RES. J. 90, 156-57 (2002).
[85] King, *supra* note 72, at 477.
[86] Tadd M. Johsnon & James Hamilton, *Sovereignty and the Native American Nation: Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1272 (1995).
[87] *See, e.g.*, Boone Cragun, *A Snowbowl Déjá Vu: The Battle Between Native American Tribes and the Arizona Sonwbowl Continues*, 30 AM. INDIAN L. REV. 1 (2005); Ted Griswold and Jonathon P. Scoll, *Gregory Mountain: A Sacred Site Protection Failure*, 26 NAT. RES. & ENV'T 3 (2012). There is also a long list of cases in which tribes have sought relief or an injunction related to proposed development and NEPA or NHPA review. Ferster, *supra* note 78. Even where these cases do not specifically list a consultation failure as cause for the litigation, the fact that these cases ended up in court strongly suggests that the affected tribal government or group were inadequately involved in planning conversations.
[88] National Congress of American Indians, *Recognition of the 50th Anniversary of the National Historic Preservation Act of 1966*, Resolution #PHX-16-001 (2016), at 2, http://www.ncai.org/attachments/Resolution_cHQVCEgYfdOdRlGADRCuAlfERHLjmMxzsQPdQiOZOBacWWdBPgf_PHX-16-001%20final.pdf (last visited Oct. 27, 2017).

It is difficult to define what effective policy means in the context of NEPA and NHPA. On one hand, these statutes have explicit, substantive goals of historic preservation and environmental protection. On the other hand, the requirements that they establish are entirely procedural in nature; there is an assumption in both statutes that the substantive goals will be achieved if the procedures described in statutes and regulations are followed.[89] Moreover, neither statute requires that agencies undertake the least harmful action; rather, both give agencies substantial discretion to make decisions that weigh the benefits of development against the environmental and cultural resource impacts that may occur, provided that the decision is made on an informed basis.[90] Nonetheless, both statutes include a substantive, if aspirational, expectation that the required procedures are not mere box-checking exercises, but rather describe procedures that should prevent and reduce harms to natural and cultural resources.

Scholars of environmental impact assessment have wrestled with the tension between procedural and substantive effectiveness, and point to public engagement and stakeholder consultation as key elements of effectiveness.[91] Among scholars, an environmental impact assessment process is considered procedurally effective if the lead agency has faithfully undertaken its duty to gather scientific information and to consult with relevant agencies, experts, affected parties, and the public.[92] Substantive effectiveness, however, requires more than ticking off such obligations. It requires, first, that agencies consider the information and analysis

[89] Jack F. Trope & Dean B. Suagee, *Tribal Sacred Places and American Values*, 17 NAT. RES. & ENV'T 2, 103 (2002); THOMAS F. KING, CULTURAL RES. LAWS & PRACTICE, at 15 (Alta Mira Press 2004).
[90] Trope & Suagee, *supra* note 84, at 103; Thomas F. King, *supra* note 84, at 39.
[91] Matthew Cashmore, *et al.*, *The Interminable Issue of Effectiveness: Substantive Purposes, Outcomes and Research Challenges in the Advancement of Environmental Impact Assessment Theory*, 22 IMPACT ASSESSMENT AND PROJECT APPRAISAL 295, 295-96 (2004); *see also* Jie Zhang, *et al.*, *Critical Factors for EIA Implementation: Literature Review and Research Options*, 114 J. OF ENVTL. MGMT. 148, 151 (2013).
[92] Douglas C. Baker & James N. McLelland, *Evaluating the effectiveness of British Columbia's environmental assessment process for first nations' participation in mining development*, 23 ENVTL. IMPACT ASSESSMENT REV. 581, 582-83 (2003).

gathered during the consultation process, and second, that agencies incorporate this information into final decisions.[93] In essence, an effective NEPA or NHPA process is one in which agencies' final decisions differ in some way from what would have occurred had the impact assessment process not been required, resulting in projects which are designed to mitigate impacts to environmental and cultural resources and address communities' concerns.[94] In this sense, consultation with the public, with experts, and with affected communities is at the heart of what makes NEPA and NHPA effective. Effective implementation of these statutes requires that agencies solicit information from relevant stakeholders and incorporate this information into project design in ways that reduce harm to the environment and to tribal interests.[95]

While scholars and practitioners familiar with NEPA and NHPA generally find these statutes effective,[96] these statutes have also been widely criticized for failing to provide tribes with an ability to substantively shape agencies' decisions. In Part II, we examine consultation in practice, and explore how shortcomings in agencies' consultation practices can undermine these statutes' effectiveness.

II. In Practice, Consultation is Often "Good Words" That Fail to Achieve NEPA and NHPA's Substantive Goals.

Increasingly, scholars and practitioners have argued that to be effective, tribal consultation must generally go above and beyond the minimum legal requirements described in

[93] D. Van Doren, *et al. Evaluating the Substantive Effectiveness of SEA: Towards a Better Understanding*, 38 ENVTL. IMPACT ASSESSMENT REV. 120, 122-23 (2012).
[94] Sherry Hutt & Jaime Lavalee, *Tribal Consultation: Best Practices in Historic Preservation* (2005), https://www.nps.gov/thpo/downloads/NATHPO_Best_Practices.pdf (last visited Oct. 27, 2017); *see also* RICHARD W. STOFFLE, NIEVES M. ZEDENO, & DAVID B. HALMO, AMERICAN INDIANS AND THE NEVADA TEST SITE: A MODEL OF RESEARCH AND CONSULTATION (U.S. Dep't of Energy 2001); Lawrence Roberts, *Federal Consultation With Tribes Regarding Infrastructure Decision Making*, Departments of the Interior, Justice, and Army (2016), https://www.justice.gov/tribal/file/903596/download.
[95] Van Doren *et al.*, *supra* note 88, at 122-23.
[96] *See, e.g., NEPA Success Stories,* Department of Energy Office of NEPA Compliance (2017), https://energy.gov/sites/prod/files/2013/09/f2/NEPA_Success_Stories.pdf.

ACHP regulations.[97] Both the archaeological community and a consortium of national THPOs have spent significant time establishing ethical guidelines and frameworks for "de-colonizing" archaeological research and facilitating tribes' substantive role in NHPA implementation.[98] While some consultations adhere to these best practices, consultations usually meet the letter of law while providing tribes with little opportunity to meaningfully shape agency decisions. In Part II(A), we review consultation practices that are considered meaningful by tribes and by applied archaeologists, showing that these favored practices often go above and beyond the basic legal requirements. In Part II(B), we review three cases of tribal consultation under NEPA and NHPA, showing how best practices are used or ignored in practice. In Part II(C), we summarize the consultation practices exhibited by our case studies and compare them to the best practices discussed in Part II(A). In Part II(D) we discuss the implications of failed or limited consultation for environmental and cultural justice.

