Bones of Contention

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*"Show me the manner in which a nation cares for its dead and I will measure with mathematical exactness the tender sympathies of its people, their respect for the laws of the land and their loyalty to high ideals."* – Gladstone

We live in a culturally diverse society. The success and sustainability of our modern infrastructure is dependent on collaborative interactions between the diverse cultural groups within our society. This paper will examine the relationship between the federal government and the American Indian and Alaska Native (AIAN) population.

In the mid-20th Century, several large hydro-electric dams were constructed by the federal government with little consideration given to the holistic consequences, such as the impact of mass flooding on American Indian culture.

This paper will use the discovery of Native American human remains after lowering the watershed of a lake created by a hydro-electric dam and the subsequent federal Indian policies as a vehicle to examine issues such as historical trauma, tribal sovereignty, and the struggle between the federal government and the AIAN population which culminated in many reforms, including the National Historic Preservation Act of 1966 (Advisory Council on Historic Preservation, 2000) and the Native American Graves Protection and Repatriation Act (U.S. Department of the Interior, 1990). Comparative attempts at reconciliation between commercial interests and AIAN cultures will be referenced, such as the Oahe Dam Project and the Sioux Indians, and the Shasta Dam and the Winnemem and Wintu tribes.

A solution will be outlined for the troubled relationship between ethics and economics that has arisen from diversity conflicts.

1. **Title Page**
2. **Introduction**
3. **BODY:**
4. **Prevalence:** Historical overviews of significant hydro-electric dam projects that greatly impacted AIAN cultures will be examined. Focusing on negotiations between AIAN and the federal government, this section will identify challenges faced and subsequent resolutions. Historical events will be referenced to create a broader perspective of federal Indian policy (Miller, 2008).
5. Oahe Dam and the Sioux Indians (Ojibwa, 2010); (Schuler, 1990); (Berman, 2010)
6. Shasta Dam and the Winnemem Wintu tribe (Hoveman et al, 2002)
7. **Causes**: The concepts of sovereignty and equality are explored. The concept of ‘historical trauma’ will be introduced as a causative factor in contemporary mistrust between AIAN and the federal government and a subsequent obstacle to successful negotiations.
8. Williams V. Lee (Berger, 2011)
9. Historical trauma (Struthers & Lowe, 2003)
10. **Consequences:** Two principle federal legislations to emerge from events which had a detrimental economic, environmental and cultural impact on AIANs are discussed: The National Historic Preservation Act (NHPA); and the Native American Graves Protection and Repatriation Act (NAGPRA).
11. NHPA (Advisory Council on Historic Preservation, 2010)
12. NAGPRA (U.S. Department of the Interior, 1990); (Riley, 2002); (Schillaci & Bustard, 2010); (Lewis, 1986)
13. **Solutions:** Methods for optimizing collaborative discussions and resolution processes with AIANs (Manson & Buchwald, 2007):
14. The ‘one size does not fit all’ approach (Thomas et al, 2011)
15. Issues of law and equality surrounding AIAN – sovereignty and jurisprudence (Nesper, 2007); (Berger, 2010)
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17. **CONCLUSION**

Long-term solutions are presented to build upon the current legislation, based on lessons learnt from historical encounters and key concepts outlined in this paper (Kirsch, 2011); (Thom et al, 1993); (Anderson, 1997)

**III(A). Prevalence:**

The relationship between the U.S. government and AIANs has been wrought with conflict and mistrust since the first European settlements in America. Beginning in the Colonial period (1492), European diseases such as smallpox, influenza and measles killed approximately 90% of AIANs in North America (Miller, 2008). Europeans principle interests were to obtain the valuable resources of the Indian territories. This led to military conflicts such as the Indian Wars of 1644 and the French and Indian War in 1754-1763, which culminated in the Royal Proclamation of 1763 issued by King George III to prevent his subjects in the thirteen American colonies from encroaching on Indian territories. The Proclamation forbade American colonists from moving into ‘Indian Country’, which was defined as all lands west of the Appalachian and Allegheny Mountains.

