Integrating Cultural Impact Assessments into Environmental Analysis

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Cultural impact assessments (CIAs) are rare in environmental practice in the United States. This paper explores the use and integration of CIAs into environmental assessments with respect to cultural resources of communities and American Indian tribes. It notes the shortcomings of consultation under Section 106 of National Historic Preservation Act and public comment under the National Environmental Policy Act and recommends employing CIAs to fill the gaps, decrease time and costs, and possibly limit lawsuits.

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Cultural impact assessments (CIAs) are produced in New Zealand, Australia, and Canada as part of the legal requirements for environmental analyses. In the United States (US), the State of Hawaii requires that CIAs be performed under state law as part of environmental assessments. In 1997, the Hawaii Environmental Council developed guidelines for producing a CIA and noted that the purpose of a CIA is to promote and preserve the cultural beliefs, practices, and resources of Native Hawaiians and other ethnic groups. In 2015, California legislature added a requirement for incorporating tribal cultural resources into the California Environmental Quality Act. However, other than these two examples, existing US laws fail to incorporate assessments of the impacts and effects of proposed projects and activities on communities and American Indian tribes.

Voluntary guidelines for conducting a CIA developed in Canada define a CIA as:

> …a process of evaluating the likely impacts of a proposed development on the way of life of a particular group or community of people, with full involvement of this group or community of people and possibly undertaken by this group or community of people: a cultural impact assessment will generally will address the impacts, both beneficial and adverse, of a proposed development that may affect… the values, belief systems, customary laws, language(s), customs, economy, relationships with the local environment and particular species, social organization and traditions of the affected community. (Secretariat of the Convention on Biological Diversity, 2004)

For purposes of this article, this definition provides a useful conceptualization and framework for CIAs.

A CIA can be a useful tool in environmental analysis. It can provide significant information for the decision maker, possibly lessen the time and costs required for a project, and perhaps result in fewer court cases. The current methodology for analyzing cultural resources generally addresses architecture, archaeology, and other evidence of past human behavior defined as "historic properties" under regulations and guidelines. Chapters of environmental regulatory documents regarding cultural resources are typically broad in scope, offer literature overviews of the history and prehistory of the area of concern, and may describe settlements, occupation of the area by American Indian tribes, and other historical factors that have contributed to the development of the geographic area. This information can be somewhat generic, because specific information, such as locations of archaeological sites and areas considered significant to tribes, is usually redacted or kept from public review, due to statutes that prevent public disclosure or the confidential nature of the information. The concerns in this article go beyond the scope of historic properties as defined by Section 106 of the National Historic Preservation Act (NHPA) and includes living cultures and their values as reflected by the environments within which their beliefs systems are based.

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There is often an implicit assumption by all parties – the federal agencies requiring the environmental analysis and documentation; the project proponent and their contractor writing the documents; and the communities, tribes, and other groups concerned with the impacts of the project on their worlds – that Section 106 of the NHPA will address any and all cultural concerns. This is simply not true. Assessing impacts on historic properties is a myopic process, because it only includes a narrow spectrum of the cultural environment (i.e., those districts or sites that are determined to be eligible for listing in the National Register of Historic Places). The process is more exclusive than inclusive, often leaving out living cultures and traditions. A viewscape; traditional gathering areas for community events, such as parades and local commemorative annual events; or a sacred mountain or river and the plants and animals associated with it may not meet the criteria to be classified as a historic property, and therefore may not be considered in the Section 106 process.

Another issue stemming from relying on Section 106 of the NHPA to convey cultural concerns when assessing environmental impacts, particularly for American Indians, is the consultation requirement. There is a trend of producing a draft environmental assessment document that includes a programmatic agreement developed under Section 106 of the NHPA as an appendix. Often, the federal agency and state historic preservation office will develop an agreement that specifies consultation that will occur after the proposal has been approved by the federal agency. The federal agency may send letters to tribes and other identified consulting parties informing them of the proposed action and asking whether they have any concerns. However, this is not actually consultation, but notification. We discuss the consultation process and what makes it successful or how efforts fall short; however, even in the most successful cases, the Section 106 process is limited to assessments of historic properties and does not include consideration of the broader core of cultural values (Nissley and King, 2014).