A. Effective Consultation Practices Must Go Beyond Minimum Statutory Requirements.

In 2005, the National Association of Tribal Historic Preservation Officers (NATHPO) released "best practices" guidelines for practitioners working with THPOs within the Section 106 consultation framework.[99] To develop these guidelines, the NATHPO conducted interviews with

[97] *See generally* Alexander, *supra* note 51; Hutt & Lavalee, *supra* note 89; Stoffle *et al.*, *supra* note 89.
[98] *See, e.g.*, Sonya Atalay, *Archaeology as Decolonizing Practice*, 30 AM. INDIAN QUARTERLY 280 (2006); CHRIS SCARRE & GEOFFERY SCARRE, THE ETHICS OF ARCHAEOLOGY: PHILOSOPHICAL PERSPECTIVES ON ARCHAEOLOGICAL PRACTICE (Cambridge Univ. Press 2006); KAREN VITELLI & CHIP COLWELL-CHANTHAPHONH, ARCHAEOLOGICAL ETHICS (Alta Mira Press 2d Ed 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, "*archaeology matters.*" JEREMY SABLOFF, ARCHAEOLOGY MATTERS: ACTION ARCHAEOLOGY IN THE MODERN WORLD (Left Coast Press Inc. 2006). These efforts also 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.
[99] Hutt & Lavalee, *supra* note 89.

members of the ACHP, historic preservation practitioners, and consultation participants.[100] The resulting guidelines emphasized that the following elements are crucial to successful consultation: [101]

- Early contact and communication;
- All parties are well informed about the scope of the project and the potential impacts;
- Site visits with agency and tribal officials;
- Use of a tribal liaison;
- Presence of a THPO in the consultation process;
- Evidence of mutual respect, such as locating meetings in a convenient location or paying travel costs for tribal officials.

These recommendations echo themes raised by Richard Stoffel and other applied archaeologists, who developed 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).[102] Like the NATHPO guidelines, Stoffel *et al.*'s model includes the formation of a liaison committee between tribal governments and agency officials, early contact and communication with tribes, and trust developed through a robust commitment to consultation.[103] To this end, Stoffel *et al.* state that a single letter requesting consultation is insufficient, and should be followed with telephone calls and face-to-face meetings with tribal representatives.[104] They also suggest that non-recognized tribes and pan-Indian organizations should be included in the consultation, to insure inclusion of cultural groups not formally recognized by the federal

[100] *Id.*
[101] *Id.* 39.
[102] The Nevada Test Site is under the purview of the DOE/NV and is located in southern Nevada adjacent to the Yucca Mountain Site Characterization Office. Consultation on cultural resources within the boundaries of the NTS included twenty tribes and Indian Organizations as well as anthropologists from the University of Arizona, University and Community College systems in Reno and Las Vegas, and archaeologists from the Desert Research Institute. Stoffle *et al., supra* note 89.
[103] *Id.* at 21-36.
[104] *Id.* at 26.

government, but who may have connections to the affected resources.[105] These guidelines for best practices expand the group of stakeholders participating in the consultation process and also suggest that consultation should go beyond the legal requirements of NEPA or NHPA.[106]

More recently, the Department of the Interior, the Department of Justice, and the Department of Agriculture released a framing paper in 2016 titled "Federal Consultation with Tribes Regarding Infrastructure Decision Making."[107] Rather than constructing a model or set of guidelines, the paper defines three principles for meaningful consultation: first, accountability for federal agencies to identify potential impacts on tribes; second, providing timely and complete notice to tribes; and third, working collaboratively with tribes to address their concerns or mitigate effects.[108] The paper highlights the Desert Renewable Energy Conservation Plan (DRECP) as an example of meaningful engagement with local tribes.[109] Consultation for the DRECP included two summits between tribes and agencies, 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.[110] Most importantly, the DRECP consultation and information exchange incorporated tribal voices into shaping the final project during the development and planning process.[111]

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[105] It is not uncommon for tribes to have cultural connections to areas that extend beyond reservation borders, particularly for tribes that were traditionally nomadic or whose reservation lands are smaller than, or in a different location than, their traditional territories. *Id.* at 25.
[106] *Id.* at 26. Stoffle *et al.* make a distinction between general and project specific consultation. General consultation is an ongoing permanent relationship between the agency and the affiliated tribes to continuously build information and knowledge of natural and cultural resources within the agencies purview. Project-specific consultations focus on the effects of an action and are limited in scope by the legislation with which the agency must comply. 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. *Id.* at 23-24.
[107] *See generally* Roberts, *supra* note 89.
[108] *Id.* at 4.
[109] *Id.* at 3.
[110] *Id.* at 3-4.
[111] *Id.* at 4.

This review of best practices in tribal consultation shows that THPOs, applied archaeologists, and federal agencies generally agree on a similar set of basic principles for meaningful consultation that go beyond NEPA and NHPA's minimum consultation requirements. Minimum consultation requirements include the following: tribal representatives should be involved early in the process, information sharing and consultation practices should be transparent and inclusive, and tribes should have a voice in the scoping process, seeking of project alternatives, and in mitigation decisions.[112]

B. Consultation in Practice: NEPA and NHPA in Indian Country

Consultation in practice does not always match the best practices outlined above. This section examines three instances that illustrate the range of consultation practices used by federal agencies. We selected these examples due to our familiarity with the cases, and because these three cases represent different approaches to and outcomes from consultation: the Sarpy Mine Expansion, a bare bones, letter-of-the-law consultation that met basic requirements, but clearly fell short of the spirit and intent behind NEPA and NHPA's consultation processes; the Tongue River Railroad Expansion, where the consultation requirement went above and beyond the letter of the law and clearly met the legislative intent; and finally, the Dakota Access Pipeline (DAPL), in which nearly everything went wrong, including the consultation – which has since been challenged in court.[113]

1. Absaloka Mine Expansion: Echoes from Crow Country

The first case study comes from the Crow Reservation in South Central Montana. Westmoreland Resource Inc. (WRI) has maintained the Absaloka Mine within the Crow

[112] Hutt & Lavalee, *supra* note 89.
[113] The Standing Rock Sioux et al. v United States Army Corps of Eng'rss et al., 205 F. Supp. 3d 4 (D.C. Cir. 2016).

Reservation borders since 1974.[114] The one reservation coal mine has long been an economic mainstay in Crow Country, where unemployment rates are as high as 47%.[115] Crow tribal members make up nearly 70% of the mine workforce (totaling nearly 170 employees) who earn on average $66,000 annually.[116] Coal royalties and tax revenues fund much of the tribal government, and in fact provide well over half of the Crow Nation's non-federal budget.[117] In response to declining coal production at Absaloka, WRI sought to expand the mine onto a 3,660-acre section of the Crow Indian Reservation.[118]

Initially, WRI filed for a permit from the Montana Department of Environmental Quality (MDEQ) and the Federal Office of Surface Mining and Reclamation and Enforcement (OSM), seeking revisions to their existing permits that would expand the mining operation.[119] The permit revision also required approval by the Bureau of Indian Affairs, which triggered the NEPA process.[120] Preparation of the DEIS began, and included initiation of the NHPA Section 106 process to identify and evaluate important cultural resources.[121] A preliminary archaeological survey of the area had included what would later be called the Sarpy Creek Bison Kill site, a massive, 3000-year-old bison-hunting site of a type considered the hallmark of northern Plains archaeology.[122] The DEIS noted that "[e]vidence of processed bison bone has been found at one

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[114] WWC Eng'g, *2008 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*, https://deq.mt.gov/Portals/112/DEQAdmin/EIS/Absaloka/Draft%20EIS%20Complete.pdf (last visited Oct. 27, 2017).
[115] U.S. Senate Comm. on Indian Affairs Oversight Field Hearing on "Empowering Indian Country: Coal, Jobs, and Self-Determination" Testimony of Crow Nation Chairman Darrin Old Coyote, at 3 (Apr. 8, 2015), https://www.indian.senate.gov/sites/default/files/upload/files/4.6.2015%20SCIA%20Witness%20Testimony%20-%20Darrin%20Old%20Coyote.pdf.
[116] *Id.*
[117] *Id.*
[118] WWC Eng'g, *supra* note 108, at ES-1.
[119] *Id.* at ES-4.
[120] *Id.*
[121] *Id.* at 3-161.
[122] *See* MARCEL KORNFELD, GEORGE FRISON, & MARY LOU LARSON, *Prehistoric Hunter-Gatherers of the High Plains and Rockies* (Left Coast Press 3d ed. 2010).