A system of negotiating between American settler’s and AIANs developed from this early period based on treating the AIANs as groups of tribal governments. Thus AIANs were designated as having a ‘sovereign status’ under their tribal government. The basic system is still in existence today. One of the consequences of this method of interaction is that U.S. government and AIAN interactions are seen as political, not racial in nature (between two governments as opposed to two racial groups). The U.S. Constitution of 1789 placed sole power over negotiations with AIAN tribes under the jurisdiction of Congress. To enforce this, Congress passed the Trade and Intercourse Act of 1790, which prevents states and private individuals from dealing with tribes and buying AIAN lands. After the American War of 1812, the threat of English invasion subsided. The U.S. began to overpower tribes and the treaties made became more one-sided as the U.S. were able to dictate the terms based on their military superiority. Under Andrew Jackson’s presidency, a more hostile attitude towards Indians was advocated which led to the Removal Act of 1830, which forced tribes to move west of the Mississippi River into what is now the state of Oklahoma. Over 4,000 of 16,000 Cherokees died on the ‘Trail of Tears’ as they were forced by U.S. troops to march from their ancestral lands in Georgia to Oklahoma (Miller, 2008). With the discovery of gold in California in 1849, American settlers began to migrate west along the Oregon Trail. This created a new situation where the U.S. government again forced AIANs to give up their lands and instead pick out smaller areas of lands reserved specifically for them. This gave rise to the term ‘reservation’. New treaties were written up allocating the tribes smaller and smaller areas of land which culminated in AIANs having only 300 remote and small reservations in which they were confined.

In 1887 the Allotment Act was passed which changed the ownership of Indian lands from community to individuals, to encourage the European farming-style use of the land and to encourage AIAN integration into American culture. The federal governments agenda during the ‘Allotment and Assimilation Era’ (1887-1934) was to forcibly assimilate the AIAN population and end their cultural identity. The Federal Bureau of Indian Affairs was used to usurp control of life on the reservations and undermine the tribal governments. When there was a surplus of allotments on Indian land (due to insufficient tribal citizens to divide up the entire reservation), the surplus allotments were sold to non-Indians. This effectively reduced the entire AIAN tribal holdings from 138 million acres in 1871 to 48 million acres by 1934 - 20 million of which was worthless because it was desert or semi-arid land (Miller, 2008).

In 1924, President Coolidge signed the Indian Citizenship Act which made all AIANs U.S. citizens. The Act allowed for dual-citizenship, so AIANs could retain their tribal citizenship and still be U.S. citizens. While this afforded AIANs some benefits, such as education, it also meant they were now eligible to pay taxes to the federal government on the remaining lands they owned.

Thus, George Washington’s vision of White ‘civilized’ Americans pushing AIANs out of their home was nearly achieved:

*“…the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho’ they differ in shape.”* (George Washington, 1783)

Following the failure of the Allotment Act to assimilate AIANs into mainstream American culture, Congress passed a new act – the Indian Reorganization Act (IRA) - under President Franklin Roosevelt which reflected a shift in Federal policy from trying to assimilate AIANs to instead supporting tribal self-government. This new policy change ended the sales or loss of any more reservation lands. To date, there is approximately 11 million acres of protected lands on Indian reservations which cannot be sold without the permission of the U.S. government. Under IRA, tribes formed corporations to create economic sustainability and development of the reservations.

From the 1940s to the 1960’s the federal government implemented yet another shift in policy towards AIANs, known as the Termination Era. This was characterized by Congress returning to their previous strategy of assimilating Indians into American culture by subjecting them to state laws and taxes, which they had previously been exempt. Thus federal responsibility for Indians finally ended. Although Alaska Natives avoided this ruling as Alaska had yet to achieve the status of statehood.

The most recent chapter in federal Indian policy is known as the ‘self-determination’ era, which was initiated under President Kennedy’s administration. Under this policy the government repudiated the termination of tribes from federal responsibility and restored all previously ‘terminated’ tribes to full federal recognition. Thus a ‘government-to-government’ political relationship was re-established and federal services were once more initiated. Ultimately, the Indian Self-Determination and Education Assistance Act of 1975 allows AIANs to contract for federal services. Thus, while new programs for health, education and economic development are federally funded they are planned and administered by local tribal governments.

Against this historical ‘tug-of-war’ between the U.S. Government and AIANs let us now consider the clash of agendas between mainstream contemporary American society versus traditional AIAN culture as demonstrated by the impact of several hydroelectric dams on Indian land.

In 1944 Congress approved the Pick-Sloan Plan for flood control and navigation of the Missouri River. The Plan involved the construction of four dams – Garrison, Fort Randall, Oahe, and Big Bend – which would impact twenty-three Indian reservations and result in the forced relocation of nearly 1,000 Indian families (Ojibwa, 2010).

*“Pick-Sloan caused more damage to Indian land than any other public works project in America.”* – Philleo Nash, Commissioner of the U.S. Bureau of Indian Affairs (1961 – 1966)

Construction of the Oahe Dam destroyed 90% of the timber land on the Standing Rock and Cheyenne River Sioux reservations as well as the most valuable rangeland, most of the gardens and cultivated areas, and the wild fruit and wildlife resources.

