

ARTICLE

NATIVE AMERICAN COLLABORATION IN CULTURAL RESOURCE PROTECTION IN THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA

Kristine Olson Rogers*

*The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.*¹

Before the arrival of Lewis and Clark, the Oregon Trail immigrants, the Chinese railroad laborers, the dam builders, the commercial fishermen, the highway engineers, the Cascadian architects, and before the arrival of the windsurfers, a prehistoric populace lived in a trading mecca on the Columbia River.² One hundred centuries later, the descendants of both the original inhabitants and original displacers are trying, in tandem at last,

* Copyright 1993 by Kristine Olson Rogers, Associate Dean for Academic Affairs and Professor of Law, Northwestern School of Law at Lewis & Clark College; J.D. 1972, Yale Law School. The author would like to acknowledge the diligent research and editing assistance of Kristen Chapin, J.D. 1992, Northwestern School of Law at Lewis & Clark College, without whom this article never would have been completed. This article was improved immensely after its first draft by the perceptive reviews of some of the key players in this drama: Barbara Bailey, Columbia River Gorge Commissioner appointed by the Governor of Oregon; Walter R. Echo-Hawk, Senior Staff Attorney, Native American Rights Fund; Brian Litt, Recreation Planner, Columbia River Gorge Commission; Paul Minthorn, Rights Protection Specialist, Confederated Tribes of the Umatilla Indian Reservation; Louie Pitt, Jr., Assistant Director for Intergovernmental Affairs, Department of Natural Resources for the Confederated Tribes of the Warm Springs Reservation and Columbia River Gorge Commissioner; Lawrence Watters, former Assistant Attorney General, State of Washington and current Counsel to the Columbia River Gorge Commission; and Jeffrey Rogers, City Attorney, Portland, Oregon and the author's collaborator for over two decades.

1. EDWARD LAZARUS, *BLACK HILLS WHITE JUSTICE* 11 (1991) (quoting Northwest Ordinance of 1787, 1 Stat. 51, 52 (1789)).

2. See W. Raymond Wood, *Contrastive Features of Native North American Trade Systems*, in *FOR THE CHIEF: ESSAYS IN HONOR OF LUTHER S. CRESSMAN* 153, 156-58 (Fred W. Voget & Robert L. Stephenson eds., 1972).

to preserve their cultural remnants. This article examines the ways Native Americans are participating in contemporary political processes to protect cultural resources in the Columbia River Gorge.³

After eight years of political maneuvering, Congress passed the Columbia River Gorge National Scenic Area Act ("Act") in 1986.⁴ Consequently, Oregon and Washington adopted a bi-state compact.⁵ Pursuant to the compact, twelve commissioners were appointed: three by each of the governors of Oregon and Washington; one by each of the counties of Clark, Skamania, and Klickitat in Washington; and one by each of the counties of Multnomah, Hood River, and Wasco in Oregon.⁶ A designate of the Secretary of Agriculture also sits on the Commission *ex officio*.⁷

The Act describes two overriding purposes, the second subsidiary to the first: (1) to protect and enhance the scenic, natural, recreational, and cultural resources; and (2) to promote economic development consistent with the first objective, primarily within the urban areas of the Gorge.⁸ In addition, the Act prohibits the Columbia River Gorge Commission from undertaking any action that would impact the "treaty tribes'" rights to fish,

3. The Columbia River Gorge pierces the Cascade Mountains and divides Oregon and Washington approximately 120 miles upstream from the Pacific. The Columbia River Gorge National Scenic Area includes approximately 90 miles of the Columbia River and contains approximately 44,000 residents. COLUMBIA RIVER GORGE COMM'N, MANAGEMENT PLAN FOR THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA 2 (Sept. 1992) [hereinafter PLAN] (adopted by the Columbia River Gorge Comm'n on Oct. 15, 1991, concurrence by the U.S. Secretary of Agriculture on Feb. 13, 1992).

4. Pub. L. No. 99-663, 100 Stat. 4274 (codified as amended at 16 U.S.C. §§ 544-544p (1988 & Supp. III 1991)). See generally Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 ENVTL. L. 863 (1987) (discussing the political process and legislative history behind the passage of the Act).

5. In 1987, Oregon and Washington ratified the Columbia River Gorge Compact, which incorporated by reference the Act and established the Columbia River Gorge Commission. 1987 Or. Laws, ch. 14, § 7 (codified at OR. REV. STAT. ANN. § 196.150 (Butterworth 1991)); 1987 Wash. Laws, ch. 499, § 1 (codified at WASH. REV. CODE ANN. § 43.97.015 (West Supp. 1992)).

6. OR. REV. STAT. ANN. § 196.150, art. II; WASH. REV. CODE ANN. § 43.97.015, art. II. The author is the appointed Commissioner from Multnomah County, serving a term from 1987-93.

7. OR. REV. STAT. ANN. § 196.150, art. IIa.

8. 16 U.S.C. § 544a.

hunt, and gather other foods in the Gorge.⁹ Moreover, the National Scenic Area ("NSA") is governed by several layers of local and state bureaucracy.¹⁰ Given this backdrop, the Commission pledged to work with the four tribal governments to ensure the protection of treaty rights and to protect and to enhance cultural and natural resources.¹¹

After its adoption, state, local, and federal agencies have worked to implement the Act. In the six years since their appointment, the Commissioners have completed rudimentary inventories of the scenic, natural, cultural, and recreational resources in the Gorge,¹² and have mapped land use designations for the NSA.¹³ Most important, they have crafted a Management Plan ("Plan") incorporating those inventories and land use designations.¹⁴ These efforts have received the half-hearted blessing of the Secretary of Agriculture, despite his concerns about erosion of "private property rights" and county planning "flexibility."¹⁵ Two of the six counties have adopted ordinances;¹⁶ if the other counties do not follow suit, the Gorge Commission will proceed to do so as required by the Act.¹⁷ While the Commissioners and some local governments are working to fulfill the primary purpose of the Act, Congress is attempting to promote the secondary purpose, economic development. Congress is

9. 16 U.S.C. § 544o(1). These tribes are represented by four tribal governments: the Nez Perce Tribe; Confederated Tribes of the Umatilla Indian Reservation; Confederated Tribes of the Warm Springs Reservation; and Confederated Tribes and Bands of the Yakima Indian Nation. See PLAN, *supra* note 3, at IV-25 to IV-31 (discussing treaty rights in the General Management Area).

10. PLAN, *supra* note 3, at 3.

11. Columbia River Gorge Commission meetings with individual tribal councils, 1987-88; see *supra* note 9 (listing the four tribes).

12. 1988 COLUMBIA RIVER GORGE COMM'N ANN. REP. 7; see also 16 U.S.C. § 544d(a)(1).

13. 1989 COLUMBIA RIVER GORGE COMM'N ANN. REP. 10-11; see also 16 U.S.C. § 544d(b). This area is bordered roughly by the Deschutes and Sandy Rivers on the east and west, and extends just past the ridgelines of the Gorge on the north and south.

14. PLAN, *supra* note 3.

15. Letter from Edward Madigan, Secretary, U.S. Department of Agriculture, to the Columbia River Gorge Commission 2 (Feb. 13, 1992) [hereinafter Madigan Letter] (on file with author).

16. See, e.g., Letter from Dean Evans, Chairman, Skamania County Board of Commissioners, to Columbia River Gorge Commission (Jan. 8, 1993) (on file with author); Letter from Gladys McCoy, Chair, Multnomah County, to Columbia River Gorge Commission (Jan. 13, 1993) [hereinafter McCoy Letter] (on file with author).

17. 16 U.S.C. § 544d(c).

considering appropriations under the Act for an interpretive center, a conference center, recreational projects, and other economic development activities.¹⁸

Despite these coordinated efforts, certain conflicts between world views of the Native Americans and the dominant white culture, the *Weltanschauungs* of the past and the present, and certain incompatibilities of the growth ethic and environmental values are all played out in dramatic fashion in the Gorge. Echoing its cataclysmic creation eons ago,¹⁹ titanic forces are now clashing to carve out the Gorge's future. The stakes are high because some of the resources are non-renewable.

This article comprises five parts. It begins with a description of the resources involved, from ancient times through contemporary landscapes.²⁰ Next, the threats to the resources are detailed within the categories of the Management Plan's "tracks": agriculture, commercial development, forestry, recreation, and residential and urban area expansion.²¹ Third, existing cultural resource protection measures from other jurisdictions are briefly outlined along with their flaws and internal inconsistencies.²² Then the evolution of the Management Plan is chronicled, from inventory through several staff proposals and drafts.²³ At the heart of this Plan, a policy emerged to provide tribal collaboration in cultural resource protection that is worthy of national emulation.²⁴ Finally, the article discusses various potential loopholes in the NSA planning process and some promising law reform measures to enhance the protection provided in the Plan.²⁵

18. *Id.* § 544d(a)(2); see, e.g., Letter from Sid Morrison et al., United States House of Representatives, to the Hon. Sidney R. Yates, Chairman, Subcommittee on Interior, Commission on Appropriations (May 27, 1992) (requesting funding for priority projects in the Gorge) (on file with author).

19. See JOHN E. ALLEN ET AL., *CATACLYSMS ON THE COLUMBIA* 3 (1986).

20. See *infra* notes 26-77 and accompanying text.

21. See *infra* notes 78-122 and accompanying text.

22. See *infra* notes 123-65 and accompanying text.

23. See *infra* notes 166-288 and accompanying text.

24. See *infra* notes 289-301 and accompanying text.

25. See *infra* notes 302-57 and accompanying text.

I. CULTURAL RESOURCES OF THE NATIONAL SCENIC AREA

A. *Gifts from the Creator*

Any discussion of cultural resources from a Native American perspective must be grounded in natural resources. Indeed, tribal ordinances typically begin by addressing the elements, flora, fauna, and geographical locations.²⁶ Within the NSA, these tribal concerns would center around the following natural resources: the river itself; the salmon and other water life; the roots, berries, trees, and plants that support Indian lifeways; wildlife and its habitat; distinctive rock formations with spiritual associations, such as vision quest sites; and the Cascade Range Mountains—Mount Hood, Mount St. Helens, and Mount Adams—sacred to native people since time immemorial.²⁷

B. *Material Remains of Prehistoric Inhabitants*

Although far from exhaustive, archaeological research in the Gorge has determined that people have lived, hunted, and fished in the area for at least ten thousand years.²⁸ Evidence of this ancient past can be found in rock art, pithouse village sites, campfire debris, sculpture, tools, weapons, human burials,²⁹ and

26. See, e.g., WARM SPRINGS TRIBAL CODE § 490.510 (1986).

27. See CHUCK WILLIAMS, BRIDGE OF THE GODS, MOUNTAINS OF FIRE 51-71 (1980) (examining the relationship between the native people of the Columbia River Gorge area and the land); see also *infra* note 355 and accompanying text.

28. C. MELVIN AIKENS, U.S. DEPT OF INTERIOR, ARCHAEOLOGY OF OREGON 41 (1984).

29. *Id.* at 47-63. By listing human burials here, the author does not wish to imply that they belong in the same category as artifacts and cultural remains. As attorney, theologian, and professor Vine Deloria notes:

The attitude of the federal agencies toward Indian remains, an attitude supported and applauded by museum directors and archaeologists, has been that they were resources, comparable in most respects to timber, oil, and water, belonging to the federal agency on whose land they were found. The Native American Rights Fund, led by Walter Echo-Hawk, challenged this conception and, in a series of negotiations, secured restoration of many human remains and saw enacted several state and federal statutes placing Indian human remains on a near-equal standing with non-Indian skeletons.

Vine Deloria, Jr., *Secularism, Civil Religion, and the Religious Freedom of American Indians*, 16 AM. INDIAN CULTURE & RES. J. 9, 16-17 (1992).

the rich oral tradition of stories passed down from generation to generation.³⁰

The area around The Dalles, Oregon was once the summer gathering place of as many as 22,000 people.³¹ The early natives of the Gorge took advantage of its abundant salmon, its inspirational location, and its favorable summer climate to draw traders from other regions³² who brought exotic treasures such as buffalo hides and shell ornaments.³³ Marriages were arranged, races scheduled, new ideas exchanged.³⁴ Information was imparted about explorers from the coast or events farther east.³⁵

C. Lewis and Clark's "Discovery"

In 1805, Lewis and Clark's Corps of Discovery canoed into view, and surely astounded the natives with their preference for dog meat instead of the succulent salmon.³⁶ Their journals document and confirm many of today's archaeological conclusions about the area. For instance, Lewis and Clark reported observing as much as fifty tons of salmon drying on the shore in huge bales for trade.³⁷ Remnants of the Lewis and Clark expedition in the Gorge include their campsites, carvings, and the trade items left in each Indian village that hosted them.³⁸ Although several

30. WILLIAMS, *supra* note 27, at 26-35. Increasingly, the Native American stories describing prehistoric events are being verified scientifically. See John E. Allen, *Ancient Native Legends Confirmed by Geology*, THE OREGONIAN, Apr. 18, 1985, at B3; Robert A. Freed, *Major Landslide 900 Years Ago Shaped Life in Columbia Gorge*, THE OREGONIAN, Feb. 25, 1988, at D3.

31. AIKENS, *supra* note 28, at 71; see also WILLIAMS, *supra* note 27, at 73.

32. Artifacts from as far away as Alaska, the Great Plains, and California have been discovered in archaeological investigations of what appears to be ancient trading, gaming, and ceremonial activity. Wood, *supra* note 2, at 156-58; see also WILLIAMS, *supra* note 27, at 73.

33. Wood, *supra* note 2, at 156-58; WILLIAMS, *supra* note 27, at 73.

34. WILLIAMS, *supra* note 27, at 73.

35. *Id.*

36. *Id.* at 82; see also THE JOURNALS OF LEWIS AND CLARK 272 (John Bakeless ed., 1964) [hereinafter JOURNALS].

37. Wood, *supra* note 2, at 158; see also GERALD S. SNYDER, IN THE FOOTSTEPS OF LEWIS AND CLARK 176 (1970).

38. JOURNALS, *supra* note 36, at 269-70; see CLIFFORD E. TRAFZER & RICHARD D. SCHEUERMAN, RENEGADE TRIBE: THE PALOUSE INDIANS AND THE INVASION OF THE INLAND PACIFIC NORTHWEST 1-9 (1986) (an excellent description of Lewis and Clark among the natives).

tribal holy men and women had heard of their impending arrival and prepared honorary welcoming songs for the explorers,³⁹ the Corps of Discovery actually represented the first wave of an invasion that would culminate in the Indians' forced removal from their hallowed land.⁴⁰

D. Immigrants Along the Oregon Trail

Wagon trains trudging along the Oregon Trail often stopped near The Dalles at the east end of the Gorge, unloaded, and continued their trip by canoe.⁴¹ Burials of those who did not survive the trip occurred with some frequency.⁴² Evidence of these immigrants may still be found today. Ruts from the countless wagon wheels are still visible in the hills to the east of The Dalles, and artifacts from the travellers may be found in the trail's "shoulders" or in nearby campsites.⁴³ In addition to the physical evidence, music, literature, and art also commemorate this national migration. Two trail interpretive centers have recently been sited in Oregon: one on Flagstaff Hill in Baker City, and one at the trail's end in Oregon City.⁴⁴

E. Chinese Laborers

In the late nineteenth century, Chinese laborers and their families were brought to the Gorge to assist in the construction of railroads along both sides of the river.⁴⁵ Vestiges of their sojourn may be seen in shards of porcelain found at their campsites, accounts of herbal medicine practiced with ancient Asian skills, and Chinese bake ovens located periodically along the

Today, Lewis and Clark's expedition appeals to both collectors and history buffs. For example, the Jefferson peace medals that Lewis and Clark distributed are highly prized among collectors. EMORY M. STRONG, *STONE AGE ON THE COLUMBIA RIVER* 207-09 (1959); TRAFZER & SCHEUERMAN, *supra*, at 4. Roadmarkers along both sides of the Gorge highlight different parts of the Lewis and Clark adventure. Hundreds of people make this pilgrimage each year, tracing the explorers' steps.

39. TRAFZER & SCHEUERMAN, *supra* note 38, at 2.

40. *Id.* at 1.

41. WILLIAMS, *supra* note 27, at 81.

42. LAZARUS, *supra* note 1, at 14.

43. *Id.*

44. Personal observation of the author.

45. WILLIAMS, *supra* note 27, at 138 (discussing briefly the Chinese importation to the Columbia River Gorge).

railroad tracks.⁴⁶ Not much is known about the Chinese presence in the Gorge, perhaps due to its transitory nature or the cultural biases of researchers.