site in the study area," and concluded that "[t]ypically these site types are not likely to yield a great deal of significant archaeological information because they represent repeated occupations and periods of use with little or no separation of the components."[123] Later, after the site had been destroyed, other archaeologists would dispute these findings. They would argue that the size and significance of the site, as well as the evidence suggesting ritual closure of the site, made it scientifically and culturally valuable, and potentially eligible for listing in the National Register of Historic Places.[124]

In accordance with NEPA requirements, a Notice of Intent to prepare an EIS and Notice of Scoping were published in the Federal Register on November 28, 2006.[125] The DEIS was made available on March 21, 2008, initiating a 46-day comment period.[126] Public comment was limited: eight citizens attended the first meeting, none attended the second, and only the Northern Cheyenne Tribe's Air Quality Division and two private citizens provided written comments.[127] A single public hearing was held at the Big Horn County courthouse at 7:00 pm, April 23, 2008.[128] Besides agency and tribal officials, only three members of the general public attended; no written comments were received regarding the public meeting.[129] The DEIS elicited written comments from only two agencies and two individual citizens. None of these individuals were Crow tribal officials or Crow tribal members, and none of the comments concerned cultural resources.[130] A

[123] WWC Eng'g, *supra* note 108, at 3-158.
[124] *See* Jawort, *supra* note 6.
[125] WWC Eng'g, *supra* note 108, at 1-11.
[126] U.S. Dept. of the Interior Bureau of Indian Affairs, Record of Decision, Absaloka Mine Crow Reservation South Extension, Bighorn County, Montana, at 9 (2008), https://deq.mt.gov/Portals/112/DEQAdmin/EIS/Absaloka/ROD.pdf.
[127] *Id*.
[128] *Id*.
[129] *Id*.
[130] *Id*.

ROD was issued in October 2008, effectively ending the NEPA analysis in a straightforward, no-incident process.[131]

Problems arose when project implementers began to undertake mitigation actions at the Sarpy Creek Bison Kill site.[132] In a scene of destruction reminiscent of the late 19th and early 20th Century bison "mines" for phosphate fertilizer production,[133] the excavation of the Sarpy Creek Bison Kill barely echoed across the Crow Reservation and into Indian Country. The DEIS mentioned the presence of bison processing, but provided few details about the site and no details at all about possible mitigation or data recovery plans.[134] As the project moved forward, the consulting parties approved a "data recovery plan" that included a short archaeological testing period followed by excavation of the site with a backhoe, destroying one of the most culturally and scientifically valuable archaeological sites found on the northern plains in recent decades.[135] The consulting parties included the Crow THPO, but excluded the Crow Cultural Committee and the Crow 107 Committee of Tribal Elders, who had been designated as consulting parties for the Section 106 process. No attempt was made to notify other members of the Crow Tribe, other area tribes, or other members of the archaeological community.[136]

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 crucial

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[131] *Id*. at 10.
[132] MacMillan, *supra* note 5.
[133] Leslie B. Davis, *20th Century Commercial Mining of Northern Plains Bison Kills,* 23 PLAINS ANTHROPOLOGIST 254, 260-61 (1978).
[134] WWC Engineering, *supra* note 108, pt. 3 at 158-59.
[135] Data recovery focused on using an automated screen to collect diagnostic spear points and selected skeletal remains useful for determining the minimum number of individuals represented in the bone assemblage (e.g., astragali or ankle bones). The rest of the scientifically rich bison remains were heaped on the ground, exposed to the elements, and trampled by grazing cattle. Intact projectile points and other stone artifacts lay discarded on the backfill piles, which had been scattered neatly across the pit in orderly rows. *See* MacMillan, *supra* note 5; Jawort, *supra* note 6.
[136] The DEIS was circulated to area tribes, but contained minimal information about the Sarpy Creek Buffalo Kill Site. *See* WWC Eng'g, supra note 108, at 161-62.

to fulfilling the intent of NHPA. In addition, a broad contingent of individuals, tribal governments, professional organizations, and non-profits could easily have asserted an interest in development of the mitigation plan for the site.[137] Because the site is approximately 3000 years old and typifies plains bison hunting cultures, many plains Indian tribes legitimately had interests and stakes in the fate of the kill site. Blackfeet, Crow, Northern Cheyenne, and the Lakota all have roots in plains bison hunting cultures and potential connections to the site.[138] Other stakeholders include the professional archaeologists working in the surrounding region and the Montana and Wyoming Archaeological Societies.[139] At the very least, best practices suggest that the Crow Cultural Committee and the 107 Committee of Tribal Elders should have been consulted about plans for the site.[140]

Best practices also suggest that the consultation was insufficiently transparent, if not deliberately secretive. Subsequent reporting would show that only a few OSM, WRI, and Crow THPO officials knew of the plan to excavate the site.[141] The Crow Cultural Committee and 107 Committee of Tribal Elders 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. An outside observer might well conclude that the decision was reached among the fewest possible participants in order to

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[137] Some other significant bison bonebeds and kill sites include Head Smashed In, a World Heritage Site in Alberta Canada; the Vore Buffalo Jump, a NRHP listed site in Wyoming; and Hudson-Meng, another NRHP listed site located in Nebraska. All of these sites are focal points for intensive multi-decade research projects. *See* Brian O. K. Reeves, *Head-Smashed-In: 5500 years of Bison Jumping in the Alberta Plains*, 23 PLAINS ANTHROPOLOGIST 151 (1978); Charles Reher & George. Frison, *The Vore site, a stratified buffalo jump in the Wyoming Black Hills*, 16 PLAINS ANTHROPOLOGY 1 (1980); Larry D. Agenbroad, *The Hudson-Meng Site: An Alberta Bison Kill in the Nebraska High Plains*, 23 *PLAINS ANTHROPOLOGIST* 128 (1978).

[138] *See* ELEANOR VERBICKY-TODD, COMMUNAL BUFFALO HUNTING AMONG THE PLAINS INDIANS: AN ETHNOGRAPHIC AND HISTORIC REVIEW, OCCASIONAL PAPERS, Archaeological Survey of Alberta, No 24, 1 (1984).

[139] Federal regulations specify "individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties." 36 C.F.R. § 800.2(c)(5) (2012).

[140] *See supra* note 129, 130.