The Section 106 regulations require consultation with American Indian tribes and Native Hawaiians that may have religious and cultural attachments to an area that may be affected by a proposed project, in addition to other parties that have an interest in the historic properties affected. Due to the responsibility and policy of government trusts, the federal government is assigned the responsibility of consulting with American Indian tribes and Native Hawaiians. Contractors assessing significant impacts and/or identifying historic properties may collect information about an American Indian tribe's cultural values, but these contractors are limited to facilitating consultation; technically, they cannot actually consult with these groups. The federal agency must be involved with all the consulting parties and their concerns.

One problem with waiting to consult until after a Record of Decision is issued and the project is approved, as occurs in a Section 106 agreement and as described earlier, is that this leaves the American Indian tribes and other consulting parties with no way to meaningfully communicate their positions on project alternatives. An example of the Section 106 agreement calling for more consultation after the project has been approved by the federal agency is a solar energy project, the Imperial Valley Solar Project, being constructed on federally owned land in southern California. The average life of a solar development is around 30 years. The cultural and natural environment took thousands to millions of years to develop. The proposal was initially for the installation over 12,000 acres of solar collectors aligned in rows; however, the acreage of the project was reduced when the state permitting agency recognized the significance of the prehistoric resources located in the area of development. The state proposed that the applicant undertake efforts to list the district on the National Register of Historic Places in order to mitigate the adverse effects of the project. The historic district is an ancient lake that evidences aquaculture performed by the indigenous people until it dried up. The American Indian tribes living in the Mohave Desert today are descendants of the people that had occupied the area historically (and prehistorically).

Due to both state and federal required permits, an environmental impact report was produced under state law, and an Environmental Impact Statement (EIS) was produced under federal law by different contractors for this project. The federal agency decided to execute a programmatic agreement under Section 106 and, therefore, was required to consult with the American Indian tribes in the area. Having been involved in the consultation process for this project, I can state with conviction that it was neither done in good faith nor reasonable. Throughout the meetings, the tribal members stated over and over that the mountain overlooking the dry lake was sacred, that the lizard and tortoise (both endangered species) played a vital roles in the tribe's creation traditions, and that the ancient trail system still easily visible on the desert floor was of great cultural importance to them. Anyone in the room listening would have recognized this information as being central to the tribe's relationship with the landscape. It is a major part of their world and worldview. But no one was listening; the federal agency proceeded with the execution of the

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programmatic agreement without considering any means of incorporating the tribe's concerns, allowing the project to move forward with a federally approved right-of-way. The tribe filed a lawsuit that resulted in an injunction, Quechan Tribe of the Fort Yuma Reservation v. US Department of the Interior, and, ultimately, the project was cancelled.

It is generally understood that, in the traditional worldview of American Indians, cultural resources are not separated from natural resources. I am politely reminded of this perspective by tribal members that enroll in a training seminar I teach titled "Integration of Cultural and Natural Resources." They approach the topic wondering, "Why were they separated in the first place?" They see their world as holistic and inclusive of all resources. Comments submitted by tribes on draft and final EISs reflect this perspective. For example, in the case of a proposed mine expansion in Nevada, the Western Shoshone tribe identified the entire Mount Tenabo area as a unified sacred area and rejected attempts to disassociate the groundwater from the mountain as a separate, discrete resource. The water feeds the springs on the mountain, and the sacred springs give life and healing energy to the tribe (Eitner, 2014). In this case, the tribe argued that the proposed 15-year mining operation did not warrant the destruction of an environment they have valued for thousands of years. From a tribal perspective, the continuation of their culture depends on the ability to practice and retain their traditional values, which are intimately associated with the mountain and the groundwater that feeds the mountain springs.