F. Hydroelectric Engineering and Indian Burial Inundation

The first dam built in the National Scenic Area was the Bonneville Dam, completed in 1938.⁴⁷ It created the "Bonneville Pool," which stretches lakelike from below Cascade Locks almost as far east as The Dalles, and it flooded hundreds of Indian habitation, ceremonial, and burial sites along the way.⁴⁸ When federal officials gathered to celebrate the fiftieth anniversary of the dam in 1988, tribal officials conducted a vigil with mourning chants and drumming on what is left of a nearby island.⁴⁹

Similarly, when the floodgates of The Dalles Dam were closed in 1957, it affected the Native Indians.⁵⁰ Observers recall hundreds of Indian people lining the shores wailing their lament.⁵¹ Gone was the revered Celilo Falls, site of the area's richest salmon fishery, mecca of the ancients.

Before the floodgates were closed, helicopter pilots were hired to airlift burials off the islands behind the dam and transport the

46. *Id.*; see also ANNIE DILLARD, *THE LIVING* (1992) (a well-researched novel describing the Chinese importation).

47. PENELOPE KIELPINSKI & CATHERINE V. PETERSON, *GORGE YOURSELF: A GUIDE TO PLACES AND EVENTS IN THE HEART OF THE COLUMBIA RIVER GORGE* 60 (1988).

48. See Rick Minor, *History of Archaeological Investigations in the Columbia River Gorge*, in *PREHISTORY AND HISTORY OF THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA, OREGON AND WASHINGTON* 31, 31-34 (Stephen D. Beckham et al. eds., 1988). Traditionally, Native Americans buried their dead on scaffolding on the islands in the river. STRONG, *supra* note 38, at 79.

49. Joanna Grammon, *Tribes Hold 50-Hour Vigil to Mourn Loss of Salmon*, *THE SKAMANIA COUNTY PIONEER* (Wash.), Aug. 12, 1987, at 5. In acknowledgment of the many other Indian burials in this area, the Skamania County Cemetery District recently passed a resolution changing the name of the cemetery from "Cascade Pioneer Cemetery" to "Cascade Indian and Pioneer Cemetery." Cemetery Dist. No. 1, Skamania County, Wash., Resolution 1992-14 (July 8, 1992) (on file with author).

50. FAY G. COHEN, *TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS* 46 (1986).

51. Dorsey and Violet Schalk took their two children to witness the event and photographed the mourners. Conversation with Dorsey and Violet Schalk (Nov. 12, 1991). Several of the current Columbia River Gorge Commissioners also have personal memories of this historic, sobering moment. The Yakima Indian Nation Cultural Center at Toppenish, Washington houses in its archives original footage of the inundation.

bodies to a mass grave on the Washington end of The Dalles Bridge, beside an industrial port.⁵² Funerary items were stolen and sold to collectors.⁵³ Local "pot hunters" descended on the areas behind the dam and engaged in a frenzy of looting, racing to add to their collections before the opportunity was lost forever.⁵⁴

When the State of Washington was planning its centennial celebration, several promoters suggested opening the floodgates of The Dalles Dam so that tourists could see the majesty of the Falls.⁵⁵ Tribal leaders objected, saying that unless Celilo was to be permanently restored, it would be unbearably painful.⁵⁶ The idea was abandoned.⁵⁷

G. The Fishery

*My strength is from the fish; my blood is from the fish, from the roots and berries. The fish and game are the essence of my life.*⁵⁸

52. Conversation with Lynell Schalk, Special Agent-in-Charge, Bureau of Land Management, U.S. Department of the Interior (June 19, 1990).

53. *Id.* Some of these items were still on display at an Artifact Collectors Show and Sale at the Portland Armory in April, 1990. The ghoulish nature of this type of trade is evident from excerpts of a letter found among the 1950s correspondence of a Washington pot hunting group:

Up to the present we have uncovered 22 burials. These were all old (having only a few pieces of iron & coper [sic]), they had no glass beads or indications of caskets. Of these 22 burials we took 14 out systematically, due to certain reasons we were forced to "butcher" the remaining 18. We have photographs, sketches and burial reports of the 14. We also saved the skulls, long bones & pelvis of the skeletons, except for a few where the bones were to [sic] decomposed for removal. Also fragmentary reports on the other 18.

.....
If you wish, you may have all the data (photographs, reports, bones, etc.,) from this camp, except the artifacts. These and a few of the skulls we wish to retain.

Letter from Gordon L. Lalander, Columbia Archaeological Society, to Dr. Richard Daugherty (1958) (on file with author).

54. See STRONG, *supra* note 38, at 50-51.

55. Conversation with William Lipe, Professor of Anthropology, Washington State University (Aug. 1986).

56. Conversation with William Yallup, Sr., Program Director, Yakima Indian Nation Cultural Resources Program (Nov. 1986).

57. Yakima Indian Nation Tribal Council Meeting (Feb. 19, 1988).

58. 1991 COLUMBIA RIVER INTER-TRIBAL FISH COMM'N ANN. REP. 10 [hereinafter 1991 ANNUAL REPORT] (quoting Chief Meninock of the Yakimas (1915)).

Platforms, where tribal fishermen ascend and reach out with huge dip nets to catch salmon, are still in use at several points along the river and its tributaries.⁵⁹ Both ceremonial and subsistence fishing are accomplished in this way. Commercial fishing, with tribally regulated large net sites, also occurs in zones.⁶⁰ Declining salmon runs in the river have prompted recent lawsuits to enforce the government's duty under the Endangered Species Act.⁶¹ Without the returning fish, several crucial traditional ceremonies cannot be held. At the Spring Root Feast, for instance, the salmon is a sacrament.⁶² The treaty-guaranteed fishery, indispensable for preserving this way of life, is itself a cultural resource,⁶³ as well as a natural resource.

H. The Old Scenic Highway and Associated Historic Structures

In 1914, Samuel Lancaster imported several Italian stone masons⁶⁴ and realized his dream of constructing a world-class highway from Troutdale to The Dalles on the Oregon side of the Columbia.⁶⁵ The stone masons' graceful bridges and remarkable tunnels have been photographed and reproduced around the world.⁶⁶

59. Personal observation of author.

60. COHEN, *supra* note 50, at 120; see also *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969), *rev'd and remanded*, 529 F.2d 570 (9th Cir. 1976) (holding, inter alia, that district court order allowing Indians to resume commercial fishing in Columbia River was proper, where states' hearings to promulgate regulations were not in compliance with requirement for least restrictive imposition on Indian treaty rights).

61. Paul Koberstein, *States Deadlock on Regional Salmon Plan*, THE OREGONIAN, Aug. 26, 1992, at B4; *Environmental Groups Sue U.S. Over Decreasing Salmon Runs*, THE OREGONIAN, July 23, 1992, at D4. See generally Robert J. Miller, Comment, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543 (1991).

62. Conversation with Louie Pitt, Jr., Assistant Director for Intergovernmental Affairs, Department of Natural Resources for the Confederated Tribes of the Warm Springs Reservation (Apr. 4, 1992).

63. The U.S. Supreme Court recognized the vital importance of fishing to the lives of Native Americans in *United States v. Winans*, 198 U.S. 371 (1905): "The right to resort to the fishing places . . . was . . . not much less necessary to the existence of the Indians than the atmosphere they breathed." *Id.* at 381; see also 1991 ANNUAL REPORT, *supra* note 58, at 7 (discussing cultural and economic reliance on the salmon and other fish).

64. JOHN E. TUHY, SAM HILL: THE PRINCE OF CASTLE NOWHERE 103, 152 (1983).

65. Dwight A. Smith, Oregon Dep't of Transportation, Columbia River Highway Historic District 62-64 (1984).

66. *Id.* at 66-67.

Some of the landmarks along the route of the Old Scenic Highway were established at the time the road went in, others capitalized on its success later. Sunday drivers from Portland in the 1920s and 1930s would picnic by its overlooks.⁶⁷ It allowed campers access to the first campground in the nation, at Eagle Creek.⁶⁸ The Columbia Gorge Hotel provided tourist facilities for tired and hungry motorists.⁶⁹ Crown Point monument, the Vista House visitor center,⁷⁰ became the jewel of the Cascadian architects. The road itself is now listed on the National Register of Historic Places. It runs by waterfalls, old inns, parks, monuments, barns, fields, stores, restaurants, and acres of orchards.

The National Scenic Area Act earmarks \$2,800,000 for improvements to the scenic highway.⁷¹ An Oregon Department of Transportation Task Force has established priorities for its restoration.⁷² First on their list is an area between Hood River and Mosier which could be opened to visitors.⁷³ This could provide a trail for hiking and biking, which would also be accessible to wheelchair users.⁷⁴ Although this section of the Historic Highway may become a remarkable recreational resource, it also may threaten a major rock alignment that appears to be a vision quest site.⁷⁵

67. TUHY, *supra* note 64, at 153-55.

68. WILLIAMS, *supra* note 27, at 162.

69. *Id.* at 145.

70. The Vista House, designed by Edgar Lazarus, was dedicated on May 5, 1918. *Seventy-fifth Anniversary Commemorative Issue*, VISTA HOUSE VIEWS (Friends of Vista House, Corbett, Or.), Summer 1992, at 4, 9.

71. 16 U.S.C. § 544n(b)(3).

72. Nancy H. Gronowski & Jeanette Kloos, Oregon Dep't of Transportation, A Study of the Historic Columbia River Highway 45-47 (Nov. 1987).

73. Conversation with Jeanette Kloos, Oregon State Highway Division (Dec. 22, 1992).

74. Gronowski & Kloos, *supra* note 72, at 3; *see also* Letter from Eric Ward, Chairperson, Wasco County Economic Development Commission to Oregon Department of Transportation (Aug. 20, 1987) (on file with author). The National Scenic Area Act's mandate includes protection and enhancement of recreational resources, as well as cultural resources. 16 U.S.C. § 544(a). The Historic Highway is both, and is one of the foremost attractions in the NSA. *See* JONES & JONES, Columbia River Gorge National Scenic Area Recreation Overview, tbl. 1 (Apr. 6, 1988) (on file with author). The Historic Highway has special importance to the economy of the Gorge in light of its use by visitors.

75. This site has not been thoroughly evaluated yet, but it has been identified by several archaeologists as an area of future research interest. Conversation with Cheryl Mack, Archaeologist, U.S. Forest Service (Apr. 3, 1990) (discussing the similarity of this site to a site directly across the river on Catherine Creek, Washington); *see also* Sandra Newman, *Rock Cairn Site*, SCREENINGS (Oregon Archaeological Society, Portland, Or.), Oct.

I. Contemporary Cultural "Landscapes of the Heart"

The National Park Service has pioneered planning work identifying "landscapes of the heart."⁷⁶ The Gorge, with its multitude of inhabitants over the years, has several candidates in this category. They range from signs for favorite old eating or drinking haunts to community gathering spots, parade routes, and traditional teenage parking places.⁷⁷ In keeping with the multiple-use philosophy of the Act, there ought to be recognition for these, too, in the National Scenic Area.

1985 (detailed geological description of site).

In general, vision quest sites are sites used by Native Americans in puberty rites, or times of crisis to clear heads and seek signs from spirit powers. See LAZARUS, *supra* note 1, at 7. Perhaps the best description of the characteristics of a vision quest in this area may be found in *The First Oregonians*:

At puberty, most boys and many girls went on a spirit quest. Prepared by an upbringing of awareness that they faced a rite of passage at 12, 13, or even 14, the young people knew that they would have to go out alone at night to retrieve marked sticks from distant places—their first tests. Ultimately each would go to a vigil site, often a lonely promontory overlooking the river or the sea, and prepare to gain a spirit helper.

These young people, quite alone, had to endure several days and nights of seclusion. They were prohibited from eating and were instructed to fast, pray, and dance. Above all, they were to wait. Even if they became scared, cold, and sick, they were to wait until the spirit world spoke. Ultimately, perhaps in the fourth or fifth day, each gained a "spirit helper." These helpers might be animate or inanimate: otter, grizzly bear, bluejay, fir tree, or even flint, the stone from which some men made projectile points.

Stephen D. Beckham, *The Oregon Coast*, in *THE FIRST OREGONIANS* 6 (Carolyn M. Buan & Richard Lewis eds., 1991).

The evidence that leads one to suspect strongly the Mosier Tunnel entrance rock alignments as a vision quest site is fourfold: (1) it is on "a lonely promontory overlooking the river"; (2) it faces east; (3) it corresponds with a virtually identical site across the river; and (4) it contains deliberate patterns of rock such as those typically directed by elders for questers' projects over a four to five day vigil.

76. U.S. National Park Service Workshop in Ebey's Landing National Historical Reserve, Wash. (Aug. 1, 1988) (materials on file with author). The National Park Service ("NPS") has developed standards for managing historic rural landscape districts to preserve local cultural values. For instance, planners accommodating residents' "vernacular landscapes" have mandated the preservation of tavern signs and traditional places for harvest-related activities. *Id.*

77. Personal observations of the author (e.g., Tad's Chicken & Dumpling road sign; cherry festival activities in The Dalles; Hood River brewery deck; Bridal Veil post office, etc.).

II. THREATS TO CULTURAL RESOURCES IN THE NATIONAL SCENIC AREA

Concurrently, as the once-abundant cultural resources are dwindling, forces imperiling those resources are mushrooming, primarily due to population growth spurred by tourism. Conflicts inherent in the NSA legislation become apparent as the competing interests (given congressional protection and direction to enhance) crowd each other.⁷⁸ There is no federal guidance about how to resolve the incompatibilities between the classes of protected scenic, natural, cultural, and recreational resources ("SNCRs").

A. Agricultural Practices

Cultivation entails a great deal of ground disturbance. In addition, large-scale agricultural operations involve building many structures, using heavy equipment, and accommodating all the activities associated with processing the produce. Plowing, grazing, and tree-planting, for example, can wreak havoc with the most typical kind of prehistoric site in the Gorge—a lithic scatter.

Lithic scatters, the remnants of ancient tool and weapons manufacture, were such a common sight to Gorge farmers and ranchers that they were often dismissed out of hand as "worthless." Until recently, flakes of obsidian and pieces of broken stone tools and arrowheads were not even of much interest to archaeologists.⁷⁹ However, research in the Great Basin tracing the seasonal migration patterns of the early hunting and gathering culture has made great strides with the use of aerial infrared photography.⁸⁰ Lithic scatters have become key clues in piecing together these paths.⁸¹

Agriculture is a "sacred cow" in the Gorge. Many orchards qualify as "landscapes of the heart" to local residents. Most of the plowing activity occurred long before anyone was concerned about

78. See *supra* note 8 and accompanying text (discussing the Act's purposes).

79. Conversation with William Cannon, Archaeologist, Bureau of Land Management, U.S. Department of the Interior (May 6, 1982) (describing the enormous research potential of lithic scatters).

80. See, e.g., *Current Research*, 56 AM. ANTIQUITY 356, 362-63 (Apr. 1991).

81. Cf. *id.* at 363.

the preservation of lithic scatters. Even some self-described archaeophiles now argue that there is nothing left to preserve.⁸² Nonetheless, as our research capability becomes more sophisticated, there may be more reason to reassess these areas. Moreover, there may be additional information potential *beneath* the lithic scatter or other resources that were not previously recognized or susceptible to analysis.⁸³

B. Commercial Development

Several new commercial ventures have been proposed to accommodate the expected surge in tourism in the National Scenic Area.⁸⁴ Even those which have the most idealistic appeal, such as opportunities for the elderly or physically challenged, can pose substantial threats to cultural resources. As is so often the case, the enhancement of some resources can work to the detriment of others.

The most obvious example of this type of competition is found along the Old Scenic Highway. If the Mosier Tunnels are reopened for wheelchair and bicycle access, at least three commercial ventures may be considered for nearby areas: tourist rides sponsored by antique car clubs; a concession stand for refreshments; and bed and breakfast establishments in the adjoining town.⁸⁵ All of these additions may make the experience more interesting and convenient, but they may also have an impact on the adjacent vision quest site.⁸⁶ Contemporary questers⁸⁷ will

82. Conversation with Barbara Bailey, Pat Bleakney, and Stafford Hansell, Commissioners from the eastern end of the Gorge (Oct. 15, 1991).