[141] MacMillan, *supra* note 5.

facilitate timely completion of Section 106 review. Today, the skeletons of several hundred bison killed on a late fall day some 3,000 years ago remain exposed to the elements on a remote hillside near the edge of Crow Country.[142]

2. *Tongue River Railroad Expansion: Cowboys, Indians, and Conservationists vs. King Coal*

The second case study comes from the Northern Cheyenne Reservation in Southeast Montana and the consultation process concerning the Tongue River Railroad Expansion (TRRE). In October 2012, The Tongue River Railroad Company (TRRC) filed a permit application with the Surface Transportation Board (STB) for the construction of an eighty-three mile rail line connecting Miles City, Montana with the Otter Creek mine and a second proposed Montco mine near Ashland, Montana.[143] In December of the same year, TRRC would add a request for a forty-two mile rail line that would connect the two proposed mines with Colstrip, Montana in a proposal termed the "Colstrip Alternative."[144] NEPA was triggered as part of the STB review of the TRRC's permit request, with the STB's Office of Environmental Analysis (OEA) serving as the lead agency based on their permitting authority for the construction of new rail lines.[145]

From the start, the consultation process was more transparent and inclusive than the consultation used for the Sarpy Bone Bed. TRRC initiated contact with tribal consulting parties—a network of northern plains tribes—in January 2012, months before filing the permit application with the STB. In October of 2012, the Montana State Historic Preservation Office (MTSHPO), among other agencies, was invited to participate.[146] Ten public scoping meetings

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[142] *Id*.
[143] Surface Transp. Bd., *Key Cases: Tongue River*, https://www.stb.gov/stb/environment/key_cases_tongueriver.html (last visited Oct. 29, 2017).
[144] *Id*.
[145] *Id.*, *see* 49 C.F.R. § 1105.
[146] Surface Transportation Bd., Draft Environmental Impact Statement for the Proposed Construction and Operation of the Tongue River Railroad, at A-1 (Apr. 17, 2015),

were organized and held in four local communities with the express goal of seeking public involvement in the project planning stages.[147]

As part of their consultation strategy, the STB established a publicly accessible website detailing the environmental planning.[148] Pages contained links to all permits, project maps, planning documents, public informational materials, correspondence, and meeting transcripts. The website also detailed 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 significant efforts to create and maintain an inclusive and transparent process.

Preparation of the DEIS occurred from 2012 through 2015. By April 2015, the DEIS was available on the project website, as well as at several local, rural libraries.[149] To solicit comments on the draft, STB and TRRC held ten public meetings in rural Montana communities, both on and off the Northern Cheyenne Indian Reservation, and two online public meetings.[150] Informational materials were prepared in advance and made available to participants online and at the meetings. A court reporter was present and public meeting transcripts were also available on the TRRC website.[151] STB's attention to detail created transparent decision-making and incorporated the concerns of a diverse public.

A review of written comments and transcripts from public meetings shows a public unified in opposition to the expansion. The population of Rosebud County, Montana is a

https://www.stb.gov/decisions/readingroom.nsf/fc695db5bc7ebe2c852572b80040c45f/e7de39d1f6fd4a9a85257e2a0049104d?OpenDocument.

[147] *Id*.

[148] Surface Transp. Bd., *supra* note 140. The project website, tongueriverеis.com, is no longer operational.

[149] *Id*.

[150] *Id*.

[151] Surface Transp. Bd., *Surface Transportation Board Issues Tongue River Railroad Issues Draft Environmental Impact Statement*, news release (Apr. 17, 2015), https://www.stb.gov/__85256593004F576F.nsf/0/5AB8791080B3A1D685257E2A005099E0?OpenDocument.

demographic mix of rural Native American communities and multi-generational ranching families with intertwined histories.[152] Their common values embrace traditional culture: hunting, plant gathering, religious practice, and cattle ranching.[153] The community's main environmental concern was the noise that would be generated by the coal trains. These concerns were repeated throughout the more than 200 written and oral comments made in the 60 days of the DEIS review.[154]

Conflicts over an inventory and evaluation of archaeological sites conducted as part of the NHPA Section 106 compliance also arose during the review process. Teams of archaeologists – which included tribal members who worked alongside professional archaeologists – surveyed some 8,600 acres among all alternative routes, but were unable to access another 3,300 acres because of landowner restrictions.[155] The survey reported 350 archaeological sites and thirty-six traditional cultural properties; fifty-eight total cultural resources were identified along the Colstrip Alternative.[156] As with other areas of the NEPA analysis, the Section 106 process was transparent. This transparency provided an opportunity for stakeholders to review and question the Section 106 findings.

The Northern Cheyenne Tribe, in collaboration with the Sierra Club, the landowners' group, and Chris Finley, a retired National Park Service archaeologist, questioned the Section 106 report findings, raising issues of due diligence and good faith efforts in the Colstrip

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[152] *See* Carol Ward, *The importance of context in explaining human capital formation and labor force participation of American Indians in Rosebud County, Montana*, 63 RURAL SOCIOLOGY 451 (1998).
[153] *Id.*
[154] 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 concerned an estimated thirty-seven coal trains would connect Montana and Wyoming coal mines to Pacific Northwest shipping terminals on a daily basis. These stakeholders were concerned about changes to traffic patterns, greater noise levels, concerns with toxic coal dust, and questions about declining coal markets and community carbon dioxide footprints. The procedural transparency initiated by the STB as lead agency facilitated an open and meaningful dialogue on these issues in the DEIS review.
[155] Surface Transp. Bd., *supra* note 140, at 11-26.
[156] *Id.*

Alternative Cultural Resource Survey.[157] Tasked by the Sierra Club and a landowners' group, Finley evaluated a sample of the survey area, conducting fieldwork with a Native American field crew in April 2015.[158] The Northern Cheyenne Tribe also initiated an additional survey to ensure that no cultural sites were missed during the EIS process.[159] The review process deteriorated during subsequent Section 106 consultation meetings. On April 26, 2016 the STB dismissed the TRRE proposal without prejudice, effectively stopping the project.[160] On June 16, 2016, members of the Lummi Indian Nation of Washington, who had fought the TRRE from the West Coast, delivered a twenty-two foot long totem pole to the Northern Cheyenne Tribal Headquarters in Lame Deer, Montana, and the tribes celebrated a war victory over King Coal.[161]

3. The Dakota Access Pipeline Project: Protests from Standing Rock

The third case study is likely the best known and most widely publicized of the three. In 2014, Dakota Access, LLC proposed construction of a 1,134 mile long pipeline to transport approximately 450,000 barrels of crude oil per day from the Bakken and Three Forks production areas in North Dakota to ports in Chicago, where it would eventually reach Midwest and Gulf Coast markets.[162] After announcing its plan to construct the pipeline in June 2014, Dakota

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[157] *See* Matthew Brown, *Northern Cheyenne to investigate impact of proposed railroad on cultural sites*, Billings Gazette (Jul. 25, 2015), http://billingsgazette.com/news/state-and-regional/montana/northern-cheyenne-to-investigate-impact-of-proposed-railroad-on-cultural/article_cfd81aeb-26b0-548d-8706-327d2e336679.html.
[158] *Id*.
[159] *Id.*
[160] Surface Transp. Bd. (Apr. 26, 2016), Decision in Docket No. FD 30186, https://www.stb.gov/Decisions/readingroom.nsf/WEBUNID/03CBCE78A2C47C8485257FA00053D50A?OpenDocument. While challenges to the initial Section 106 compliance efforts complicated the NEPA and NHPA review, changes in the global economic environment were primarily responsible for killing the TRRE project. 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 in response to diminished global demand. *See* Tom Lutey, *Federal Panel Kills Tongue River Railroad*, BILLINGS GAZETTE (Apr. 26, 2016).
[161] Lynda Mapes, *A Northwest traveling totem-pole protest targets fossil-fuel development*, SEATTLE TIMES (Oct. 25, 2017), https://www.seattletimes.com/seattle-news/environment/a-northwest-traveling-totem-pole-protest-targets-fossil-fuel-development/.
[162] U.S. Army Corps of Eng'rs, Environmental Assessment: Dakota Access Pipeline Project, crossings of flowage easements and federal lands, at 3 (2015), http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll7/id/2426.