In other words, their culture, and ultimately, their tribe, will go extinct if they cannot continue to practice the traditional cultural systems that maintain their health and life-giving energy. We don't generally use the word "extinct" in the US when referring to federal environmental and historic preservation laws and policy for American Indians. However, when teaching a class on Native American cultural property law to a large group of American Indians, representing multiple tribes, in the Northwest, I did use this word. My comment was preceded by saying the tribes typically wouldn't employ the word "extinct" to refer to themselves. A traditional practitioner from a tribe that was recently federally recognized and does not have reservation lands stated unequivocally that, "oh yes, we do use that word." In order to ensure a future in which it is possible for the tribe's traditional culture and associated practices to survive, they must be committed to ensuring that the associated environment survives as well. In essence, many tribes view the entire landscape and all of its components, including themselves, as a holistic ecosystem from which their cultural values and traditions are derived. In general, current environmental practice does consider the extinction of cultural values and, thus, the extinction of the people who adhere to those values.

This holistic view ecosystems that is inclusive of cultural values and the people that rely on many components of the ecosystem has led cultural resource practitioners to start identifying landscapes as historic properties under Section 106 of the NHPA. Although this is a step towards taking cultural values and human interactions with a landscape into consideration as part of environmental assessments, it falls short in capturing indigenous people's relationship with their environment. The definition of a CIA emphasizes involving the people or community in the assessment, to evaluate the impacts of a proposed development on their culture. This approach is essential for accurately identifying what the affected group values. The identification of historic properties in Section 106 of the NHPA, is, for the most part, done by a contractor that will likely employ a specialist in the specific field at issue (i.e., an ethnographer or anthropologist to identify cultural groups and their values, traditions, and beliefs). In order to determine whether a place is eligible for inclusion in the National Register of Historic Places, this skill set is necessary; however, it also highlights why the Section 106 process falls short of fully examining the impacts of proposed developments on tribes, groups, or communities.

What types of proposed projects and environmental reviews are good candidates for integrating a CIA into environmental analyses? The projects that include, or affect, an geographical area that is clearly identified and well known as a valued place of cultural tradition is a starting point; however, all environmental assessments could benefit from including a CIA. Sometimes, the cultural value of an area is well known and apparent from the beginning of the proposal process. In his analysis of the decision-making processes used by government agencies to approve or reject projects that impact the environment, Robert Evans looks at three case studies: a live fire training by the Army in the Makua Valley, Oahu; a radio communications tower on Mount Taylor, located in US Forest Service lands in New Mexico; and a coal mine expansion on the Crow reservation and ceded land in Montana, which was reviewed and approved by the Bureau of Indian Affairs (Evans, 2014). All three cases could have benefited from including a CIA in the environmental analysis; however, the first two cases involve sacred ecosystems that are well-known beyond the traditional cultural groups that use them. In fact, the cultural heritage of both Makua Valley and Mount Taylor are so well documented that their value to the

indigenous peoples of the respective areas are described in Wikipedia. Both of these projects would have been ideal candidates for a CIA, because some of the cultural traditions and values involved with these two sites are public knowledge. By including the Native Hawaiians and the Navajo early in the planning process and the process development of alternatives for these two projects, better outcomes might have been achieved more quickly.

In Hawaii, the Army failed to recognize the significance of the Native Hawaiian cultural system and their long-held traditional belief that the Makua Valley is a place of origin. The name of the valley, Makua, is the Hawaiian word for "parent." The Makua Valley is "…a living system… a living being…" according to the Native Hawaiians (Henkin, 2012). In less than a decade, three different lawsuits were filed against the Army's proposed training exercises. One extremely important outcome of the first lawsuit (put forth by Earthjustice) is Native Hawaiians' guaranteed access to the valley to perpetuate and carry out their cultural traditions. Without this, the Native Hawaiians' spiritual connection to the valley would be lost (Henkin, 2012). Robert Evans suggests that the Army could have perhaps saved a lot of time and trouble if it had allowed the public to become more involved at an earlier stage of the decision-making process. By not involving the public, including the Native Hawaiians, the cultural element of the proposed location of the training exercises was overlooked. The Army documented numerous archaeological sites, temples, burial sites, alters, and petroglyphs located in the valley, but did not include the living culture's input or potential alternatives generated from discussion with Native Hawaiians. One can only imagine how different the outcome of this project might have been had the Army prepared a CIA as part of its first environmental analysis.