83. For example, archaeologists from decades earlier did not bother to collect soil or pollen samples from sites—an activity now routinely done as a rich source of data. Conversation with C. Melvin Aikens, Chairman, Department of Anthropology, University of Oregon (Dec. 1983).

84. See 1988 COLUMBIA RIVER GORGE COMM'N ANN. REP. 11.

85. Conversation with Nancy Russell, Founder, Friends of the Columbia River Gorge (June 10, 1986). The recreation planner for the Commission, Brian Litt, offers assurances that as long as *he* is on staff, antique car clubs will be restricted by permit to occasional use only; concession stands may be within a half mile, but will not be abutting the rock alignments. Conversation with Brian Litt, Recreation Planner, Columbia River Gorge Commission (Oct. 1992). The real threat lies in the Commission's lack of jurisdiction over the adjacent "Urban Area" in Mosier. See *infra* notes 115-22 and accompanying text.

86. See *supra* note 75 and accompanying text.

be unable to avoid the noise and visual distraction of the increasing tourist presence, and the ancient rock alignments are sure to be breasted (and thereby crumbled or realigned) by curious passersby.

C. Forestry

Under the terms of the National Scenic Area Act, logging practices are exempt from regulation by the Commission.⁸⁸ Instead, they are governed by the states' Forest Practices acts.⁸⁹ Several timber companies operate in the Gorge, almost all of which opposed the original legislation and lobbied for the exemption.⁹⁰

Logging has figured heavily in cultural resource depredation cases around the country.⁹¹ Logging roads are often built through cultural resource sites.⁹² Bulldozers, skidders, and logging trucks are not precision instruments designed to avoid damage to sensitive areas. Despite substantial opposition, the State of Washington has granted Department of Natural Resources permits to timber companies to log in the Klickitat River area,

87. On a recent law school seminar field trip, the author and five of her students inadvertently discovered a vision quest niche in the rock walls above the Old Scenic Highway. The placement of eagle feathers and other objects at the site suggested contemporary usage.

88. 16 U.S.C. § 544o(c).

89. *Id.*; see Terence L. Thatcher & Nancy E. Duhnkrack, *Goal Five: The Orphan Child of Oregon Land Use Planning*, 14 ENVTL. L. 713, 730-33 (1984) (a scathing review of Oregon's Forest Practices Program). Although somewhat dated, Thatcher and Duhnkrack's basic critique remains valid. Conversation with Terence Thatcher, former Counsel, Oregon National Wildlife Federation (Oct. 19, 1992).

90. See 132 CONG. REC. S15,646-48 (Oct. 3, 1986) (discussing the timber interests' opposition). Previously, timber interests in Oregon had also lobbied successfully to exempt themselves from county regulation of harvest practices on private lands. Thatcher & Duhnkrack, *supra* note 89, at 74.

91. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); see also *Save the Jemez v. Block*, No. Civ. 84-1150 BB, 84-1166 BB (D.N.M. Feb. 24, 1986) (settlement agreement and order); *Native Americans for Enola v. United States Forest Serv.*, Civ. No. 90-826-PA (D. Or. Mar. 28, 1991) (stipulation for dismissal without prejudice). See generally Patricia Cummings, *Native Religions, New-Agers, and the Forest Service*, INNER VOICE (Association of Employees for Environmental Ethics, Eugene, Or.) Sept./Oct. 1992, at 8, 9, 14.

92. See the cases cited, *supra* note 91.

and the White Salmon, Little White Salmon, and Windriver area.⁹³ Similarly, the State of Oregon has allowed logging immediately adjacent to the Old Scenic Highway on a highly visible bluff near the city of Hood River.⁹⁴

In many eyes, forestry remains integral in the Pacific Northwest economy. The industry is a powerful political force, as evidenced by its ability to negotiate an exemption for itself in the Act. When timber interests compete with cultural resource advocates, timber usually comes out on top (at least within the U.S. Forest Service administrative process).⁹⁵ Notwithstanding this political history, the NSA Act mandates absolute protection of cultural resources, not a balancing of cultural resources interests against timber interests. This protection is tied, however, to land use designations: once an area is designated "forest," states' Forest Practices acts govern and allow a balancing of interests.

D. Recreation Development

Aware that increased recreational opportunities pose an immediate threat to cultural resources along the river, the Commission authorized "compatibility studies" for river access sites that were most likely to be developed.⁹⁶ Where cultural resource concerns were identified, the Commission considered three alternatives: abandoning the project altogether, avoiding the sensitive area, or interpreting and protecting the resource. Three examples of proposed development will illustrate these approaches.

93. *Coalition Appeals USFS River Plans*, GORGE WINDS (Columbia Gorge Coalition, White Salmon, Wash.), Summer 1992 (on file with author).

94. Minutes, Columbia River Gorge Commission 2-3 (Aug. 25, 1992) (on file with author).

95. This was the case in *Lyng*, 485 U.S. at 442-43, where the Forest Service declined to adopt a commissioned study recommending against completion of a road through the Chimney Rock area. See generally Thatcher & Duhnkrack, *supra* note 89 (an illuminating discussion of the primacy of timber interests in Oregon environmental regulations).

96. PLAN, *supra* note 3, at I-67 to I-68; see also Memorandum from Columbia River Gorge Commission Planning Staff to Interested Parties (Feb. 14, 1990).

1. Doug's Beach AKA Friendly Village AKA . . . ?

Doug's Beach, near Lyle, Washington, is a favorite launching spot for windsurfers.⁹⁷ Lewis and Clark called the area "Friendly Village" because it was home to a large number of Natives who welcomed the explorers to their territory.⁹⁸ The area originally had an Indian name, but that name has not been preserved by Euro-American history. The State of Washington now intends to make it more friendly to the windsurfers by paving part of it for parking, installing toilets, and making other accommodations for recreational users.⁹⁹ Hundreds of sailboarders will run roughshod over the remnants of the village, unless the cultural resource concerns can be documented and protected through the decision making process. Abandoning the project would be the solution most consistent with the Act's mandate to protect cultural resources. At a Commission hearing, however, the windsurfers came out in droves to protest exclusion from one of the windiest locations in the Gorge; the few tribal voices of protest were overwhelmed.¹⁰⁰

2. Discovery Center AKA Crate's Point AKA _____'s Grave

Crate's Point, near The Dalles, is the site of the NSA Interpretive Center ("Discovery Center"), which hopes to attract several hundred thousand visitors each year. On the bench below

97. Minutes, Columbia River Gorge Commission 2 (Apr. 16, 1991) [hereinafter Apr. 1991 Minutes] (workshop).

98. Cf. JOURNALS, *supra* note 36, at 274; see Tommy J. Eli & Jerry Meninick, Cultural Resource Protection and Management Plan: Treaty Rights of the Yakima Indian Nation 8 (Nov. 17, 1986) (providing an historical and cultural perspective on the importance of the Doug's Beach area to the native people) (on file with author).

99. Apr. 1991 Minutes, *supra* note 97, at 2; Letter from Brian Litt, Recreation Planner, Columbia River Gorge Commission Staff, to Kristine Olson Rogers (Aug. 25, 1992) [hereinafter Litt Letter] (on file with author). The Yakima Indian Nation has recently petitioned the U.S. Army Corps of Engineers for acquisition of the Doug's Beach area as a Treaty Fishing Access Site. Letter from Wilferd Yallup, Chairman, Yakima Indian Nation Tribal Council, to Colonel Charles Hines, District Engineer, U.S. Army Corps of Engineers (July 20, 1992) (on file with author).

100. See Minutes, Columbia River Gorge Commission 28-43 (Mar. 12, 1991) (summaries of pro and con positions taken by attendees of public hearing on Preliminary Draft Plan).

the Point are several Indian burials that were vandalized in 1990.¹⁰¹ Umatilla and Warm Springs Reservation representatives have been working with local law enforcement officers to keep the site under surveillance.¹⁰² At this stage in the planning process, this project will not be abandoned.¹⁰³ Fortunately, the Discovery Center site can be designed by architects and landscapers to draw the public away from the burial sites. Avoidance seems to be the best alternative.

3. Washington State Park AKA Doetsch Ranch AKA Wah-cle-lah

Doetsch Ranch, near Beacon Rock on the Washington side of the river, was once a major Chinook Indian village called Wah-cle-lah.¹⁰⁴ It, too, figured prominently in Lewis and Clark's journals.¹⁰⁵ The site is well known, so the prospects of maintaining its integrity are slim.¹⁰⁶ It is currently slated to be a new day-use facility with picnic sites, cooking shelters, a comfort station, and parking area.¹⁰⁷ The Washington State Parks and Recreation Commission is well aware of the cultural resource issues at the site and views it as an interpretive opportunity.¹⁰⁸ Accordingly, the Parks and Recreation Commission's plan reads

101. These burials were brought to the author's attention in 1988. Conversation with Jeffrey Van Pelt, Cultural Resource Technician, Confederated Tribes of the Umatilla Indian Reservation (Apr. 1988). The author saw the vandalized graves in 1990.

102. Conversation with Jeffrey Van Pelt, Cultural Resource Technician, Confederated Tribes of the Umatilla Indian Reservation, and Paul Minthorn, Rights Protection Specialist, Confederated Tribes of the Umatilla Indian Reservation (July 6, 1992).

103. This project was listed as the number one priority for funding under the Forest Service budget. Memorandum from Jonathan Doherty, Executive Director, Columbia River Gorge Commission, to Stafford Hansell, Chairman, Columbia River Gorge Commission, and Allen Bell, Land Use Planner, Columbia River Gorge Commission Staff 1 (Apr. 16, 1992) [hereinafter Doherty Memorandum] (on file with author); see Minutes, Gorge Discovery Center Steering Committee 2-4 (Aug. 26, 1992) (discussing funding for the Discovery Center) (on file with author).

104. WILLIAMS, *supra* note 27, at 81.

105. JOURNALS, *supra* note 36, at 276-84.

106. See, e.g., Litt Letter, *supra* note 99, at 3 ("[T]he Wah-cle-lah village site has already been substantially compromised after years of private ownership and 'benign neglect.'").

107. Washington State Parks and Recreation Commission, Consistency of Proposed Doetsch Ranch Recreation Facility with Scenic Area Management Plan, GMA Recreation Development Plan Grant Guidelines 4 (Jan. 23, 1992) [hereinafter Recreation Development Plan] (on file with author).

108. *Id.*

as follows: "Ultimately, some interpretation of the rich cultural resources of the site will be proposed. Details regarding the nature and location of interpretive features must be preceded by completion of the necessary studies and development of appropriate protection measures."¹⁰⁹

Whether the Parks and Recreation Commission is prepared to follow through with the "appropriate protection measures" remains to be seen. The Commission is, however, sensitive to the issue and its plan may serve as a model for this alternative approach.

E. Residential Development

Contemporary residents of the Gorge tend to prefer the same locations that their ancient predecessors chose for homesites. Views, river access, available drinking water, and protection from the wind are all obvious and timeless considerations for settlers. Hence, new residential developments are often proposed in areas containing archaeological sites.

One of the Gorge Commission's recently contested case hearings is an example of a particularly determined depredator. Richard Murray of The Dalles owns land containing a documented site.¹¹⁰ When the Commission staff informed him that he could not excavate foundations at that location, he immediately filed an appeal, which the Commission denied.¹¹¹ In the meantime, Mr. Murray offered to sell to the Confederated Tribes of the Umatilla Indian Reservation the right to dig for artifacts on his land.¹¹² When the Umatillas refused that offer on principle and when he lost his appeal, Mr. Murray bulldozed the site, claiming that he

109. *Id.*

110. Columbia River Gorge Commission, Development Review Rep., File No. C-90-0038-W-G-11 (Apr. 4, 1990) (on file at Columbia River Gorge Commission offices, White Salmon, Wash.); Columbia River Gorge Commission, Development Review Rep., File No. C-90-0275-W-G-12 (undated) [hereinafter Undated Review Rep.] (on file at Columbia River Gorge Commission offices in White Salmon, Wash.).

111. Undated Review Rep., *supra* note 110, at 1.

112. Letter from Richard J. Murray to Confederated Tribes of the Umatilla Indian Reservation (Jan. 2, 1991) (on file with author).

was merely preparing the land for cultivation.¹¹³ The Commission is considering a civil enforcement action.¹¹⁴

F. Urban Area Expansion

The Scenic Area Act created thirteen "Urban Areas," four in Oregon and nine in Washington,¹¹⁵ which are exempt from the protection provisions of the Act.¹¹⁶ The Act allows for expansion of the "Urban Areas," and several such applications have already been filed with the Commission.¹¹⁷ Urban area cultural resource protection is considered wholly a matter of state law,¹¹⁸ similar to the "hands off" attitude displayed regarding forest practices.¹¹⁹

When the Commission recently considered rules governing the "Urban Area" expansion applications, its staff proposed that these areas be excused from performing cultural resource surveys because of the additional expense involved.¹²⁰ Since the Commission's original survey was so inadequate,¹²¹ the staff's proposal would have amounted to giving away the store without appraising its stock. The proposed rule was modified to provide that the Commission would undertake a survey of any area destined to come under the jurisdiction of another governing body.¹²²

113. Executive Session, Columbia River Gorge Commission (Feb. 1992).

114. *Id.*

115. 16 U.S.C. § 544b(e)(1).

116. *Id.* § 544d(c)(5)(B).

117. Sally Newell, *Gorge Panel Deadlocks on Boundary Change*, THE DALLES CHRONICLE (Or.), Feb. 12, 1992, at 1.

118. See *infra* notes 123-65 and accompanying text.

119. See *supra* notes 88-95 and accompanying text.

120. Minutes, Columbia River Gorge Commission 10 (Feb. 11, 1992) [hereinafter Feb. 1992 Minutes] (on file with author).

121. See *infra* notes 166-78 and accompanying text.

122. Feb. 1992 Minutes, *supra* note 120, at 12; see also Columbia River Gorge Commission, Urban Area Boundary Revisions Handbook 15 (Feb. 11, 1992) [hereinafter Revisions Handbook].

III. CULTURAL RESOURCE PROVISIONS OF FEDERAL, TRIBAL, STATE, AND LOCAL LAWS IN THE NATIONAL SCENIC AREA

A. Federal Laws

Since at least 1906, the federal government has attempted some measure of protection for cultural resources.¹²³ Federal laws include the Antiquities Act;¹²⁴ the Historic Sites Act;¹²⁵ the Reservoir Salvage Act, as amended by the Archaeological and Historic Preservation Act;¹²⁶ the National Historic Preservation Act;¹²⁷ the National Environmental Policy Act;¹²⁸ Executive Order 11,593 (Protection and Enhancement of the Cultural Environment);¹²⁹ the American Indian Religious Freedom Act;¹³⁰ the Archaeological Resources Protection Act;¹³¹ the Native American Graves Protection and Repatriation Act;¹³² and a myriad of individual agency regulations.¹³³ It is not surprising that this legislation and administrative action are often inconsistent.¹³⁴ Each statute is also severely limited in its application. Private lands are rarely covered: when they are,

123. See Kristine Olson Rogers, *Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandals*, 2 J. ENVTL. L. & LITIG. 47, 47-55 (1987).

124. 16 U.S.C. §§ 431-433 (1988 & Supp. H 1990).

125. *Id.* §§ 461-467.

126. *Id.* §§ 469-469c (1988).

127. *Id.* §§ 470-470w-6 (1988 & Supp. II 1990).

128. 42 U.S.C. §§ 4321-4370a (1988 & Supp. II 1990).

129. Exec. Order No. 11,593, 3 C.F.R. 154 (1971), *reprinted in* 16 U.S.C. § 470 (1988).

130. 42 U.S.C. § 1996 (1988).

131. 16 U.S.C. §§ 470aa-470mm (1988 & Supp. II 1990).

132. 25 U.S.C. §§ 3001-3013 (Supp. II 1990).