Access began coordination with the United States Fish and Wildlife Service (USFWS) to develop its proposed route, emphasizing its desire to avoid national parks, historic properties, and reservation lands.[163] The proposed pipeline stretched from the Bakkan/Three Forks production area in Northwest North Dakota to a shipping terminal in Pakota, Illinois.[164] The underground pipeline would pass through North Dakota, South Dakota, Iowa, and Illinois, and cross the Missouri and Mississippi Rivers, in addition to many minor waterways.[165] While the alternative route does technically avoid reservation lands, meeting the initial planning goals, the pipeline comes within one half mile of the Standing Rock Sioux reservation.[166]

Crude oil pipelines exist within a complicated regulatory environment that results in a non-intuitive application of NEPA and NHPA review. The 1906 Hepburn Act recognizes oil pipelines as a common carrier,[167] and pipelines were previously subject to regulation by the Interstate Commerce Commission (ICC) until regulatory oversight was transferred to the Federal Energy Regulatory Commission (FERC) in 1977.[168] FERC oversees operation and transport of crude oil through pipelines, but lacks authority over pipeline construction.[169] The USACE has authority to regulate crude oil pipeline construction. However, because crude oil pipelines fall under Nationwide Permit 12, they are not generally subject to federal oversight and thus are exempt from NEPA or NHPA review unless something else in the proposal triggers the review

[163] U.S. FISH AND WILDLIFE SERVICE, DAKOTA ACCESS LLC: Environmental Assessment, Grassland and Wetland Easement Crossings, at 13 (2015), https://www.fws.gov/uploadedFiles/DAPL%20EA.pdf.
[164] U.S. ARMY CORPS OF ENG'RS, *supra* note 156, at 1.
[165] *Id.* at 40.
[166] Standing Rock Sioux Tribe v. United States Army Corps of Eng's, 205 F. Supp. 3d 4, 7 (D.C. Cir. 2016).
[167] Hepburn Act of 1906, ch. 3591, § 1, Stat. 584 (1906).
[168] Collin P O'Rourke, *Oil Pipeline Regulation: The Current Patchwork Model and an Improved National Solution*, LSU J. ENERGY L. & RES. CURRENTS (2016), https://jelr.law.lsu.edu/2016/02/02/oil-pipeline-regulation-the-current-patchwork-model-and-an-improved-national-solution/.
[169] *See* Federal Energy Regulatory Commission, *Regulating Oil Pipelines*, https://www.ferc.gov/industries/oil.asp (last visited Oct. 29, 2017).

process.[170] In the case of DAPL, NEPA was triggered on several occasions, including the request for USACE to approve the plan to cross Lake Sakakawea and Oahe Lake/Dam on the Missouri River.[171] Here, however, the review of USACE is limited by Nationwide Permit 12, which, *inter alia*, specifies that each individual water crossing is an independent federal action and thus limits USACE's jurisdiction to portions of the project immediately adjacent to or associated with the water crossing.[172] In fact, because of these mechanisms, only 5% of the work on the pipeline would require any federal review.[173]

As a result, DAPL was not subject to comprehensive NEPA and NHPA review. More limited NEPA and NHPA review occurred, however, focused on individual permits that were required from USACE for Dakota Access to drill underneath navigable waters in North Dakota, South Dakota, Illinois, and Iowa.[174] Here, we focus our attention on the review and consultation process undertaken by the USACE's Omaha District, who was responsible for consultation with the Standing Rock Sioux Tribe.

The Omaha District was responsible for conducting NHPA and NEPA review of the crossings at upper Lake Sakakawea and Lake Oahe.[175] Both reservoirs serve as drinking water sources for reservations: Lake Sakakawea for the Fort Berthold reservation[176] and Lake Oahe for the Standing Rock reservation.[177] While the consultation process is poorly documented, and

[170] *See* Army Corps of Eng'rs, *supra* note 11. For example, the proposed Keystone XL crude oil pipeline triggered NEPA and NHPA review because it crossed international borders. *See* Congressional Research Service, *Proposed Keystone XL Pipeline: Legal Issues* (2012), at 1.
[171] U.S. Army Corps of Eng'rs, *supra* note 156, at 1.
[172] Army Corps of Eng'rs, *supra* note 11, § 2.3.1 at 13-15.
[173] Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs, 205 F. Supp. 3d 4, 2 at 31 (D.C. Cir. 2016).
[174] Under Section 14 of the Rivers and Harbors Act of 1899, all such water crossings require a permit from USACE. *See* 33 U.S.C. § 408 (2012).
[175] U.S. Army Corps of Engineers, *supra* note 156, at 1.
[176] Amy Sisk, *Upstream from Standing Rock, Tribes Balance Benefits, Risk of Oil Industry*, National Public Radio, (Nov. 24, 2016), http://www.npr.org/2016/11/24/503212965/upstream-from-standing-rock-tribes-balance-benefits-risks-of-oil-industry.
[177] U.S. Army Corps of Eng'rs, *supra* note 156, at 38.

records often provide incomplete or conflicting information,[178] the court documents from subsequent litigation suggest that consultation with the SHPO began in August 2014.[179] The consultation went public on September 30, 2014, when USACE Omaha District met with the Standing Rock Sioux Tribal Council to present the project.[180] The Standing Rock Sioux Tribe's THPO communicated with Dakota Access LLC personnel several times in the weeks after the meeting.[181] A timeline of the DAPL case shows that USACE sent the Standing Rock THPO a letter dated February 17, 2015, requesting information and consultation about the project.[182] The THPO responded on February 25 with a letter identifying cultural resources that might be impacted by the project and requesting a full EIS and Class III Cultural Resource Survey.[183] Testimony by Monica Howard, Director of Environmental Science for Dakota Access, details numerous attempts by USACE to contact the tribe by letter and email, with no response from the THPO, as well as several consultation meetings that were not attended by tribal officials.[184] By late 2015 the USACE sought to end the consultation process and issue its decision. On December 8, 2015, the USACE published the Draft Environmental Assessment (DEA) on their website and opened a public comment period from December 9, 2015 to January 8, 2016.[185] The DEA provides limited information about the consultation process, noting only that letters were sent to

[178] Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs *et al.*, 205 F. Supp. 3d 4, Section D at 11-33
[179] Pub. Comm'n of S.D., Direct Testimony of Monica Howard, In the matter of the Application of Dakota Access, LLC, for an Energy Facility Permit to Construct the Dakota Access Pipeline Project, HP14-002 (Jul. 6, 2015), https://puc.sd.gov/commission/dockets/HydrocarbonPipeline/2014/HP14-002/exhibits/dapl/33.pdf.
[180] Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs, 205 F. Supp. 3d 4, 15 (D.C. Cir. 2016).
[181] *Id.*
[182] Brandon Howard, *Timeline: History of the Dakota Access pipeline*, Chicago Tribune (Jan. 24, 2017), http://www.chicagotribune.com/news/nationworld/ct-dakota-access-pipeline-timeline-dapl-20161219-htmlstory.html.
[183] Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs, 205 F. Supp. 3d 4, 28-29 (D.C. Cir. 2016).
[184] *Id.* at 14-15, 19-20.
[185] *Id.* at 41.

interested parties in October 2014 and July 2015, and made no mention of the tribe's responses and requests for an additional archaeological survey.[186]