In the second case, the US Forest Service reversed its position between its 2009 draft EIS and the final document published in 2011. In the draft EIS, the Forest Service concluded that the proposed radio communications tower would have significant impacts on historic properties in the region of Mount Taylor, but supported the proposal anyway. Mount Taylor is listed in the National Register of Historic Places as a traditional cultural property. The Navajo objected to the proposed tower, because Mount Taylor is one of four sacred mountains in their worldview. In an unusual outcome, the Forest Service ultimately decided not to approve the placement of the radio communications tower and supported the no-action alternative in the Record of Decision. In the 2011 EIS, a traditional Navajo individual is quoted on the life-giving forces of the mountain and how the traditional ceremonies and practices that involve the mountain are necessary for the tribe to "… thrive as a Nation" (Evans, 2014). In this case, it would have been more expedient to develop a CIA and include it in the draft environmental document. Given the cultural role of the mountain in the Navajo worldview, the CIA would have resulted in a more complete analysis and perhaps would have facilitated the development alternatives to the project that were acceptable to the Navajo. The radio company filed an appeal several months after the agency's final decision; however, the Forest Service affirmed their original decision.

Given the public knowledge and acceptance of the sacredness of Mount Taylor, another option that might have helped reach a final decision more quickly, in addition to conducting a CIA, is granting the Navajo Nation cooperating agency status. A 1999 memorandum from the Council on Environmental Quality ("Designation of Non-Federal Agencies to Be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act") encourages federal agencies to grant non-federal entities, including American Indian tribes, cooperating agency status. During the scoping process, tribes with special expertise may be identified, and the federal agency can pursue whether those tribes would be interested in being a cooperating entity. In this role, tribes may actively engage in the development of alternatives to projects that would avoid or address significant impacts (Suagee, 2010). Although some tribes have submitted their own proposed alternatives as members of the public, and not cooperating entities, a tribe with cooperating agency status might be able to more meaningfully collaborate with the federal agency in the decision-making process for the project.

One major difference between the requirements of Section 106 of the NHPA and the requirements of the National Environmental Policy Act is consultation versus commenting, respectively. Consultation requires that the federal agency talk with the consulting parties directly. The definition of consultation in the implementing regulations for Section 106 is, "the process of seeking, discussing and considering the views of other participants, and where feasible, seeking agreement" (36 Code of Federal Regulations Section 800.16(f)). Assuming that this process is conducted correctly, there is a profound difference between the process of engagement and consultation with other parties as compared to the request for, and response to, comments about federal environmental regulations.

The National Environmental Policy Act encourages public involvement; members of the public may attend scoping meetings, public hearings, submit their comments on draft

and final environmental documents, and have their comments responded to by the federal agency. This commenting process does not allow the flexibility and the direct dialogue that is involved, by definition, in the consultation process. The ability to grant certain groups cooperating agency status is a provision that enables a discussion to occur among the federal agency decision makers and other parties affected by a proposed project. It is a method of getting the people who will be impacted by a project, and who can, consequently, provide improved alternatives for that project, talking early in the environmental analysis process. In both the commenting and consultation processes, the federal agency remains the final decision maker.

What does the integration of CIAs into the environmental analysis process and environmental practice in general offer? It offers more specific information derived from those groups and/or communities that rely on a particular ecosystem for their continued existence. It offers a dynamic interactive methodology that can result in additional alternatives to proposed projects. It may offer a way of saving time, costs, and lawsuit filings. It may offer better outcomes for projects overall, by being more inclusive of the groups that will be affected by the projects. In conclusion, efforts to incorporate CIAs into environmental practice is highly recommended to improve assessments of traditional cultures and communities being impacted by proposed projects. In cases in which the survival of a cultural group is at risk, it is essential.

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