133. See Rogers, *supra* note 123, at 91-103 (discussing federal agency regulations).

134. These acts and administrative regulations often contain conflicting definitions of a "protected resource." For example, on the issue of qualifying age, statutes and agency regulations vary considerably. Under the Archaeological Resources Protection Act, an archaeological resource is defined as an item "at least 100 years of age." 16 U.S.C. § 470bb(1). Under the National Park Service regulations, an archaeological resource is at least 50 years old, and a cultural resource is less than 50 years old. 36 C.F.R. § 1.4(a) (1992). Further complicating the issue are state statutes with varying age limits; Oregon defines an archaeological object as at least 75 years old. OR. REV. STAT. ANN. § 358.905(1)(a) (Butterworth 1987).

protection is indirect.¹³⁵ Most of the provisions were crafted by archaeologists,¹³⁶ and hence are scientifically slanted, and fail to account for those lands tribal leaders identify as culturally sensitive. All the legislation, with the exception of the Archaeological Resources Protection Act ("ARPA") and the Native American Graves Protection and Repatriation Act ("NAGPRA"), merely require potential depredators to jump through prescribed procedural hoops.¹³⁷ None is designed to *halt* noncriminal actions impacting sites.

B. Tribal Ordinances

Many tribal cultural resource protection ordinances are based largely on models from the Navajo,¹³⁸ Zuni,¹³⁹ Warm Springs,¹⁴⁰ and Colville tribes.¹⁴¹ "Cultural resources" are broadly defined and include cultural vegetation, sacred sites, animals, and water.¹⁴² However, because of jurisdictional restrictions, they have limited force off the reservation.¹⁴³

135. For instance, under the National Environmental Policy Act ("NEPA"), private lands are covered only if there is federal money, or a federal permit or license involved in the proposed development. 42 U.S.C. § 4331(b) (policy set forth in NEPA applies to "Federal plans, functions, programs, and resources"). Under the Archaeological Resources Protection Act, private lands are covered only in the trafficking provisions, and only if artifacts are taken off private lands in violation of state law. 16 U.S.C. § 470ee(c).

136. See, e.g., Annetta L. Cheek, *Protection of Archaeological Resources on Public Lands: History of the Archaeological Resources Protection Act*, in PROTECTING THE PAST 33 (George S. Smith & John E. Ehrenhard eds., 1991).

137. Carol Carnell, *Legal Background of Archaeological Resources Protection*, U.S. Dep't of the Interior (1991) (Technical Brief No. 11) (on file with author).

138. NAVAJO TRIBAL CODE tit. 19, §§ 1001-1004 (1977).

139. See generally T.J. Ferguson, *Archaeological Ethics and Values in a Tribal Cultural Resource Management Program at the Pueblo of Zuni*, in ETHICS AND VALUES IN ARCHAEOLOGY 224 (Ernestene L. Green ed., 1984) (information on the Zuni archeology program).

140. WARM SPRINGS TRIBAL CODE §§ 490.001-490.840 (1986).

141. Colville, Or., Archaeological and Historic Resources Protection Ordinance (Aug. 18, 1980).

142. See, e.g., WARM SPRINGS TRIBAL CODE § 490.010(4) ("Cultural materials may include such things as eagle feathers, fish, game, roots, berries, cedar bark, Indian medicines and water having special significance.").

143. Tribal governments, as sovereign nations, have jurisdiction within reservation boundaries with some limitations. Cf. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). However, the vast bulk of the land in the NSA is "ceded territory" on which the tribes may have aboriginal rights, but the application of their ordinances has not been tested in the courts. See FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 62-70, 332-44, 486-93 (1982) (discussing, respectively,

Nonetheless, tribal ordinances have tremendous potential to carry a great deal of moral weight in land use planning debates. All future land use ordinances developed by other jurisdictions could increase their scope through incorporating tribal ordinance provisions by reference.¹⁴⁴ At the very least, deference should be paid to tribal concerns with respect to human remains, and sacred sites and objects.

C. Oregon Law

The Oregon Legislature passed what was, for its time, a model state statute in 1983.¹⁴⁵ Its major flaws include its failure to address private lands (except indirectly)¹⁴⁶ and its exemption¹⁴⁷ for "inadvertent finds." It has a fairly comprehensive definition of cultural resources and sacred objects,¹⁴⁸ and it seeks tribal involvement in disputed cases.¹⁴⁹ Burials are the subject of a separate Oregon statute.¹⁵⁰ This statute has provisions that do apply to private land.¹⁵¹ Enforcement of the criminal provisions of this statute has been painfully slow, but recently successful.¹⁵²

treaties, tribal sovereignty, and aboriginal title).

144. See Kristine Olson Rogers & Elizabeth Grant, *Model State/Tribal Legislation and Jury Education: Co-Venturing to Combat Cultural Resource Crime*, in *PROTECTING THE PAST* 47, 49-64 (George S. Smith & John E. Ehrenhard eds., 1991).

145. 1983 Or. Laws ch. 620, §§ 1-10, 15 (codified at OR. REV. STAT. ANN. §§ 358.905-358.955 (Butterworth 1987)).

146. *Id.* § 358.920(2) (requiring written permission from the landowner before removal of any archaeological object is allowed).

147. *Id.* § 358.915 ("The[se] provisions . . . do not apply to a person who unintentionally discovers an archaeological object on public land or private property and retains the object for personal use.").

148. See *id.* § 358.905.

149. *Id.* § 358.950.

150. *Id.* §§ 97.740-97.760 (Butterworth 1990).

151. *Id.* § 97.745.

152. See, e.g., John Payne, Comment, *Oregon's Grave Protection Statute: History and Suggested Amendments* (Aug. 27, 1992) (unpublished manuscript on file with author); Conversation with Ed Caleb, District Attorney, Klamath County, Or. (Jan. 26, 1992).

Oregon cultural preservation laws, like similar laws in other states, were intended to prevent archaeological looting.¹⁵³ The equally devastating actions of private developers are not meaningfully sanctioned. The statutes also fail to provide any incentive for compliance.¹⁵⁴

D. Washington Law

In 1989, in conjunction with its centennial celebrations, the Washington State Legislature revised its cultural resource protection scheme.¹⁵⁵ It updated its definitions and tightened its permitting requirements, but, most importantly, it extended protection for Native American and archaeological sites on private lands.¹⁵⁶ The law singles out burials and rock art over fifty years old,¹⁵⁷ prohibits their desecration wherever found, and imposes permit requirements, even on private landowners, for any activity impacting a site.¹⁵⁸

The statute was developed by the State Historic Preservation Office ("SHPO") in close consultation with tribal leaders.¹⁵⁹ As a result, it takes the extra steps to provide for reburial costs and gives important civil causes of action to tribes or individual tribal members. The statute also includes remedies, such as injunctive relief, damages for emotional distress, punitive damages, and

153. Conversation with C. Melvin Aikens, Chairman, Department of Anthropology, University of Oregon, and Kathy Gorospe, Executive Secretary, Oregon State Commission on Indian Services (Jan. 1984). Professor Aikens and Ms. Gorospe were among the chief drafters and lobbyists of this legislation.

154. Tax incentives for private landowners have been proposed unsuccessfully several times in Oregon. Other states, however, have been successful in developing these types of programs. See Rogers & Grant, *supra* note 144, at 53.

155. 1989 Wash. Laws ch. 44, § 1-11 (codified as amended at WASH. REV. CODE ANN. §§ 27.44.020-27.44.901, 27.53.030, 27.53.060 (West Supp. 1992)).

156. *Id.* § 27.53.060.

157. *Id.* § 27.44.030(4).

158. *Id.* § 27.53.060.

159. Tape of Symposium "Native to the Gorge," held by the Columbia River Inter-Tribal Fish Commission (June 19, 1989) (on file with author). There are 26 federally recognized tribes in the State of Washington; Rob Whitlam, the Washington State Archaeologist, makes it a point to work with all of them. *Id.*

attorney's fees.¹⁶⁰ In conjunction with the SHPO, Washington tribes will be involved with drafting all permit terms.¹⁶¹

*E. Land Conservation
and Development Commission Goal Five*

Under Oregon's land use planning framework, the State Land Conservation and Development Commission ("LCDC") has adopted several statewide goals that counties must implement through their land use ordinances.¹⁶² Goal Five addresses cultural resource protection and requires counties to promulgate cultural resource management rules.¹⁶³ Many counties have not begun to implement Goal Five with respect to cultural resources, and LCDC has been lax in enforcing compliance.¹⁶⁴

The available legal recourse for parties seeking greater protection of cultural resources under LCDC's jurisdiction is unclear. Goal Five is presently underutilized; it may gain more prominence in the next few years due to greater publicity among land use attorneys, and as new development continues to encroach on undisturbed areas.¹⁶⁵

160. WASH. REV. CODE ANN. § 27.44.050(3)(a)-(d).

161. *Id.* § 27.53.060(2).

162. See OR. REV. STAT. ANN. § 197.030-197.065 (Butterworth 1991). There are 19 statewide goals altogether. *Id.*

163. See OR. ADMIN. R. 660-16-000 to 660-16-020 (1991) (detailing requirements and procedures for complying with Goal Five).

164. Edward Sullivan, Remarks at a Continuing Legal Education Presentation in Portland, Or. (Nov. 8, 1991) [hereinafter CLE Meeting].

165. *Id.*; see also Thatcher & Duhnkrack, *supra* note 89, at 749. One of Goal Five's most recent invocations came in connection with a proposal by the City of Portland to develop land along the Columbia South Shore, which contains multiple prehistoric and historic sites. See Northwest Env't Defense Center v. Corps of Eng'rs., C.V. 91-476-JE (D. Or. 1991) (documents, including archaeological survey reports, on file with author). Since the parties were able to reach agreement on mitigation measures, the parameters of Goal Five in this context were not adjudicated.

IV. CULTURAL RESOURCE PROTECTION
IN THE COLUMBIA RIVER GORGE
NATIONAL SCENIC AREA MANAGEMENT PLAN

A. *Cultural Resource Inventory*

The Act required the Commission, in the first year of its existence, to produce an inventory of all cultural resources within the approximately 300,000 acres of the Scenic Area.¹⁶⁶ The Commission deferred to its named federal "partner," the U.S. Forest Service ("USFS"), for technical assistance in contracting with a professional archaeological firm to accomplish this task.¹⁶⁷ Instead of the thorough overview originally contemplated by Congress, the Request for Proposals issued by the Forest Service merely required a survey of existing published information about cultural resources in the Gorge.¹⁶⁸

Less than five percent of the lands in the NSA have been physically surveyed for the presence of cultural resources.¹⁶⁹ Much of the paltry data that exists for the area is contained either in early military records (skewed by the ethnocentrism of the Indian Wars of the 1850s),¹⁷⁰ in the amateur publications of pot hunters,¹⁷¹ or in the hastily written research reports of salvage archaeologists.¹⁷² There has been no systematic collec-

166. 16 U.S.C. § 544d(a)(1) (1988 & Supp. II 1990).

167. See U.S. Dep't of Agriculture, *Cultural Resources Overview and Inventory Strategy: Request for Proposals 1* (Nov. 1987) (on file with author).

168. *Id.* at 1, 5-6; see also Heritage Research Assocs., *Cultural Resources Overview: Columbia River Gorge National Scenic Area 12* (Dec. 7, 1987) (responding to the Forest Service's Request for Proposals by submitting a technical proposal indicating that an inventory strategy may be based on existing data) (on file with author).

169. *Revisions Handbook, supra* note 122, at 15.

170. See TERENCE O'DONNELL, *AN ARROW IN THE EARTH* 124-217 (1991) (describing the pervasive ethnocentrism during this time period).

171. See, e.g., STRONG, *supra* note 38, at 5 ("I am [a] relic hunter only—one of the fast-growing group who are pleased to call themselves 'amateur archaeologists.'").

172. See, e.g., Herbert W. Krieger, *Prehistoric Inhabitants of the Columbia River Valley*, in *EXPLORATIONS AND FIELD-WORK OF THE SMITHSONIAN INSTITUTION IN 1927*, at 133 (W.P. True ed., 1928); Richard Daugherty, *Excavations in the Ice Harbor Reservoir, 1957-1960: A Preliminary Report 8-12* (1961) (available from Washington State University Library).

tion of oral histories and very little, if any, collaboration with Native Americans.¹⁷³

The importance of oral histories should not be underestimated. Two noted ethno-historians have observed:

Some scholars may discredit oral histories, labeling them as "fish tales that grow with the telling." But like written documents, oral histories tell us a great deal about the American Indian communities and the people who made up those communities. Oral histories reveal internal matters within families, bands, and tribes that help explain the course of Indian events, decisions, and actions. Oral histories provide another dimension to a complicated past that should not—indeed cannot—be interpreted as good versus evil or civilized versus savage. Those who view the past using white docu-

173. This is not surprising, given the USFS dim view of such efforts. See, e.g., Michael Boynton & June Wilburn, *Tribal Governments as Paid Consultants: Implications for the Process of Cooperative Planning in the Columbia River Gorge National Scenic Area 6* (Mar. 1989) (on file with author). This paper was originally presented at a professional meeting with Boynton's fellow archaeologists. At that meeting, these federal agency archaeologists expressed their frustration in dealing with the tribes' "inabilities" to meet deadlines, etc., and "demands" to be paid for their expertise. Conversation with Scott Steumke, Archaeologist, Confederated Tribes of the Warm Springs Reservation (Mar. 1989).

Instead of adopting the Commission's view that funding for tribal archaeological programs was essential to sovereignty and fell properly within the terms of the Indian Self-Determination Act, 25 U.S.C. § 450 (1988), the federal authors characterized funding for the tribes as fostering dependency, and implied that they had opposing interests:

If the tribes prevail, will cultural resource research that requires tribal participation will [sic] be mandated to fund that tribe's assistance. Should the tribes lose, will all tribal response to cultural resource research will [sic] likely be withheld to the detriment of both parties, and to the special relationships that exist between all concerned?

[All parties need to consider and discuss the ramifications of dependency upon financing for consultation purposes. Should the funding situation collapse, the tribes may well consider themselves to be ostracised from the planning process. The only resort will then be litigation over the management plan and, possibly, the ordinances. Should they lose that appeal, is it likely that alienation and permanent damage to tribal interests in the Scenic Area will result?

Boynton & Wilburn, *supra*, at 8; see also *infra* note 240 and accompanying text.

Most recently, the USFS Region 6 Forester, John Lowe, took what had been earmarked by Congress as Commission-sought funds for oral history purposes, and attempted to divert the monies to the regular operating budget for the Forest Service Regional Office. Letter from Pat Bleakney, Chairman, Columbia River Gorge Commission, to John Lowe, Regional Forester, U.S. Department of Agriculture (Dec. 21, 1992) (on file with author); Letter from JoAnna Meninick, Chairperson, Yakima Tribal Cultural Commission, to John Lowe, Regional Forester, U.S. Department of Agriculture (Jan. 25, 1993) (on file with author).

ments alone, ignoring Indian resources, especially oral histories, fail in their tasks as scholars. Those who do not study the Indian cultures about whom they are writing cannot provide the thorough job required of them. For without an understanding of the Indians and their sources, scholars cannot presume to interpret the American Indian past.¹⁷⁴

In short, the USFS "inventory" is far from complete and does not meet the technical requirements of the Act. The Nez Perce cultural resource staff sharply and thoroughly criticized this "inventory" when it was submitted to the Commission.¹⁷⁵ Recognizing this deficiency in its data base, the Commission has requested additional funding from Congress to do more field survey work and to begin oral history interviews in cooperation with the four affected tribal governments.¹⁷⁶ Because of the expense of professional archaeological services, the Commission has been reluctant to impose survey requirements on individual landowners.¹⁷⁷ Even though this "inventory" hardly represented a true picture of the cultural resources of the NSA, the Commission was required under the Act to proceed with the other stages of Management Plan development.¹⁷⁸

174. TRAFZER & SCHEUERMAN, *supra* note 38, at xiv (footnotes omitted).

175. Nez Perce Staff Report (Jan. 16, 1991) (on file with author).

176. Doherty Memorandum, *supra* note 103, at 5 (Apr. 16, 1992). *But see supra* note 173 (USFS attempt to divert money for its own use).

177. Minutes, Columbia River Gorge Commission 4 (Apr. 13, 1991) [hereinafter Apr. 13, 1991 Minutes] (workshop) (on file with author).

178. Even with an incomplete inventory, the Act requires the development of land use designations within the second year, a Management Plan by the end of the third year, and the development of county ordinances within the fourth year. 16 U.S.C. § 544d(a)-(c). The critical nature of the inventory stage is again underscored in the evolution of LCDC's Goal Five:

Most disturbing are counties that have used the inventory stage of the Goal Five process to make substantive decisions affecting resource protection. Those natural areas with no conflicting uses are included in the inventory; those where development pressures are strong are omitted at the inventory stage because there is either "inadequate" information on the areas or they are declared to be not "significant."

Thatcher & Duhnack, *supra* note 89, at 722 (footnote omitted).