The USACE began to prepare their final EA in early 2016. After two Army Corps archaeologists conducted a site visit in March 2016,[187] the USACE issued a finding that the project would not adversely impact historic properties, and the North Dakota SHPO concurred with the finding.[188] The Standing Rock Sioux Tribe's THPO had not provided USACE with a declaration, however, and the ACHP disputed the ACOE's finding of no adverse effect on multiple grounds: inadequate scoping, incorrect definition of the area of potential effect, an incorrect definition of a major federal undertaking, incomplete identification of resources, and an inadequate and disjointed tribal consultation process.[189] In response, the Assistant Secretary of the Army Civil Works sent a letter to the ACHP affirming the USACE finding of no adverse impacts.[190] That same day the USACE published the FONSI for the Dakota Access crossings, allowing the project to move forward and leading to the protests that gripped the Standing Rock Sioux Nation for months in 2016.[191]

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[186] USACE Omaha District DAPL Environmental Assessment at 80. One letter from the USACE is addressed to "Mr. Young," an officer at the Standing Rock Sioux THPO. Waste Win Young, the Standing Rock Sioux THPO at the time, is a woman. While this may have been a careless mistake, it can easily be interpreted as a lack of respect for the Standing Rock Sioux Tribal Government, their authority, and Waste Win Young's position. *See Dakota Access LLC, Draft Environmental Assessment: Dakota Access Pipeline Project Crossings of Flowage Easements and Federal Lands (Nov. 2015).*

[187] Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs, 205 F. Supp. 3d 4, 22-23 (D.C. Cir. 2016).

[188] *Id.* at 23.

[189] Advisory Council on Historic Preservation, Letter to Lt. Gen. Thomas P. Bostick (May 19, 2016), http://www.achp.gov/docs/nd-sd-ia-il.coe.dakota%20access.con04.19may16.pdf.

[190] Letter from ACHP to Secretary Jo-Ellen Darcy (Aug. 19, 2016), www.achp.gov/.../nd-sd-ia-il.coe-r.achp%20response%20to%20asa%20darcy.19aug16.pdf.

[191] Dakota Access LLC, Final Environmental Assessment for Section 408 (2016). The USACE's St Louis District also engaged in NHPA and NEPA review for separate water crossings, and documents there provide a more detailed picture of St. Louis's consultation process and counterpoint to the failed negotiations with the Standing Rock Sioux. After spending nearly a year on a Phase I archeological survey, the USACE St Louis district sent letters requesting formal consultation to over seventy tribes in September 2015, and a follow up letter to twenty-eight tribes in January 2016 with specific information about areas potentially affected by the permit. The district received responses from tribes from January 29, 2016 to July 28, 2016. The EA includes a letter received from the Osage Nation, identifying areas of concern, as well as measures that USACE took to respond to those concerns, including the use of Horizontal Directional Drilling, general avoidance of the sites, and confirming for the tribe that sites of concern were located

The Standing Rock Sioux Tribe later brought suit against the USACE and Dakota Access LLC, alleging that Dakota Access LLC flouted their consultation obligations under NHPA. The Tribe sought an injunction on the grounds that cultural and historical sites would suffer irreparable harm should the project proceed.[192] The Court initially denied the Tribe's request for a preliminary injunction because the Court could not concur with the accusation that Dakota Access LLC had failed in its obligation to consult under NHPA.[193] This decision highlights two legal issues associated with the consultation requirements under NHPA and NEPA. The first is that both laws provide significant discretion to the lead agency to decide both the appropriate form of consultation and who should be involved. Second, since consultation practices are defined loosely by both laws, disagreements about what constitutes "good faith" practices can lead to very different opinions about the quality of the consultation. In the DAPL case, the Standing Rock Sioux expected government-to-government interaction reflecting "best practices," as outlined by Stoffel *et al.* or the NATHPO, but USACE pursued a legally adequate, if less ambitious, consultation strategy.

C. Lessons in Tribal Consultation

The case studies selected for this paper highlight different approaches to consultation practiced by different lead agencies. While the projects are different in many aspects, the central role and direct impact of the projects on tribal lands, the environment, and cultural resources are a unifying theme. These case studies illustrate a consultation process in which project proponents made no attempt to meaningfully comply with ACHP guidelines (the Sarpy Mine Expansion), an

outside project area. On March 2, 2016, the USACE St Louis district sent a third letter to all tribes, inviting them to monitor sites, and documented an agreement with the Osage that the tribe would forego the consultation process, but would monitor activity near one site of particular concern. On April 4, 2016 the Illinois Historic Preservation Agency agreed with the USACE St Louis district and Dakota Access LLC that no further work was necessary to comply with NHPA.

[192] Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs, 205 F. Supp. 3d 4, 15 (D.C. Cir. 2016).

[193] *Id.* at 7.

inclusive and exhaustive collaboration process (the TRRC project), and a legal but inadequate consultation (DAPL), that gave short shrift to the substantive goals of NEPA and NHPA, the historic relationship between tribes and the federal government, and the nature of government-to-government consultation.

Consultation for the Sarpy Mine Expansion raised significant questions about the inclusivity of the review process. The lack of knowledge among important decision-making entities within the Crow Tribal Government is evidence of limited attempts at information provision at best, and strongly suggests that actors who did have knowledge had limited motivation to share these details with stakeholders who might object to the site's destruction. The information we have about the consultation process shows minimal public involvement, no effort to educate the public about the full consequences of the mine expansion, and no meaningful attempts to broaden stakeholder participation.[194] Public notices were published only in newspapers; meetings were held at the county courthouse instead of more accessible Tribal offices on the Crow reservation; and a lack of outreach to other plains Indian Tribal Governments[195] failed to meet the standards for best practices reviewed in Part A of this section.[196]

Best practices suggest that the lead agency and project manager should have at least met with all entities within the Crow Tribal Government that play a role in decisions about cultural resources. Furthermore, because of the size, age, and potential importance of the site and the nomadic nature of plains Indians, the broadest range of Tribal Governments, including at a minimum the Blackfeet, Northern Cheyenne, Shoshone, and Sioux, should have been contacted

[194] *See supra* notes 120-124 and accompanying text.
[195] *See supra* notes 130-132 and accompanying text.
[196] *See supra* Part IIIA.

on a government-to-government level as part of the BIA trust responsibility and obligations.[197] The public and the archaeological community should have been notified and involved in the decision-making process. Finally, there should have been greater attention to transparency, so that these actors understood both the nature of the site at stake, and the way the mine expansion would affect those cultural resources. Instead, a small handful of people made and carried out a plan that stole an important and irreplaceable piece of cultural heritage from current and future generations.

Consultation for the TRRE more closely fits with agreed upon best practices for consultation.[198] While the process had its challenges and obstacles, consultation is not about unanimous decision-making; rather, the goal is informed decision-making in an environment where all stakeholders have the opportunity to meaningfully participate in the decision-making process. In the TRRE consultation, a broad range of stakeholders were included in the early planning stages and continued to be involved in the scoping, data collection, and eventual preparation of the EIS.[199] The TRRC and STB held meetings in the local impacted communities, in an effort to go to the people rather than making the people come to them.[200] They also recognized that in rural communities, traveling to meetings can be a barrier to participation, and thus made transcripts available and virtual attendance possible. Furthermore, creating a website to make documents and transcripts available to the public increased levels of transparency in the consultation process.[201] While the TRRE had unified and motivated opposition, there were no mass protests or confrontations with law enforcement about the NEPA or NHPA review, likely

[197] *See supra* notes 130-132 and accompanying text.
[198] *See supra* notes 89 and 140 and accompanying text.
[199] *See supra* notes 142-145 and accompanying text.
[200] *Id.*
[201] *Id.*

because opponents had ample opportunity to affect and participate in the decision-making process.

Lessons from the DAPL case are less clear. Judicial review of the consultation found that USACE met the legal obligations of NEPA and NHPA, but the widespread protests and subsequent litigation suggests that the Standing Rock Sioux and other stakeholders felt they had little opportunity to shape the project proposal through the consultation process. The USACE provided ample records of attempts to contact the Standing Rock Sioux and other interested parties,[202] but there is limited evidence that USACE engaged in meaningful consultation with the Tribe. Here, a difference between agency definitions of consultation obligations and tribal expectations for government-to-government relationships becomes evident. The Standing Rock Sioux clearly believe that meaningful consultation for DAPL did not occur, but the Court found that USACE had fulfilled its legal obligations.

To understand the lessons from DAPL, the conversation must go beyond comparing definitions of "meaningful" versus "legal" consultation, or a rehashing of records. Instead, we must look at the unique legal environment that USACE applies to NEPA and NHPA review. USACE has explicitly limited its jurisdiction by treating individual portions of projects as individual federal actions. By expressly limiting their jurisdiction to insertions, exits, and associated actions relating to crossing navigable waterbodies, they have legally constructed a situation where they cannot review the cumulative impact of a project, like DAPL, and instead are relegated to reviewing minor portions of the action. This has the effect of undermining the legislative intent of NEPA and NHPA to inform decision-makers about the cumulative impact of major federal actions.

[202] *See supra* note 178; *see also supra* note 180.

Perhaps the biggest lesson from DAPL is that perceptions about consultation range from "meaningful" to "legal," and courts are restricted to evaluating whether the consultation process meets the "legal" definition, thus giving agencies substantial discretion. The DAPL case also demonstrates that tribes and other stakeholders may have limited judicial recourse when agencies choose to define their NEPA and NHPA consultation requirements narrowly and without meaningful consultation.

C. Failure to Consult with Tribes Presents Environmental and Cultural Justice Problems

By now, environmental justice problems are well documented, demonstrating that minority and low-income communities experience disproportionate exposure to environmental harms such as toxic waste sites and pollution-emitting facilities.[203] While scholars and activists often focus on inequitable distribution of environmental harms, environmental justice also requires that communities become meaningfully involved in decisions that affect their well-being.[204] Numerous executive actions have highlighted the federal government's aspirations to involve communities in decision-making, including executive orders issued by Presidents Clinton and Obama, as well as subsequent emphasis on environmental justice in the NEPA process.[205] Despite these "good words," problems with environmental and cultural justice are prevalent in agencies' actual consultation practices.

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 raised environmental justice concerns, because the Standing

[203] *See generally* Robert Bullard, *Environmental Justice: It's More than Waste Facility Siting*, 77 SOC. SCI. QUARTERLY 493 (1996); *see also* Evan J. Ringquist, *Assessing Evidence of Environmental Inequities: A Meta-Analysis*, 24 J. OF POLICY ANALYSIS AND MGMT. 223 (2005).
[204] *See supra* note 23 and accompanying text.
[205] *See supra* notes 73 - 75 and accompanying text; *see also* note 24 and accompanying text.

Rock Sioux claimed to have had little opportunity to meaningfully participate in the planning process for a project with significant environmental impacts to tribal land, water, and cultural resources. Moreover, while DAPL is highly visible, it is not a singular example. Indeed, as demonstrated by the cases studied in this paper, DAPL is just one of many ongoing interactions between tribes and the federal government governed by the tangled assessment process mandated by NEPA and NHPA.

While less attention has been paid to cultural justice in the NEPA and NHPA process, it is an important aspect of environmental justice, particularly when Native American cultural resources are at stake. Cultural resources include tangible remains such as archaeological sites, artifacts, and architecture, but may also include less well-defined resources, like culturally significant plants and animals, and traditional cultural properties.[206] Destruction of these resources may remove the evidence of a people's history, effectively erasing them from our shared national story, which may delegitimize their claims to ancestral or historic lands, or allow the majority to misappropriate their history.[207] Additionally, this loss significantly undermines efforts by minority cultures to preserve and maintain traditional knowledge, histories, and customs for future generations, which ultimately may contribute to the extinction of a culture. In this sense, control of cultural resources and research allows the majority to decide how, and if, the minority culture fits within the dominant story of the majority.[208] While cultural justice problems are not unique to indigenous communities, the problem is particularly acute among Native American tribes, many of whom are at the forefront of the current Western energy boom.

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[206] THOMAS KING, CULTURAL RESOURCE LAWS AND PRACTICE 8-9 (Alta Mira Press 2004).
[207] *See generally* Atalay, *supra* note 93; *see also* TJ Ferguson, *Native Americans and the Practice of Archaeology*, 25 ANNUAL REV. OF ANTHROPOLOGY 63 (1996).
[208] Roderick McIntosh, Susan Keech McIntosh & Tereba Togola, *People without History*, 42 ARCHAEOLOGY 74 (2006).

III. NEPA and NHPA Consultation and Public Engagement Practices Deserve Greater Scrutiny

The case studies above show that in practice, tribal consultation under NEPA and NHPA often falls far short of the statutes' substantive purpose of incorporating tribal concerns into the agencies' decisions. The Tongue River case, however, also illustrates how a robust consultation practice can give a community a strong voice in development discussions. One of the major differences in the Tongue River case is the level of transparency within the consultation process. Conversely, lack of transparency in the consultation process enables agencies to pursue outdated and ineffective consultation practices. Below, we argue that a key shortcoming in NEPA and NHPA is that they lack sufficient mechanisms to hold agencies accountable for adhering to NEPA and NHPA's procedural requirements for tribal consultation.

A. The Administrative Procedure Act Limits Judicial Review of Agencies' Tribal Consultation Procedures.

The Absaloka mine expansion and Dakota Access Pipeline cases reveal that agencies' approaches to consultation often fail to meet either the letter or the spirit of NEPA and NHPA. In the case of the Absaloka mine expansion, the Office of Surface Mining conducted public outreach as required by NEPA, but did so in such a way that Crow tribal members and the Crow Tribe's Cultural Advisory Committees were unaware of the project until after cultural resources had been destroyed. In the case of DAPL, Dakota Access, LLC initiated contact with the Standing Rock Sioux's Tribal Council and the THPO, but primarily conducted consultation through letters and ignored its obligations for government-to-government interaction.[209] These two examples illustrate how agencies may attempt to complete a consultation process without

[209] *See supra* note 178-180 and accompanying text.

full and careful adherence to the requirements of Section 106, let alone achieving the substantive goal of ensuring that tribes' concerns are addressed in the agency decision-making process.[210]

Judicial review procedures provide one possible avenue for tribes to appeal agency decisions and hold agencies accountable for adherence to the Section 106 process. The Standing Rock Sioux's experience in appealing the Army Corps' decision on DAPL, however, reveals the limitations of judicial review. Dakota Access LLC was able to document a series of attempts to contact or engage with the Standing Rock Sioux, which the Court ruled was a good faith effort to discharge the consultation requirements under NHPA.[211] One interpretation of the conflict between the Standing Rock Sioux and USACE is that there was fundamental disagreement on what constitutes "good faith" or "meaningful" consultation. Unfortunately, this question is largely outside of legal purview.