B. *Early Commission/USFS Staff Proposal
for Cultural Resource "Clearances"*

Despite the inadequate inventory information, an April, 1990 staff report to the Commission recommended that the Commission adopt the federal process of assessing the "significance" of sites known by Euro-Americans on lands slated for development.¹⁷⁹ Even more surprisingly, the staff report recommended that the Commission rely on a "probability model"¹⁸⁰ developed by the Forest Service to determine the presence of resources in need of protection.¹⁸¹ The "probability model" was based on the rudimentary inventory.¹⁸²

Even in cases where the underlying data is reliable, many professional archaeologists criticize the use of probability models.¹⁸³ Statistical estimates of the occurrence of cultural resources in a given area are simply no substitute for ground testing. Furthermore, they fail completely to take into account the kinds of information that can be gleaned from tribal elders or relevant ethnic experts about individual sites. Their greatest utility appears to be in facilitating bureaucratic decision making.

The problems with reliance upon probability models to protect cultural resources have been summarized well:

Decisions regarding the disposition of archaeological sites are being made on the basis of fairly simplistic models, the predictive powers of which have been overstated by their

179. Columbia River Gorge Commission Staff Report (Apr. 17, 1990) [hereinafter April Staff Report] (on file with author). The National Historic Preservation Act utilizes a scientific significance standard to assess cultural sites. See discussion *infra* notes 190-94 and accompanying text.

180. "Probability models" are predictions of site locations based upon previously recorded data. Michael S. Berry, *Sampling and Predictive Modeling on Federal Lands in the West*, 49 AM. ANTIQUITY 842, 842 (1984).

181. April Staff Report, *supra* note 179.

182. At a Commission meeting, the author characterized this proposal as "garbage in—garbage out."

183. Letter from Barbara Hollenbeck, Archaeologist, U.S. Forest Service, to Kristine Olson Rogers (Oct. 7, 1987) (on file with author); Letter from Thomas J. Connolly, Archaeologist, Oregon State Highway Department, to Kristine Olson Rogers (Oct. 5, 1987) (on file with author); see also William B. Butler, *Significance and Other Frustrations in the CRM Process*, 52 AM. ANTIQUITY 820, 825-26 (1987).

respective formulators. It is bad enough that these models have yielded so little insight into prehistoric settlement patterns. However, the real danger lies in their potential use in the implementation of write-off policy. The federal land managers' enthusiastic support of predictive modeling indicates that they plan to rely even more heavily on remote clearance in the future to eliminate or minimize the need for fieldwork beyond the initial sample survey level. This is underscored by the continuing emphasis in proposal requests on "identifying areas of low site probability." Apparently, the *raison d'être* of cultural resource management has shifted from the conservation and interpretation of archaeological remains to the facilitation of . . . exploration and development on federal lands.¹⁸⁴

Given the staff's recommendation that the Commission follow the USFS probability model approach, lay Commissioners had to be educated about the deficiencies in this method. To avoid overburdening them with technicalities, the professional literature was summarized. In addition, the Commissioners were informed of cases where the National Historic Preservation Act ("NHPA") process had proven ineffective in protecting even those sites that were deemed to be "significant" by federal standards.¹⁸⁵

In each of these cases, the USFS had been the party *approving* development of the site. The Commission staff had been convinced to support a bankrupt procedure used by the USFS, the proverbial fox guarding the chicken coop. After substantial debate, the staff was sent back to the drawing board to design a process with meaningful tribal input:

Representatives of the Umatilla and the Warm Springs Reservation tribes expressed concerns about relying on CLGs [certified local governments] and state historic preservation offices. They prefer an option that guarantees tribal governments a role in the decision-making process. Tribal represen-

184. Berry, *supra* note 180, at 851.

185. See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Letter from Kathryn Gualtieri, Officer, State of California Office of Historic Preservation, to Robert Tyrrel, Supervisor, Shasta-Trinity National Forest (Dec. 26, 1990) (after-the-fact attempt by SHPO to consider the effect of a development project on an area that was potentially eligible for the National Register of Historic Places) (on file with author).

tatives also questioned whether it is realistic to expect the Oregon Historic Preservation Office to review cultural resource evaluations and plans. The state archaeologist has said that his office does not have the staff or funding to evaluate Gorge Commission development review notices and cannot respond to related requests in a timely manner.¹⁸⁶

Nonetheless, in this interim period, a disturbing pattern emerged. Clearances were routinely given for a project to proceed, based on the USFS probability model.¹⁸⁷ Boilerplate language was inserted in development reviews, giving the bureaucratic "green light":

The subject application has been examined for potential effects to cultural resources. Based upon prior field experience, the Cultural Resources Overview prepared for the National Scenic Area and the sensitivity modeling derived from both prior experience and the Cultural Resources Overview, this proposal has extremely low potential for effects to prehistoric or historic cultural resources or properties.

In my professional judgement [sic] and experience, a cultural resource inventory is not required for this application. No field inventory will be required of the applicant. Consequently it is recommended that the project will not have an effect, beneficial or adverse, and is consistent with the Act in this respect.¹⁸⁸

C. Preliminary Draft Plan—The First Incarnation

*In 1492, someone was lost, and we were "discovered." . . . Little squares on a map don't fit into our circle of harmony.*¹⁸⁹

186. Memorandum from Allen Bell, Land Use Planner, Columbia River Gorge Commission Staff, to Columbia River Gorge Commissioners and Interested Parties 3 (July 2, 1990) [hereinafter Bell Memorandum (July)] (on file with author).

187. Personal observation of the author who received weekly summaries of USFS development reviews from 1987 to 1992.

188. Columbia River Gorge National Scenic Area Non-Inventory of Land Use Application Cultural Resources: Record of Compliance C-89-0205-S-G-11 (Oct. 3, 1989). Incidentally, the USFS archaeologist whose "experience" is relied upon here, Michael Boynton, had been imported from California approximately one year before the "compliance" clearance. He had done no prior field work in the NSA.

189. Louie Dick, Confederated Tribes of the Umatilla Indian Reservation, Comments at Columbia River Gorge Commission Public Hearing on Preliminary Draft Management Plan (Feb. 1991) (tape available from Columbia River Gorge Commission office, White

Surprisingly, the staff persisted in reviving the unreliable NHPA process in the first planning document submitted for Commission consideration, perhaps due to pressures from county planners.¹⁹⁰ The Preliminary Draft Plan coupled federal significance determinations with an *advisory* committee, which would review the applications for individual development proposals and make recommendations to the implementing counties.¹⁹¹ Not only would this have subjected sensitive cultural resources to varying interpretations by the six counties, it allowed no formal role for the affected tribal governments to participate meaningfully in a matter so integral to religious and sovereignty issues.¹⁹²

In this unusual departure from a guiding protection philosophy, the Commission staff chose to discount the Commissioners' discussion of a litany of problems with the scientific significance standard.¹⁹³ Again, after much debate, the Commission amended the draft language, thereby allowing the tribal governments to identify those resources that were of concern to Native Americans and in need of protection.¹⁹⁴

Salmon, Wash.).

190. Bell Memorandum (July), *supra* note 186, at 4.

191. Columbia River Gorge Commission, Preliminary Draft Management Plan for General Management Areas 52-53 (Dec. 1990) [hereinafter Preliminary Draft].

192. See VINE DELORIA, JR., GOD IS RED 289-301 (1973) [hereinafter GOD IS RED] (discussing Indian theology and cultural resource protection as an attribute of sovereignty); Vine Deloria, Jr., *Sacred Lands and Religious Freedom*, 1991 NATIVE AM. RTS. FUND LEGAL REV. 1; see also KATHY GOROSPE, AMERICAN INDIAN CULTURAL RESOURCES: A PRESERVATION HANDBOOK iv-vi (1985).

193. Minutes, Columbia River Gorge Commission 6-8 (Nov. 27, 1990) (workshop) (on file with author). "Significance" is susceptible to cultural bias, scientific predisposition, and varying legal interpretations, and is a concept that evolves with the sophistication of the researcher. For instance, there has been little research interest in the Chinese community's contribution to Gorge culture. See *supra* notes 45-46 and accompanying text. Only relatively recently have scientists bothered to collect data for soil and pollen samples, obsidian hydration analysis, and lithic scatters. See *supra* notes 79-83 and accompanying text. Furthermore, the definition of "significant" varies: what is "significant" to an archaeologist is not necessarily "significant" to an administrator. Lorrie D. Northey, *The Archaeology Resources Protection Act of 1979: Protecting Prehistory for the Future*, 6 HARV. ENVTL. L. REV. 61, 70 (1982).

194. Apr. 13, 1991 Minutes, *supra* note 177, at 8-11; Cultural Resources, General Management Areas: Staff Recommendations 10-11 (Apr. 5, 1991) [hereinafter Staff Recommendations] (on file with author).

Even members of Congress have recognized the limitations of the NHPA process. The Act was amended to afford greater tribal participation.¹⁹⁵ The amendments established "Tribal Historic Preservation Programs"¹⁹⁶ under which "[a] tribe may assume all or any part of the functions of a State Historic Preservation Officer."¹⁹⁷ The amendments provide funding for tribes,¹⁹⁸ and specifically direct participation by "the tribe's traditional cultural authorities."¹⁹⁹ The amendments also include "[p]roperties of traditional religious and cultural importance"²⁰⁰ that have heretofore been omitted and neglected in the NHPA process. Moreover, the amendments explicitly incorporate NAGPRA²⁰¹ and substitute mandates for discretionary preservation actions.²⁰²

Section 4014 contains several provisions for promoting the preservation of archaeological resources on private land,²⁰³ a topic that is not addressed at all under current federal law. Finally, the amendments authorize appointment of a Native American representative to the National Advisory Council.²⁰⁴

All of these amendments serve to highlight the deficiencies of NHPA as originally implemented. The amendments were by no means assured of passage, however. The legislation was opposed by groups of private landowners,²⁰⁵ and in the Senate opposition was headed by Senator Wallop of Wyoming.²⁰⁶ The bill finally passed as a rider to the Reclamation Projects Authorization and

195. National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, §§ 4001-4022, 1993 U.S.C.A.N. (106 Stat.) 4600, 4753 (amending 16 U.S.C. §§ 470-470w-6). Senator Wyche Fowler, Jr. of Georgia sponsored the amendments.

196. *Id.* § 4006.

197. *Id.* § 4006(a)(2).

198. *Id.* § 4007(2).

199. *Id.* § 4006(a)(2).

200. *Id.*

201. *Id.* § 4014.

202. *See, e.g., id.* §§ 4003, 4004.

203. *Id.* § 4014.

204. *Id.* § 4016.

205. Conversation with David Brooks, Staff, Senate Subcommittee on Public Lands, National Parks and Forests of the Energy and Natural Resources Commission (Aug. 11, 1992).

206. *Id.*

Adjustment Act of 1992, and was signed into law by President Bush in November of the same year.²⁰⁷

Nonetheless, the NSA Preliminary Draft Management Plan for the General Management Areas²⁰⁸ devoted twenty pages to cultural resource goals, policies, and guidelines that are essentially a county clone of the experientially repudiated federal process.²⁰⁹ The staff was warned of all the problems that would inevitably arise.²¹⁰ Since other Commission problems were more pressing (such as open space designations on private lands, wetlands policy, inconsistencies between Commission and Forest Service approaches, etc.²¹¹), the staff viewed experimenting with anything other than the habitual federal process in cultural resource management as too expensive and as just one more unnecessary political and planning headache.²¹²

Thus, the opportunity to serve as a model for the nation was almost lost. However, after extensive public hearings on the Preliminary Draft and listening to the concerns of tribal representatives,²¹³ the Commission, phoenix-like, mustered the collective will to try again to honor the keepers of Native American heritage values and the special place of the tribes in the Gorge from time immemorial. This direction came despite objections of the USFS, the Washington and Oregon SHPOs, and the county planners who lobbied for "business as usual."

207. Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, §§ 1-4025, 1993 U.S.C.C.A.N. (16 Stat.) 4600.

208. Under the Act, the NSA is divided into General Management Areas ("GMAs") under the jurisdiction of the Commission and Special Management Areas ("SMAs") under the jurisdiction of the USFS. 16 U.S.C. § 544b. This article is concerned solely with the GMA Plan development. The SMA Plan was done in-house by the USFS and provides less resource protection in almost all instances. Personal observation of the author, based on discussions with several members of the USFS staff.

209. Preliminary Draft, *supra* note 191, at 49-70.

210. Apr. 13, 1991 Minutes, *supra* note 177, at 1-11; Staff Recommendations, *supra* note 194, at 9-10.

211. See Apr. 13, 1991 Minutes, *supra* note 177, at 11.

212. Bell Memorandum (July), *supra* note 186, at 4.

213. Minutes, Columbia River Gorge Commission 1-9 (Apr. 24, 1990); Minutes, Tribal Consultation Council 4-6 (May 31, 1990) (on file with author).

D. The (not-quite-ready-for) Final Draft Management Plan

*Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination.*²¹⁴

*It is the intent of the Governor of the State of Oregon to affirm the government-to-government relationship between the State of Oregon and the Oregon Indian Tribes*²¹⁵

*[I]t is the intent of the Governor of the State of Washington to confirm its government-to-government relationship with Washington tribes*²¹⁶

*As Indian Governments are assuming more and more of their destiny, it is fitting that the Forest Service respect them and work with them in a Government-to-Government relationship.*²¹⁷

*You cannot disallow our existence as legitimate governments . . . but we are conditioned to be skeptical, especially when given assurances.*²¹⁸

Because of all the controversy surrounding cultural resource provisions in the Preliminary Draft Plan, the Commission sought the advice of the Washington Attorney General's office. As a practical matter, this course may have been misguided, since Senior Assistant Attorney General James Johnson was viewed as an adversary of the tribes,²¹⁹ and later (together with Attorney General Ken Eikenberry) played a prominent role in opposing the

214. Ronald Reagan, *Statement on Indian Policy*, in PUBLIC PAPERS 96 (Jan. 24, 1983).

215. Governor Neil Goldschmidt, Office of the Governor, State of Oregon, Proclamation, Apr. 10, 1990.

216. Governor Booth Gardner, The State of Washington, Proclamation, Jan. 3, 1989.

217. UNITED STATES DEPT OF AGRICULTURE, FOREST SERVICE NATIVE AMERICAN POLICY—FRIENDS AND PARTNERS 1 (1990).

218. Andrew DuMont, Confederated Tribes of the Umatilla Indian Reservation, Comments at Columbia River Gorge Commission Public Hearing on Preliminary Draft Plan (Feb. 1991) (tape available from Columbia River Gorge Commission office in White Salmon, Wash.).

219. Johnson was lead counsel for the State of Washington in litigation in the 1970s against Indians over fishing rights. See GOD IS RED, *supra* note 192, at 25-29 (providing a history of this controversy).

NSA Plan, in general, and its treaty rights protection provisions, in particular.²²⁰

As became typical of the Washington Attorney General's office, it rendered an opinion that tainted legal advice with political suggestion.²²¹ The opinion concluded that the NSA permitted the Commission to use the NHPA standards,²²² and opined that the role of the proposed advisory committee should be more clearly defined.²²³ It confused the provisions in the plan concerning open space designation with those concerning cultural resource protection in general.²²⁴ The final version was edited even more unfavorably to the tribes and had a glaring error in omitting the phrase "tribal governments" from this sentence in the concluding paragraph: "The Scenic Act contemplates close interaction between the counties (planning departments), state and federal agencies, and especially the historic preservation offices."²²⁵

In the week preceding the Commission's workshop to prepare the Final Draft Plan, the Commission staff tried again to frame the debate in terms comfortable to the federal, state, and local governments. A memorandum of "Proposed Revisions to the Cultural Resources Section of the Preliminary Draft Management

220. See Bill Stewart, *Eikenberry Seeks Statehouse*, THE OREGONIAN, Nov. 15, 1991, at B4; Sally Newell, *'Indian Treaty Rights' Added to Gorge Plan*, SKAMANIA COUNTY PIONEER (Wash.), Nov. 13, 1991, at 3; see also *infra* note 248 and accompanying text.

221. Two months after the Preliminary Plan was published, one of Johnson's more sympathetic (to the tribes) colleagues faxed the author a draft of the forthcoming opinion (with a note saying "take 2 aspirin before you read this"). Cover Sheet of Facsimile from Larry Watters to Kristine Olson Rogers (Apr. 11, 1991) (on file with author).

222. Memorandum from James M. Johnson, Senior Assistant Attorney General, State of Washington, to Columbia River Gorge Commission 6-7 (Apr. 11, 1991) [hereinafter Johnson Memorandum] (on file with author). The opinion gave the impression that it was endorsing these standards and did not note that the Columbia River Gorge Commission could go beyond the bare minimum of existing federal laws.

223. *Id.* at 10.

224. *Id.* at 5-6 (stating that "those cultural and historical resources which are 'significant' are singled out for protection"). The open space provisions focus on "significant" cultural resources and give examples of the special types of resources that may qualify for using this more drastic management tool. However, the general language of the Act calls for some measure of protection for *all* cultural resources. 16 U.S.C. § 544a(1) ("provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge").

225. Johnson Memorandum, *supra* note 222, at 11.

Plan” disclosed further erosion of the protection provisions, despite the Commission’s determination to strengthen the plan.²²⁶ For instance, open space designations were deleted,²²⁷ survey requirements were reduced,²²⁸ reliance on the poor inventory was reaffirmed,²²⁹ and the “probability model” was reintroduced.²³⁰ Again, tellingly, only governmental documents were included in the bibliography,²³¹ despite the submission of several Native American written comments and sources.²³²

At the Commission’s day-long workshop on Saturday, April 13, 1991, the cultural resource discussion occupied more than half of the meeting.²³³ Louie Pitt, a Warm Springs Reservation tribal staff person in attendance,²³⁴ registered his concern that the staff proposal would “ignore unknown [to Euro-Americans] cultural resources,”²³⁵ and that private landowners’ funding complaints were driving the process.²³⁶ Bill Yallup from the Yakima Indian Nation reiterated tribal criticisms of the inventory upon which the land use designations and planning process were

226. Memorandum from Allen Bell, Land Use Planner, Columbia River Gorge Commission Staff, to Columbia River Gorge Commission 2-3 (Apr. 5, 1991) [hereinafter Bell Memorandum (Apr.)] (on file with author).

227. *Id.* at 2.

228. *Id.*; see also Columbia River Gorge Commission, Final Draft Management Plan for General and Special Management Areas II-54 to II-55 (July 1991) [hereinafter Final Draft Plan] (on file with author).

229. Bell Memorandum (Apr.), *supra* note 226, at 2.

230. *Id.* at 4.

231. *Id.* at 21.

232. See, e.g., Comments of: The Confederated Tribes of the Umatilla Indian Reservation (Sept. 24, 1991) [hereinafter Umatilla Comments] (on file with author); Nez Perce Staff Report, *supra* note 175; Facsimile from Louie Pitt, Jr., Assistant Director for Intergovernmental Affairs, Department of Natural Resources for the Confederated Tribes of the Warm Springs Reservation, to Kristine Olson Rogers (May 3, 1991) [hereinafter Pitt Facsimile] (on file with author); Letter from Howard G. Arnett, Confederated Tribes of the Warm Springs Reservation, to Allen Bell, Land Use Planner (June 25, 1991) [hereinafter Arnett Letter] (on file with author). Other sources include the WARM SPRINGS TRIBAL CODE §§ 490.001-490.840; Roger Anyon, *Protecting the Past, Protecting the Present: Cultural Resources and American Indians*, in PROTECTING THE PAST 215, 215-17 (1991); and GOROSPE, *supra* note 192.

233. Apr. 13, 1991 Minutes, *supra* note 177, at 1-11.

234. Mr. Pitt was named to the Commission by Oregon’s Governor Roberts on November 1, 1991.

235. Apr. 13, 1991 Minutes, *supra* note 177, at 2.

236. *Id.* at 4.

based.²³⁷ Scott Steumke, Warm Springs Reservation Tribal Archaeologist, and Louie Pitt repeated the problems with the term "significance."²³⁸ The Commission Staff countered that if the significance determination were left to the tribes, it could "stall all development in the Gorge."²³⁹ The USFS archaeologist stated that a collaborative process might not be "workable" and suggested that there was a need for "some measurable value."²⁴⁰

After extensive debate, a closely divided (six to five) Commission reaffirmed allowing tribal governments to identify sensitive resources and allowing the Cultural Resources Advisory Committee (with tribal representation) to intervene in a disputed development review.²⁴¹ The published language became immediately legendary as "Policy 16(b)": "If cultural resources may be affected by a proposed activity, an evaluation shall be performed to determine if they are significant. Cultural resources are significant if . . . [they] are determined to be culturally significant or sensitive by one or more of the tribal governments."²⁴²

With respect to the Cultural Resources Advisory Committee role, the Final Draft Plan said:

If a tribal government believes that the affected cultural resources are culturally significant or sensitive, contrary to the evaluation submitted by the applicant, the CRAC shall make an independent review of the applicant's evaluation and the tribal government's substantiated concerns. The CRAC will formulate a recommendation regarding the significance of the cultural resources.

The tribal government must substantiate its concerns in a written report. The report must be submitted to the local government, CRAC, interested persons, and the applicant within 15 calendar days from the date the evaluation of

237. *Id.* at 5.

238. *Id.* at 8-9.

239. *Id.* at 9. Representatives from Klickitat County and Clark County seconded this remark. *Id.* at 10.

240. *Id.* at 9.

241. *Id.* at 11.

242. Final Draft Plan, *supra* note 228, at II-56 to II-57.

significance is mailed. The CRAC must submit its recommendation to the local government within 30 calendar days from the date the evaluation of significance is mailed.²⁴³

By contrast, the USFS provisions for the SMA lands (only nine pages long) still followed the unmodified NHPA process and profiled a "field inventory matrix" for determining potential project impacts.²⁴⁴ The Commission's June, 1991 newsletter characterized the cultural resource protection changes:

The Commission expanded its criteria for determining significance to give Indian tribal governments a greater role. Now, a resource can be found to be significant if it is deemed culturally significant or sensitive to the tribes, even though it doesn't meet other significance tests.

If there is a disagreement about a resource's significance, a Cultural Resources Advisory Committee (composed of cultural resource professionals and tribal representatives) will be asked to make a recommendation to the county.²⁴⁵

Another round of public hearings ensued before the Commission's adoption of the Management Plan. Even though the counties were left with the ultimate decision on cultural resource issues, five of the six counties objected to the new language.²⁴⁶ Because the counties were left with the ultimate decision making authority, tribal governments objected, saying they would not submit to a "lesser" government.²⁴⁷

243. *Id.* at II-63 to II-64.

244. *Id.* at II-76 to II-84.

245. Columbia River Gorge Commission, GMA Gorge Planning Update 6 (June 1991).

246. Apr. 13, 1991 Minutes, *supra* note 177, at 10-11. Multnomah County (primarily Portland) continues to be the only county fully supportive of the CRGNSA. See McCoy Letter, *supra* note 16.

247. See, e.g., Frederick Ike, Sr., Cultural Protection Analyst, Confederated Tribes and Bands of the Yakima Indian Nation Cultural Resources Program, Statement Before the Columbia River Gorge Commission and U.S. Forest Service (July 18, 1991) (on file with author); Lise Ellner, Protection of Indian Treaty Rights in Light of the Columbia River Gorge Scenic Area Act (Aug. 1, 1990) (containing hand-written comments from the Warm Springs Reservation representative) (on file with author); Lise Ellner, Implementation of Native Aboriginal and Treaty Rights Protection in the General Management Plan for the Columbia River Gorge National Scenic Area Act (Apr. 8, 1991) (on file with author).

E. "Acknowledgment" of Sovereignty (at last)

Another aspect of the final draft that stirred substantial controversy was the inclusion of a "Treaty Rights Protection" section.²⁴⁸ Again, the Washington Attorney General's office objected to these provisions.²⁴⁹ This section contributed to the unrest and fears within the counties, and continued to frustrate the tribal representatives.²⁵⁰

The counties all filed formal comments, and the State of Washington worked in concert with Clark, Skamania, and Klickitat counties in opposing the Final Draft Plan.²⁵¹ Governor Gardner, relying on his Department of Community Development staff, sought to substitute language that would eviscerate the cultural resource provisions of the Plan.²⁵² The Department of Community Development wanted to eliminate the word "shall" wherever it occurred in the provisions, to eliminate specific standards, and to allow the counties to develop their own approaches, as long as they were the "equivalent" of the Commission's standards.²⁵³ For example, the Governor proposed deleting the review function of the Advisory Committee unless a party specifically requested it.²⁵⁴ He also wanted to "stack the deck" by adding county representatives to the Committee.²⁵⁵ He would have required the tribes to submit standards to the Commission for approval along with written "findings of fact that

248. See also Arnett Letter, *supra* note 232; Pitt Facsimile, *supra* note 232; Columbia River Gorge Commission Staff Report, Draft, Indian Treaty Rights Protection Act: General Management Areas (June 25, 1991) (on file with author).

249. See Johnson Memorandum, *supra* note 222, at 10.

250. See, e.g., Letter from Klickitat County Board of Commissioners to Stanford Hansell, Chairman, Columbia River Gorge Commission 2-3 (Sept. 23, 1991) (presented at Invitational Public Hearing, Sept. 23, 1991) (on file with author); Newell, *supra* note 220, at 1.

251. See Memorandum from Richard P. Benner, Executive Director, Columbia River Gorge Commission, to Columbia River Gorge Commission (Oct. 9, 1991) [hereinafter Benner Memorandum] (regarding proposals by Governor Gardner) (on file with author).

252. *Id.* at 3-6 (facsimile of Department of Community Development's proposed changes for the Final Draft Management Plan).

253. *Id.* No one, in this context, ever defined "equivalent" or described how it would be determined.

254. See Benner Memorandum, *supra* note 251, at 6.

255. *Id.*

demonstrate how a cultural resource meets its approved evaluation criteria.²⁵⁶

In the meantime, tribal governments were also filing formal comments. Since they had previously prepared voluminous material for Commission consideration,²⁵⁷ the Umatillas' final comments on cultural resources were succinct.²⁵⁸ With respect to Policy 16(b), they noted:

The Tribes are pleased to see this qualification added to the meaning of "significance." This allows the affected Tribes the ability to protect a cultural resource that may not meet the criteria for the National Register of Historic Places (NRHP) but which is significant to one or all of the affected Tribes.

....

It seems that an applicant will never determine a cultural resource as significant for the obvious reason that it could potentially jeopardize the anticipated project. This is an area where Indian vs. non-Indian ways of viewing the natural world and the cultural resources within the natural world are likely to conflict. For the most part, Non-Indians are simply not going to be sympathetic to the Indian world-view. The Tribes think it fair to say that what is important or significant to Indian people has no validity with Non-Indians. This is more than obvious to Indian people and cannot be reasonably disputed.²⁵⁹

With respect to permissible mitigation measures when resources are considered "culturally sensitive" by the Tribes, the Umatillas also registered concern:

256. *Id.* at 5.

257. *See, e.g.*, Jeffrey P. Van Pelt et al., *The Confederated Tribes of the Umatilla Reservation, Sensitive Cultural Resource Areas Within the Columbia River Gorge National Scenic Area* (June 1989) [hereinafter *Umatilla Report*] (on file with author).

258. *See* Project Gorge, *The Confederated Tribes of the Umatilla Indian Reservation, A Review of Chapter II, Cultural Resources, As Found in the Final Draft Management Plan for General and Special Management Areas, Columbia River Gorge National Scenic Area* (Aug. 14, 1991) [hereinafter *Umatilla Review*] (on file with author).

259. *Id.* at 4-5.

Once again, there is the potential for a difference in thinking here between the Indian and non-Indian. The "research" value of cultural resources may not have the same meaning to everyone. Many Indian people seem to care for their cultural resources because they are part of their culture, their history, and their identity, not for their research value. Simply conducting the appropriate research before developing a site important to Indian people (i.e., data recovery or mitigation) may not be an acceptable activity when dealing with the resource, particularly sacred sites including burial areas. Generally, Indian people seem to prefer that all Indian cultural resources be left unmolested in their natural state, protected from artifact collectors, vandals, and adverse impacts degrading to the site's integrity and identity.²⁶⁰

The Yakima Indian Nation delivered an entire notebook of critiques of the Draft Management Plan to the Commission Chairman.²⁶¹ The incomplete inventory was again assailed as a useless planning base.²⁶² The Umatillas' concerns about appropriate mitigation were echoed.²⁶³ The counties' suggestions that Policy 16(b) be removed were decried.²⁶⁴ The Yakimas' perceptions of the planners' prodevelopment drift were analogized to:

[A]n old city bus in the rural south during the 1930's. The bus appears to be steered by economic developers, the first 3/4 of the bus seats are reserved for recreationists, prodevelopers, and carpet baggers, while the back few seats are kept for those interested in scenic, cultural and natural resource protection.

260. *Id.* at 9.

261. This notebook of critiques is a compilation of statements, memoranda, and reports filed by various members of the Yakima Indian Nation [hereinafter Yakima Critiques]. The notebook in its entirety is available from the author.

262. Frederick Ike, Sr., Cultural Protection Analyst, Confederated Tribes and Bands of the Yakima Indian Nation Cultural Resources Program, Statement Before the Columbia River Gorge Commission and U.S. Forest Service 7, 11 (Sept. 24, 1991) [hereinafter Ike Statement (Sept. 1991)] (on file with author); *see also* Memorandum from Dennis Griffin, Archaeologist, Yakima Indian Nation, to Frederick Ike, Sr., Cultural Protection Analyst, Yakima Indian Nation Cultural Resources Program 1 (July 26, 1991) [hereinafter Griffin Memorandum] (on file with author).

263. Griffin Memorandum, *supra* note 262, at 2.

264. Memorandum from William Yallup, Sr., Program Manager, Confederated Tribes and Bands of the Yakima Indian Nation Cultural Resource Programs, to Frederick Ike, Sr., Cultural Protection Analyst, Confederated Tribes and Bands of the Yakima Indian Nation Cultural Resources Program 1 (Sept. 23, 1991) (on file with author).

As in the south, those in the back seats are told to keep quiet, avoid making any kind of a disturbance and hang on for the ride.²⁶⁵

This analogy appeared even more appropriate after the deluge of prodevelopment public testimony.

Two weeks after the hearings, another staff memorandum on cultural resource revisions surfaced, bowing to many of the counties' complaints.²⁶⁶ The memorandum began by expanding the exemptions for survey requirements,²⁶⁷ and it deleted the review and dispute resolution role of the Cultural Resources Advisory Committee. It also adopted Governor Gardner's demand that this Committee make recommendations only "upon request" of the parties.²⁶⁸ Worst of all, the memorandum tried again to convince the Commission to "[r]ely on the federal criteria to determine if cultural resources are significant" and to "delete Policy 16(b)."²⁶⁹

The Commissioners received this memorandum the day before they were to begin a three-day workshop that would end with the adoption of the Final Plan. There was very little time to respond, much less to gather support to retain Policy 16(b). Tribal representatives were caught by surprise, because they knew that the Commission had spoken already, and quite extensively, on this subject. No one had imagined that the Commission would be fighting its own staff, in addition to the Governor of Washington, five counties, and officials within the Department of Agriculture.²⁷⁰

The staff raised what they considered problems with the proposed draft, in particular with Policy 16(b). The first was its

265. Griffin Memorandum, *supra* note 262, at 4.

266. See generally Memorandum from Allen Bell, Land Use Planner, to Columbia River Gorge Commission (Oct. 11, 1991) [hereinafter Bell Memorandum (Oct.)] (on file with author).

267. *Id.* at 1; see *infra* notes 283-301 and accompanying text (discussing these provisions more completely).

268. *Id.* at 8.

269. *Id.* at 4.

270. See generally Minutes, Columbia River Gorge Commission 6 (Oct. 15, 1991) [hereinafter Oct. 15 Minutes] (on file at the Vermont Law School Library).

lack of evaluation criteria.²⁷¹ This complaint, however, misses a fundamental point of Policy 16(b)—to recognize the “Indian world view.”²⁷² Western scientists and planners expect a checklist; Native Americans do not operate that way.

Next, the staff complained that without criteria, Policy 16(b) “removes predictability from the cultural resources process.”²⁷³ However, the “significance” standard of NHPA gives only the illusion of predictability. Archaeologists regularly differ over how to interpret this standard, and the six Gorge county planners are *bound* to vary all over the lot. The only thing predictable about the federal criteria is that they usually allow development proposals to proceed.