The Administrative Procedure Act and subsequent judicial interpretation gives agencies substantial discretion to interpret statutes and regulations, on the grounds that agencies are technical experts in their respective fields and it would be inappropriate for the courts to impose judgment upon expert agencies.[212] As a result, courts have limited ability to review the substance of agencies' decisions, and instead must limit their inquiries to determining whether agencies' decisions were arbitrary and capricious – a highly deferential standard.[213] It is unclear, however, whether the normal deference that courts give to expert agencies is warranted in the case of NEPA and NHPA. Ordinarily, courts defer to agencies making decisions about matters in which they are subject matter experts. The agencies implementing NEPA and NHPA, however, often

[210] *See supra* note 180 and accompanying text.
[211] *See supra* note 187 and accompanying text.
[212] *See generally* Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).
[213] *See generally* Dawn E. Jourdan & Kevin Gifford, *Wal-Mart in the Garden District: Does the Arbitrary and Capricious Standard of Review in NEPA Cases Undermine Citizen Participation*, 18 J. OF AFFORDABLE HOUSING & CMTY. DEV. LAW 269 (2009).

are *not* subject matter experts in environmental or cultural resources. In the case of the Absaloka Mine expansion, the Office of Surface Mining is an expert on mines; in the case of DAPL, the Army Corps of Engineers is an expert on infrastructure development. The courts' normal reluctance to substitute its own judgment for that of the expert agency is therefore, arguably less applicable in these cases.

Applicable or not, this approach to judicial review gives tribes little, if any, ability to plead to the courts that agencies failed to achieve the substantive goals of NEPA and NHPA: an opportunity to have meaningful input on agencies' decision-making process. Courts may review agency consultation procedures, but in doing so will limit their inquiry to whether agencies' consultation practices were arbitrary and capricious.[214] Historically, tribes have been unsuccessful in appealing agency decisions on the ground that consultation was inadequate.[215]

B. Lack of Transparency Limits Other Forms of Accountability

Judicial review is not the only way to hold agencies accountable. Scholars of public administration have long noted that there are multiple approaches to ensuring that agencies are held accountable for their actions.[216] These approaches include political oversight as well as public engagement.[217] Political forms of accountability bring agencies' actions to the attention of actors with political authority to demand redress – such as the general public, Congress, or the White House.[218] The effectiveness of political accountability is illustrated in the Tongue River case: stakeholders who were involved in the process were dissatisfied with the initial quality of

[214] Christy McCann, *Dammed if You Do, Damned if You Don't: FERC's Tribal Consultation Requirement and the Hydropower Re-licensing at Post Falls Dam*, 41 GONZ. L. REV. 411, 437-38 (2005).
[215] *Id.*
[216] *See generally* Barbara Romzek & Melvin Dubnick, *Accountability in the Public Sector: Lessons from the Challenger Tragedy*, 47 PUB. ADMIN. REV. 227, 229-30 (1987).
[217] *Id.*
[218] *Id.*

the cultural resource survey and were able to successfully demand that the agency undertake a more rigorous assessment of cultural impacts.

Political accountability only works, however, if political actors can reasonably access information about agencies' decision-making process. In the Tongue River case, the agency went to great lengths to ensure that their decision-making process was transparent, open, and legible to concerned parties. This kind of transparency is not universal, however. All too often, the complexity and lack of transparency in agencies' approaches to tribal consultation stymies the potential use of political forms of accountability. In the Absaloka Mine case, the NHPA compliance process was non-transparent to a degree that tribal officials were unaware that their cultural resources were implicated. In the DAPL case, agencies' decision making processes were similarly non-transparent and illegible to participants. NEPA and NHPA give agencies the flexibility to design site-specific approaches to consultation, but this same flexibility means that there are few markers or junctures at which consultation would be expected. Because no two consultation processes are alike, it is difficult for those who are not intimately involved in a consultation process to determine whether an agency has acted in good faith to fulfill its duties under NEPA and NHPA.

C. A call for evaluation of agencies' stakeholder engagement and levels of transparency during consultation mandated by NEPA and NHPA

Scholars and tribes have widely criticized tribal consultation under NEPA on the grounds that agencies' consultation processes often fail to provide tribes with a meaningful opportunity to shape agencies' decisions – in essence, undermining the very goal of NEPA and NHPA. We argue that NEPA and NHPA establish fundamentally important processes for tribal consultation. What these statutes fail to do, however, is provide sufficient mechanisms to hold agencies accountable for acting in good faith during the consultation process.

We recognize that judicial review is currently a poor tool for providing tribes with an opportunity to appeal agency decisions. Instead, we call for greater transparency and attention to agencies' approaches to tribal consultation in ways that would allow tribes, the public, and elected officials to demand accountability through political means. These actors currently have limited ability to prevail upon agencies to improve consultation practices, because these practices are complex and non-transparent.

One possible remedy would be to develop a ranking system that evaluates agencies' performance in terms of public participation and tribal consultation in the NEPA and NHPA process. EPA currently evaluates the quality of the science and analysis of agency EISs, ranking each EIS on its comprehensiveness and making these rankings available to agencies and to the public. Scholars have used these rankings to examine trends in EIS quality over time, as well as to identify differences in EIS quality across agencies.[219] These rankings make agency performance transparent, provide agencies with an indication of whether or not they are performing well in their NEPA implementation, and provide the public and elected officials with useful information about agencies' performance in implementing NEPA.

We argue that the time has come to provide a similar evaluation of agencies' approaches to public participation and tribal consultation. A ranking system could be used to evaluate agencies' performance against standards such as those developed by the NATHPO, and include an assessment of factors such as whether the public and tribes were consulted early in the process, whether the process included the participation of the THPO or of designated tribal liaisons, and evidence of mutual respect between tribes and project proponents. Such a ranking system could be used to bring greater awareness of best practices to agencies, to provide

[219] *See generally* Tzoumis & Finegold, *supra* note 10; *see also* Tzoumis, *supra* note 10.

agencies with feedback about their performance, and to ensure that the public, stakeholders, and advisory agencies such as CEQ and ACHP are aware of agencies' performance.

One advantage of such a ranking system is that it need not be undertaken by a government agency. While EPA undertakes ranking of EISs, EPA is not the only possible actor who might rank agencies' approaches to public and tribal consultation. Other agencies could undertake the project, as could NGOs or watchdog groups, making this a viable option for stakeholders to pursue even without congressional authority or appropriations.

As NEPA and NHPA have matured over the past 50 years, we have seen improvements in the science used to inform impact analysis as well as an expansion of federal agencies' duty to consult with tribes and involve them in decision-making. Despite the development of "best practices" for tribal engagement, however, we have seen well-documented instances of a breakdown in tribal consultation and repeated concern that tribes have limited ability to participate in decisions that affect their cultural resources. It is time to pay better attention to the details of how agencies engage with tribes during the consultation process.

CONCLUSION

NEPA and NHPA have admirable and aspirational goals of ensuring that tribes have an opportunity to shape decisions that affect their environmental and cultural resources. The consultation process is at the very heart of these statutes, which have substantive goals of improving environmental protection and historic preservation and insuring that affected people have a voice in the decision-making process. When agencies undertake these obligations in good faith, NEPA and NHPA can be powerful tools to ensure that tribes' and other minority

communities' concerns are taken into consideration. When agencies fail to undertake their consultation obligations in good faith, however, there are too few mechanisms to hold agencies accountable due to the significant freedom they have in how they interpret their consultation obligations and because judicial review is limited to procedural oversight. This article calls for improving the situation by modifying and employing existing mechanisms for evaluating and ranking agencies' efforts at environmental review to include evaluation of public participation, transparency, and tribal consultation.