It also was contended that Policy 16(b) “places counties in a legally vulnerable position” because they will be compelled to “defend a final decision to protect or not protect cultural resources without reference to [the] criteria.”²⁷⁴ Even assuming this to be the case, they are not any less vulnerable *with* the federal “significance” interpretations. Moreover, this staff position discounts the validity of the tribes’ determination. Why should a tribal declaration of significance carry less weight than that of an archaeologist? Are tribal elders not experts on their own culture?

The staff also defended the national criteria because they are “used successfully throughout the United States . . . [and t]hey have withstood numerous court challenges.”²⁷⁵ “Success,” of course, is a relative term. The criteria have been used *in opposition* to tribal concerns.²⁷⁶

Finally, the staff admonished that “the cultural resource process is not conducted in a vacuum. It affords tribal governments at least four opportunities to participate in evaluations . .

271. Bell Memorandum (Oct.), *supra* note 266, at 5.

272. See *supra* notes 259-60 and accompanying text.

273. Bell Memorandum (Oct.), *supra* note 266.

274. *Id.*

275. *Id.*

276. See *supra* notes 91, 185 (cases in which tribes have tried unsuccessfully to contest the USFS use of this process).

. . .²⁷⁷ The tribal governments, however, can do without such patronizing reminders; they are well aware of how much good that kind of consultation does them. It fails to recognize the government-to-government relationship with the tribes, who are not just another "interested party."

In light of this eleventh hour attempt to undo the model that the Commission had devised in its Final Draft Plan, a packet of countervailing materials was prepared for each Commissioner.²⁷⁸ The following plea was made at the opening of the workshop discussion:

We've worked so long and hard to reach common ground—now it's eroding. At our retreat, we said that we would celebrate over 10,000 years of continuous culture in the Gorge. If we follow the staff recommendation, instead, we'll contribute to the obliteration of that culture. I've held this plan up as a national model—but no more! What this will say now is: "Tribal governmental concerns are expendable—it's the planners' checklists which count."²⁷⁹

Policy 16(b) had become symbolic. When Commissioners met with tribal representatives, the first question asked was: "Will you support 16(b)?" Who better to interpret a religious culture? When Byzantine mosaics are stolen, a Greek Orthodox cleric comes to testify.²⁸⁰ If the Vatican's resources were at stake, the Pope would appear. Commissioner Don Clark likened tribal concern to Israel's insistence on total control over its holy sites (even those held sacred by non-Jews) as a matter of absolute

277. Bell Memorandum (Oct.), *supra* note 266, at 5.

278. This packet included: Letter from Walter R. Echo-Hawk, Senior Staff Attorney, Native American Legal Rights Fund, to Columbia River Gorge Commission (Oct. 4, 1991) [hereinafter Echo-Hawk Letter]; Anyon, *supra* note 232; *Presidential Indian Policy Statement, in COMMISSION ON INDIAN SERVICES* (Salem, Or.), Oct. 19, 1991, at 3; Letter from Jaqueline M. Cook, President, Association for Washington Archaeology, to Columbia River Gorge Commission (Sept. 9, 1991); excerpts from Umatilla Comments, *supra* note 232; and excerpts from the Yakima Critiques, *supra* note 261 (entire packet on file at the Vermont Law School Library).

279. Cf. Oct. 15 Minutes, *supra* note 270, at 4 (comments by Kristine Olson Rogers). A tape recording of the meeting is available at the Columbia River Gorge Commission offices in White Salmon, Washington [hereinafter Tape Recording].

280. See *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1396 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

sovereignty.²⁸¹ Walter Echo-Hawk, Senior Staff Attorney at the Native American Rights Fund, remarked:

The Columbia Gorge National Scenic Area Management Plan offers a promising new model in historic preservation legislation. Your plan ratifies the concept that the affected Indian people are better qualified to assess the value of their own cultural resources than anyone else. Your plan answers the need to rethink previous cavalier attitudes toward the preservation of Native cultural resources, once the exclusive purview of non-Indian "experts."

The cultural resources policy, outlined in the plan makes explicit the promotion and enhancement of Indian self-determination which is implicit in federal policy. Acknowledgment of substantive tribal authority is crucial to the exercise of Native rights. Your plan, in offering a method of reconciling Native rights with the interests of other users of the area, offers a model to which other agencies can refer and aspire.

This model solves the problem of non-Indian land managers or anthropologists imposing inappropriate determinations of significance, based on their cultural bias or private agendas. I applaud you for your far-sightedness.²⁸²

On October 15, the debate raged on all morning. All four affected tribal governments sent representatives to support Policy 16(b) as it was written. In contrast, the Bureau of Indian Affairs ("BIA") archaeologist²⁸³ expressed "concerns" about Policy 16(b)'s lack of specificity, and supported a return to the federal criteria.²⁸⁴ At long last—and once and for all—the staff's recommendation was defeated unanimously. The Commissioners also modified Policy 16(b) to make it clear that the tribal governments'

281. Tape Recording, *supra* note 279.

282. Echo-Hawk Letter, *supra* note 278.

283. Ironically, Ms. Boynton co-authored an article with her husband, Michael Boynton, a USFS archaeologist, that questioned the ability to plan collaboratively with Native Americans. See *supra* note 173 and accompanying text.

284. Oct. 15 Minutes, *supra* note 270, at 5. Ms. Boynton's comment prompted a remark from a Commissioner about the BIA's repeated failure to represent tribes conscientiously. *Id.*

methods of evaluation would *not* be subject to the Commission's approval.²⁸⁵

At this meeting, the Plan (as a whole) was officially adopted by the Commission on a nine-to-three vote.²⁸⁶ After its adoption, a Continuing Legal Education program on historic preservation in Portland described the word "acknowledged" (as used in the Plan in reference to the Commission's formal receipt of the tribes' criteria) as a "term of art" in Oregon's land use planning that denotes approval by LCDC.²⁸⁷ Accordingly, at the next Commission meeting, the word "acknowledged" was changed to "received and filed with,"²⁸⁸ and the Plan was submitted for final printing.

V. LOOPHOLES AND MODELS

The cultural resource section of the Columbia River Gorge National Scenic Area Plan is probably as close to a national model as a draft can come, considering that every paragraph was voted upon by twelve lay people. All four tribal governments endorsed the Final Plan and urged the Secretary of Agriculture to concur with it.²⁸⁹ Had the tribes been empowered to amend the Plan under the Act, they probably would have made some changes. Still, the process of working together over the last five years, with the Commission attending Tribal Council meetings on the four

285. *Id.* at 7.

286. *Id.* at 21.

287. CLE Meeting, *supra* note 164. Oregon law requires each city and county to adopt plans that comply with LCDC's goals. OR. REV. STAT. ANN. §§ 197.175(2)(a), 197.250 (Butterworth 1991). Each of these plans then goes through a formal acknowledgment hearing before LCDC. *Id.* § 197.251 (1983).

288. Minutes, Columbia River Gorge Commission 1 (Nov. 12, 1991).

289. See, e.g., Letter from Zane Jackson, Chairman, Warm Springs Tribal Council, to Edward Madigan, Secretary, U.S. Department of Agriculture (Dec. 8, 1991) (on file with author); Letter from Wilferd Yallup, Chairman, Yakima Nation Tribal Council, to Edward Madigan, Secretary, U.S. Department of Agriculture (Jan. 8, 1991).

Under the NSA Act, the final management plan must be submitted to the Secretary of Agriculture for review and concurrence. 16 U.S.C. § 544d(f)(1). Actually, the Secretary of Agriculture violated the Act by attempting to concur with "conditions." See Madigan Letter, *supra* note 15, at 2; 16 U.S.C. § 544d(f)(1)-(2) (contemplating a concurrence or a denial, but not a conditional concurrence); Letter from Zane Jackson, Chairman, Warm Springs Tribal Council, to Stafford Hansell, Chairman, Columbia River Gorge Commission 1 (Mar. 9, 1992) (pointing out the illegality of the Secretary's "conditional" concurrence) (on file with author).

reservations and with tribal leaders attending Commission Tribal Consultation Council meetings in The Dalles every month, has created a cooperative atmosphere and trusting relationship. The elements of a model are in place; its flaws are known and manageable, and other model legislation can supplement the Plan, or eventually be specifically incorporated into it.

A. Model Elements

1. Deference to Tribal Sovereignty

The chief contribution the NSA Plan offers is the one most discussed: Policy 16(b)—in final print renumbered as 10(b).²⁹⁰ It recognizes that tribal authorities are often in the best position to determine the significant aspects of their own culture. It provides a means to circumvent the ethnocentrism of other authorities frequently manifested by government agencies and the U.S. Supreme Court.²⁹¹

2. Adverse Effects Prohibited

Policy 14 provides: "Mitigation measures shall ensure that a proposed use would have no adverse effect on significant cultural resources. Uses that would adversely affect significant cultural resources shall be prohibited."²⁹² This marks an advance beyond the "moderate impact" or "no significant impact" approach typical of so many land use regulations and environmental laws.²⁹³

290. PLAN, *supra* note 3, at I-53 to II-54.

291. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988) (Brennan, J., dissenting) (Native American religious shrines not given the same protection as Judeo-Christian places of worship); *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 907 (1990) (Blackmun, J., dissenting) (Native American sacraments not accorded legal reverence in the same manner as communion wine was during the Prohibition era).

292. PLAN, *supra* note 3, at I-54.

293. See, e.g., *Determination of Critical Habitat for the Northern Spotted Owl*, 57 Fed. Reg. 1796, 1825 (1992) (codified at 50 C.F.R. § 17.95 (1993)); *Surface Mining Reclamation and Enforcement Office, Notice*, 57 Fed. Reg. 6737 (1992); *National Forest Management Act*, § 6, 16 U.S.C. § 1604 (1988).

3. Preferred Avoidance

Policy 15 states clearly, with respect to *all* cultural resources: "Avoidance is the preferred method of cultural resource protection. Other mitigation measures to reduce the effect of a proposed use on cultural resources shall be used only if avoidance is not practicable."²⁹⁴ It is not clear how "practicable" will be defined in this context,²⁹⁵ but the spirit of this policy is evident and enforceable.

4. Cultural Advisory Committee

The Cultural Advisory Committee ("CAC")²⁹⁶ has the potential to be quite instrumental in ensuring that the model cultural resource protection mechanisms are implemented in accordance with the Plan's promise. As finally constituted,²⁹⁷ CAC members include "cultural resource professionals, interested individuals, and at least one representative from each of the four Indian tribes."²⁹⁸ The CAC's charge is to:

- A. Monitor cultural resource surveys, evaluations, impact assessments, and mitigation plans.
- B. Periodically formulate and submit recommendations to SHPOs, local governments, and the Gorge Commission regarding cultural resource surveys, evaluations, impact assessments, and mitigation plans.
- C. Monitor cultural resource decisions made by SHPOs and the local governments.
- D. Recommend procedural and administrative changes to the Gorge Commission that would improve the cultural resource protection process.

294. PLAN, *supra* note 3, at I-55.

295. The author would urge that it means "possible."

296. The Cultural Resource Advisory Committee was renamed because its acronym, "CRAC," was considered "offensive." Bell Memorandum (Oct.), *supra* note 266, at 8.

297. PLAN, *supra* note 3, at I-69. Though the Final Plan required that the CAC be formed within 200 days after the Secretary of Agriculture concurred with the plan, the CAC has not yet been formally established.

298. *Id.* at I-69. Actually, each of the four tribal governments contains several tribes. See *supra* note 9.

- E. Advise the Gorge Commission on the design and implementation of future cultural resource inventories, including oral history programs and survey strategies.
- F. Review evaluations of significance when a disagreement arises between a project applicant and an Indian tribal government. In these instances, the CAC shall submit written recommendations to the local government. Recommendations shall be based on the evaluation prepared by the project applicant, reports submitted by Indian tribal governments, and comments submitted by interested persons, including the SHPO.²⁹⁹

The CAC's mandatory review role was retained, despite Governor Gardner's urging to the contrary.³⁰⁰ The county still has the last word, but if its "final decision contradicts the comments or recommendations submitted by . . . CAC, the local government shall justify how it reached an opposing conclusion."³⁰¹ Counties will be hard pressed to override tribal opposition to a proposal.

B. Predictable Problems

1. Tribal Government Notice

During the final comment period, the Umatillas expressed the following worry:

The Tribes are curious who within the local governments would be responsible to [sic] determining whether a reconnaissance or historic survey should be required. It would appear naive to think that local governments would be as stringent in requiring reconnaissance surveys as would the Tribes. This may be unfair, but again, this gets back to what the Tribes perceive as a potentially hostile conflict between what the Tribes think appropriate and what the non-Indians think appropriate. In number 2 below it is said that "tribal governments shall be notified when (1) a reconnaissance survey is required or (2) cultural resources that are prehistoric or

299. PLAN, *supra* note 3, at I-69.

300. *Id.* at I-54, I-62; see *supra* notes 251-56 and accompanying text (discussing Governor Gardner's opposition).

301. PLAN, *supra* note 3, at I-62.

otherwise associated with Native Americans are known to exist in the project area.” This notification is somewhat after the fact, however, in that the Tribes are not able to provide input into whether a survey should be required or not. Obviously, if a survey is not required, there is less opportunity for any surface artifacts and/or features to be recorded.³⁰²

The wording of the Final Plan was rephrased slightly,³⁰³ but the concern is still valid. Tribal staff is going to have to be remarkably vigilant about *all* development proposals for quite awhile, until more survey work is done.

2. Short Timeframes

In their urge to be efficient and to minimize inconvenience for project applicants, planners have required very short deadlines for tribal response. Tribal staff have pointed out repeatedly that their limited resources, coupled with the consciously slow process of tribal government deliberation, will make compliance with these regulations difficult—if not impossible—in many instances.³⁰⁴ Nonetheless, in the heat of the debate over the more substantive provisions, the following deadlines remain in the Plan: (1) twenty calendar days to submit written comments to the counties (describing the “nature and extent of any cultural resources” and identifying “individuals with specific knowledge about them”),³⁰⁵ (2) ten days to “consult” with the project applicant,³⁰⁶ (3) thirty calendar days to comment on a survey report,³⁰⁷ (4) fifteen days to write a report to the CAC;³⁰⁸ (5) thirty calendar days to comment to the county about their assessment of effects,³⁰⁹ and (6) thirty days to comment on a mitigation plan.³¹⁰ The Columbia River Gorge Commission is

302. Umatilla Review, *supra* note 258, at 6.

303. PLAN, *supra* note 3, at I-56.

304. Tape Recording, *supra* note 279 (comments by Paul Minthorn, Treaty Rights Specialist, Yakima Indian Nation).

305. PLAN, *supra* note 3, at I-56.

306. *Id.*

307. *Id.* at I-59.

308. *Id.* at I-62.

309. *Id.* at I-64.

310. *Id.* at I-66.

just one of the many federal, state, and local agencies with which these tribal governments must interact.

3. Survey Requirement Exceptions

This is the remaining major loophole in cultural resource protection in the Management Plan. Policy 6(a) lists six substantial categories of projects for which a field survey is not deemed necessary.³¹¹ Each of the six exemptions contains the makings of great mischief.

The first exemption concerns "the modification, expansion, replacement or reconstruction of existing buildings and structures."³¹² As the Yakimas have noted, the white settlers thought nothing of building their homes atop sacred sites.³¹³ Five hundred years after Columbus' "discovery," perhaps some renewed sensitivity could be exhibited to remedy prior desecrations.³¹⁴ Particularly, "expansions" have the potential to add insult to injury.

The second exemption deals with "low-intensity recreation uses, such as fishing, hunting, and hiking; installation of surface chemical toilets; hand treatment of brush within established rights-of-way; and new uses of existing structures."³¹⁵ It does not take much imagination to picture the impacts of these activities. Rather than a list of minimally intrusive activities, it

311. *Id.* at I-51 to I-53.

312. *Id.* at I-51.

313. Morris L. Uebelacker & Tommy Eli, *The Columbia River Gorge Area Act: Initial Review of the Planning Process as It Relates to Treaty and Other Rights of the Yakima Indian Nation* 19-20 (Mar. 5, 1990) (on file with author). The authors note that:

It is doubtful that any designated residential areas exist which do not contain cultural resources important to the Yakima Indian Nation. Many contain cemeteries and burial areas. No subdivision or building permit should be allowed without a 100% survey of the parcel, and until provisions are established for the protection and preservation of any cultural resources located.

Id.

314. See, e.g., Walter Echo-Hawk, *Native American Religious Liberty: 500 Years After Columbus* (1991) (on file with author); Letter from John E. Echohawk, Executive Director, Native American Rights Fund, to General Public (1991) (regarding Columbus' legacy to Native Americans) (on file with author).

315. PLAN, *supra* note 3, at I-51 (emphasis added).

reads like a parade of horribles. Recreationists pose one of the most serious threats to cultural resources.³¹⁶

The third exemption applies to:

Proposed uses that involve minor ground disturbance, as defined by depth and extent, including repair and maintenance of lawfully constructed and serviceable structures; home gardens; livestock grazing; cultivation that employs minimum tillage techniques, such as replanting pastures using a grassland drill; construction of fences; new utility poles that are installed using an auger, post-hole digger, or similar implement; and placement of mobile homes where septic systems and underground utilities are not involved.³¹⁷

Again, these activities may sound innocent enough, but they do not leave "only footprints," as the National Park Service would require of cultural resource visitors.³¹⁸ In fact, mobile home placement, in particular, can cause major destruction of a site.³¹⁹

The fourth exemption under the Management Plan comprises:

Proposed uses that occur on sites that have been disturbed by human activities, provided the proposed uses do not exceed depth and extent of existing ground disturbance. To qualify for this exception, a project applicant must demonstrate that land-disturbing activities occurred in the project area. Land-disturbing activities include grading and cultivation.³²⁰

This exception could apply to virtually every acre of ground in the NSA. A prior disturbance exception is especially disappointing in that it is a lost opportunity to fulfill the purpose of the Act to

316. *Time Bandits* (Oregon Public Broadcasting television broadcast, Mar. 1984) (interview with Lee Gilson, Oregon State Historical Preservation Office) (video on file with author); Lynell Schalk, Special Agent-in-Charge, Bureau of Land Management, Department of Interior, Remarks at a Lecture at Northwestern School of Law in Portland, Or. (Feb. 22, 1992).

317. PLAN, *supra* note 3, at I-51 to I-52.

318. Personal observations of the author. These signs—"Take only photographs! Leave only footprints!"—are found in every national park in the southwest.

319. Oct. 15 Minutes, *supra* note 270, at 1, 2.

320. PLAN, *supra* note 3, at I-52.

protect and *enhance* cultural resources.³²¹ The exemption also flies in the face of contemporary advanced Cultural Resource Management thinking, found even within the ranks of the Forest Service.³²² Peter Pilles, an award-winning archaeologist with the Coconino National Forest, has coined the phrase "Fewksed" to describe the enormous research potential of sites previously written off by professionals due to earlier land disturbing activities.³²³

The fifth exemption covers "sites that have been adequately surveyed in the past."³²⁴ Even though this exception is qualified

321. 16 U.S.C. § 544a(1). The term "enhancement" in the Act clearly demonstrates the legal duty imposed upon government in implementing the legislation. This duty falls squarely on the Commission and the Forest Service, and is imposed on state and local governments in the compact and in local land use ordinances. See *supra* notes 4-18 and accompanying text.

322. See, e.g., Peter J. Pilles, Jr., *Elden Pueblo: The Frustration of Following Fewkes* 6-9 (Apr. 26, 1991) (text accompanying a slide presentation) (on file with author).

323. *Id.* at 3. Dr. Jesse Walter Fewkes was an archaeologist working with the Smithsonian in the 1920s who was notorious for his sloppy techniques. *Id.*

In 1971, the Coconino National Forest was identifying parcels of land suitable for land exchanges, including the land containing Elden Pueblo. Knowing of its existence, the Forest Service convened an advisory committee of knowledgeable archaeologists and asked for recommendations on the remaining research potential and the advisability of using Elden Pueblo for future land exchanges. The consensus of the committee was that, although much of the site was unexcavated, it was of limited research potential, and could only provide "checks" for data and theories obtained in more pristine sites. The committee did, however, recommend the Forest Service retain Elden Pueblo because of its significance to the development of archaeological concepts of the region. In sum, although it was acknowledged that SOME information potential existed, in general the site had been "Fewksed" and its main significance now was only commemorative.

Several years later, one fourth of the site, located on private land, was bulldozed to allow for expansion of a trailer court and in 1978 the Forest Service again considered designating the site as suitable for exchange. But now a testing program was conducted with the assistance of the Youth Conservation Corps. This testing included rooms previously dug by Fewkes as well as two mounds thought to be backdirt from Fewkes' Fresno. To everyone's surprise, it was found that not only were there substantial deposits in some rooms dug by Fewkes, but one mound was an undisturbed trash mound with excellent stratigraphy and several intact burials.

In the same year, an unauthorized backhoe trench, dug by a neighbor, revealed several intact pit houses, storage pits, and burials. It was soon realized that much more remained of the site than anyone had assumed and that Elden Pueblo still had considerable research potential.

Id. at 3-4.

324. PLAN, *supra* note 3, at I-52.

by the requirement that professionals must have been involved with the prior survey and done surface and subsurface testing,³²⁵ most of today's archaeologists would not stake their careers on the work of their colleagues who had engaged in hasty salvage work decades earlier.³²⁶ Scientific techniques improve, as well as sensitivity to the need for tribal or other ethnic experts' involvement.

The sixth and final Management Plan exception provides for "[p]roposed uses occurring in areas that have a low probability of containing cultural resources."³²⁷ This exemption is worst of all. It is the Forest Service's "probability model" reincarnate,³²⁸ an approach with superficial appeal to planners and other bureaucrats.³²⁹ Predictably, it will pose many more problems than it solves, but at least the Commission inserted the following language:

The Gorge Commission, after consulting Indian tribal governments and state historic preservation officers, shall prepare and adopt a map showing areas that have a low probability of containing cultural resources. This map shall be adopted within 200 days after the Secretary of Agriculture concurs with the Management Plan. It shall be refined and revised as additional reconnaissance surveys are conducted. Areas shall be added or deleted as warranted. All revisions of this map shall be reviewed and approved by the Gorge Commission.³³⁰

Obviously, these six exemptions represent a substantial concession to the complaining counties. The exceptions come fairly close to swallowing the model rule. The only short term solution is for the CAC and the tribal governments to monitor carefully the implementation of Policy 6(a). The appropriate long

325. *Id.*

326. Conversation with Randall Schalk, Consulting Archaeologist, INFOTEC (Dec. 18, 1991). See generally Pilles, *supra* note 322.

327. PLAN, *supra* note 3, at I-52.

328. See *supra* notes 180-88 and accompanying text.

329. See *supra* notes 187-88 and accompanying text.

330. PLAN, *supra* note 3, at I-53; see Oct. 15 Minutes, *supra* note 270, at 3.

term solution would be to amend the Plan to delete the damaging policy altogether.³³¹

C. *Enhancing Cultural Resource Protection in the Management Plan*

1. Incorporating Tribal Ordinances by Reference

Despite requests by tribal representatives and the author, the Plan still omits any references to the comprehensive work done by the four affected tribal governments in the NSA. These references could strengthen the Plan substantially. For example, the Warm Springs Tribal Council, in consultation with their tribal attorney, promulgated a comprehensive ordinance.³³² It addresses ceded lands, as well as reservation lands, and lays the groundwork for some aboriginal rights claims.³³³ It could supplement and illuminate the cultural resource provisions of the Management Plan.

The Umatillas have similar models, some of which are incorporated into memoranda of understanding with their neighboring counties.³³⁴ Ahead of many county governments in the Gorge, this tribal government adopted a comprehensive land use plan in 1979.³³⁵ Their planning expertise was praised in a recent professional publication;³³⁶ the article noted that, in addition to "standard provisions, such as those that urge concentrated development and agricultural protection," the Umatillas

331. The Columbia River Gorge Commission recently promulgated regulations to facilitate Plan amendment. Minutes, Columbia River Gorge Commission 13 (Apr. 14, 1992). Unfortunately, most of the pressures to amend appear to be coming from those seeking fewer restrictions on development.

332. See WARM SPRINGS TRIBAL CODE §§ 490.001-490.840 (1986). This ordinance was cited as a national model by the National Congress of American Indians during their convention in Portland in 1988.

333. *Id.* §§ 490.330-490.350; see also Warm Springs Tribal Council, Position Paper Regarding the Exercise of Off-Reservation Treaty Rights in the Warm Springs Ceded Area 1 (Feb. 1989) (on file with author).

334. Conversation with Dan Hester, Attorney, Confederated Tribes of the Umatilla Reservation (July 7, 1992).

335. CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, LAND DEVELOPMENT CODE (1979).

336. Marjane Ambler, *On the Reservations: No Haste, No Waste*, PLANNING, Nov. 1991, at 27-28.

have "unique ones, which protect the tribal culture. For example, the plan designates the mountain area where the Indians hunt for elk and dig roots as a 'subsistence zone,' thus effectively stopping . . . development there."³³⁷

Early in the Gorge planning process, the Umatillas also prepared a fifty-page bound document, complete with color photographs, with the avowed purpose of providing the Forest Service with a report detailing "what is known regarding the Indian cultural resources of the Columbia River Gorge National Scenic Area."³³⁸ At the very least, that document should have been cited in the Management Plan alongside the traditional government sources. It also contains a seventeen-page list of the references cited,³³⁹ a diverse compilation of sources both Indian and Anglo, scientific and amateur, scholarly and folkloric.

2. Three Landmark Congressional Actions

Two significant pieces of federal legislation were passed in the last two sessions of Congress; one is pending. The Native American Graves Protection and Repatriation Act of 1990 ("NAGPRA")³⁴⁰ has yet to be fully implemented, as it is awaiting Park Service regulations.³⁴¹ However, it has been hailed as "historic, landmark legislation for Native Americans . . . represent[ing] fundamental changes in basic social attitudes toward Native peoples by the museum and scientific communities and the public at large."³⁴² NAGPRA promises repatriation on an unprecedented scale,³⁴³ but it does not address the issue of how the repatriated remains are to be handled.

337. *Id.* at 28.

338. See Umatilla Report, *supra* note 257, at 4.

339. *Id.* at 28.

340. 25 U.S.C. §§ 3001-3013 (Supp. II 1990).

341. See Phillip Walker, *Update on the Implementation of the Native American Graves Protection Act*, in SOCIETY FOR AMERICAN ARCHAEOLOGY BULLETIN 6 (Jan. 1991), citing *Native American Graves Protection Act Memorandum* (National Park Service, Oct. 30, 1990).

342. Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 36-37 (1992).

343. Jay Pridmore, *Dickson Mounds: Closing a Window on the Dead*, ARCHAEOLOGY, July/Aug. 1992, at 18-19.

At a Gorge Commission Consultation Council, Michael Farrow of the Confederated Tribes of the Umatilla Indian Reservation suggested that a gesture of national moment could be made by designating the islands of the Columbia River as reburial islands.³⁴⁴ After all, before the impact of the dams, all the islands served as final resting places for the Native American people along the river.³⁴⁵ Miller Island, in particular, has been mentioned as an appropriate site.³⁴⁶ What better way to fulfill the spirit of NAGPRA and to honor the NSA's original inhabitants? Of course, such a designation would also have another beneficial side effect—it would protect the tribal culture by preventing development, just like the Umatilla land use ordinance.³⁴⁷

There are two other potential contributors to the Gorge protection effort. The amendments to the National Historic Preservation Act have been discussed previously: they afford far greater participation, in a co-planning capacity, by tribal representatives, and also provide necessary funding.³⁴⁸

Another Native American Rights Fund lobbying effort, the 1993 Proposed Amendments to the American Indian Religious Freedom Act of 1978 ("AIRFA"),³⁴⁹ would accomplish what litigants have been trying to achieve for fifteen years, since Congress declared its intent to protect Indian religious freedom but failed to provide a means to do so.³⁵⁰ The AIRFA draft has

344. Michael Farrow, Director, Department of Natural Resources, Confederated Tribes of the Umatilla Indian Reservation, Comments at Columbia River Gorge Commission Consultation Meeting in The Dalles, Or. (May 1990) [hereinafter Farrow Comments].

345. See Umatilla Report, *supra* note 257, at 11-12; see also *supra* notes 48-57 and accompanying text.

346. Farrow Comments, *supra* note 344.

347. See *supra* notes 335-37 and accompanying text.

348. See *supra* notes 195-207 and accompanying text.

349. Proposed Draft of the American Indian Religious Freedom Act of 1993 (to amend 42 U.S.C. § 1996 (1988)) [hereinafter Proposed Draft AIRFA]. The legislation is expected to be introduced by Senator Daniel Inouye in 1993 during the first session of the 103d Congress. It has been the subject of field hearings in Portland, Or. (Mar. 6, 1992), Los Angeles, Cal. (Nov. 12, 1992), Albuquerque, N.M. (Feb. 8, 1993), Minneapolis, Minn. (Mar. 8, 1993), and Honolulu, Haw. (Mar. 25, 1993 & Apr. 7, 1993).

350. Several federal courts have held that AIRFA is a policy statement that does not provide a valid cause of action. See, e.g., *Attakai v. United States*, 746 F. Supp. 1395, 1405 (D. Ariz. 1990); *Crow v. Gullet*, 541 F. Supp. 785, 793 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983); see also Vine Deloria, *Sacred Lands and*

five sections, one of which is directly applicable to the Gorge.³⁵¹ It would allow preservation of sites sacred to Native Americans and access to those areas for religious purposes.³⁵²

The implications of this legislation have been alarming to developers and federal multiple-use agencies.³⁵³ At times, the entire NSA, the length of the river, plus its surrounding mountains (Hood, Adams, St. Helens) have been named sacred.³⁵⁴ In an ironic twist, without contemplating these ramifications, The Dalles itself has been cited as having "great religious significance to Native Americans."³⁵⁵

The passage of the AIRFA amendments is far from assured, although it is an auspicious time in history for the effort to succeed.³⁵⁶ If it does, the Commission will have the opportunity to take the lead in incorporating religious rights restoration into land use management. It would be a worthy undertaking and one befitting the other model efforts the Commission has exhibited the courage to embrace.

CONCLUSION

Walter Echo-Hawk often begins his speeches and articles with a quotation from Felix Cohen, the "Father of Federal Indian Law,"

Religious Freedom, 1991 NATIVE AM. RTS. FUND LEGAL REV. 1 (discussing the need for amendments to AIRFA); Walter Echo-Hawk, *Loopholes in Religious Liberty: The Need for a Federal Law to Protect Freedom of Worship for Native People*, 1991 NATIVE AM. RTS. FUND LEGAL REV. 7 (same).

351. Proposed Draft AIRFA, *supra* note 349, § 101 (on file with author). This section is called "Title I—Protection of Sacred Sites."

352. *Id.*

353. See generally Echo-Hawk, *supra* note 350; Kristen L. Boyles, Note, *Saving Sacred Sites: The 1989 Proposed Amendment to the American Indian Religious Freedom Act*, 76 CORNELL L. REV. 1117 (1991).

354. Ed Edmo, Remarks at a Columbia River Gorge Commission Workshop in Corbett, Or. (Sept. 1990). Mr. Edmo, a Native American storyteller, recounted the legends of the Gorge, detailing the embodiment of the gods in the three sacred mountains. See also Umatilla Report, *supra* note 257, at 3; WILLIAMS, *supra* note 27, at 26-35 (discussing legends of the Gorge).

355. Umatilla Report, *supra* note 257, at 14, quoting Wilke et al., 1983 Executive Summary.

356. See generally Sen. Daniel K. Inouye, *Discrimination and Native American Religious Rights*, 23 UWLA L. REV. 3 (1992); Echo-Hawk, *supra* note 350; Deloria, *supra* note 350.

noting that: "Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere" ³⁵⁷ That the Commission mustered the political strength to pass Policy 16(b), in the face of daunting opposition, bodes well for the atmosphere in the NSA. This model should serve as a sign of hope that our land use planning can emerge from the stagnant air of federal bureaucracies' blind tunnels.

In recognizing the tribal governments as true partners in this effort, the Commission honored the concept of government-to-government relationships to which so many other agencies pay only lip service. Since it was our forebears who led the original incursion into this country, perhaps we can dignify our inheritance by passing it on to the next generation as a trust given by both Indian and Anglo partners in perpetuity. Then our children's children can chime in with the tribal orators as they begin the legends of the Gorge—the Wana Chinook Tymoo: "From time immemorial, when the salmon swam free, our people knew the gifts of the Great River and respected them"

357. COHEN, *supra* note 143, at v.