In 1954, representatives of the Cheyenne River Sioux testified before Congress regarding the land they lost from Pick-Sloan. The Sioux representatives quickly realized that Congress was more comfortable hearing from Indian stereotypes than real Indians. Thus, Little Cloud was instructed to speak in Lakota at the hearings and Chasing Hawk translated his words into broken English, even though both men spoke English fluently.

Congress awarded the Cheyenne River Sioux nearly $11 million and $12 million to the Standing Rock Sioux. The Indians affected by Pick-Sloan also qualified for low cost electricity from the dams located on their land. However, it took over 40-years for the Department of Energy to authorize pumping power availability to many of the Indian reservations. When the authorization was finally given in 1982 it did not provide for the construction of new power lines and so ultimately the promise of low cost power from the dams was never fulfilled. In 1992 congress authorized a further $91 million to the Standing Rock Sioux in compensation for damages.

Of particular relevance to this paper, in 2000 the Army Corps of Engineers agreed to delay raising water levels in the Lake Francis Case in South Dakota to allow the Yankton Sioux tribe to recover scattered human remains. The Indian burial site was uncovered when the water levels behind Fort Randall Dam dropped.

The scale of the impact the Oahe Dam had on the environment is difficult to grasp. The lake it created has a shore-line which is 2,250 miles long (Schuler, 1990).

In 1851, the Winnemem and Wintu tribes signed the Treaty of Cottonwood Creek, which ceded to the United States government a massive territory spanning from Sacramento to the borders of Oregon. In exchange, the tribes received a 25-square-mile reservation (Hoveman et al, 2002). Ultimately, the tribes never even received this small reservation land. Instead, a few tribal members received allotments along the McCloud River. In 1944, Congress awarded $17 million to 18 tribes of Californian Indians as compensation for failing to ratify the Cottonwood Treaty. Between 1937 and 1945 the Winnemem tribe were removed from their homes on the McCloud River allotments to allow for the creation of a lake by flooding the area behind the Shasta Dam. The Winnemem received no payment or compensation for the loss of their land and homes. In 1941, the Central Valley Project Indian Lands Acquisition Act ordered that people disturbed by the construction of the Shasta Dam be granted like land and funds to repair lost infrastructure. Still the Winnemem did not receive any land and they refused to accept the compensation offered by congress in 1944. From the 1960’s onwards the tribe did receive federal tribal health benefits. However, in 1985 the health benefits were terminated with no official reason. Higher education grants were denied and the Winnemem tribe disappeared from the Bureau of Indian Affairs list of ‘federally recognized’ tribes. The remaining tribe members are now forced to travel over 3-hours to the Sacramento Native American Health Center, a not-for-profit clinic, to receive basic health care. In 2004, Senator Campbell proposed the Winnemem Wintu Tribe Clarification and Restoration Act, which would have restored the tribe’s status as ‘federally recognized’, but the bill was not passed. In 2008, the California State Legislature passed Assembly Joint Resolution 39, which recognizes the Winnemem and Wintu tribes as authentic Indian tribes. The legislation also recommends that the federal government recognizes and reinstates the tribes, but to date this request has been ignored.

Although developers did make some effort to relocate cemeteries and shrines during the flooding that followed the Shasta and Pick-Sloan Dams, these were largely associated with Christian churches and monuments. Baby Hill, a grave site for Indian infants and a prayer site for Indian women hoping to become pregnant, is irretrievably submerged below the waters of the Garrison Dam which was part of the Pick-Sloan Project (Berman, 2010).

**III(B). Causes:**

Much of the legal and political discord between the federal government and AIANs stems from the issue of tribal sovereignty versus state and federal legislation. A landmark case on tribal sovereignty is that of Williams V. Lee. In the 1950’s Williams (a Navajo Indian) was charged in the County Court by Lee (a non-Indian who operated a trading post on an Indian reservation) for non-payment of a line of credit. Lee won the case at the County Court and was awarded some of William’s sheep, which he sold at auction in lieu of payment for the debt he was owed. Williams ultimately appealed to the U.S. Supreme Court who overturned the County and State Court judgments and ruled that State and County Courts do not have jurisdiction over civil cases that take place on Indian reservations between non-Indians and tribal members.

Williams V. Lee is highly cited as an argument that tribal governments have legal sovereignty recognized by the U.S. Supreme Court and effectively have immunity from State and County Courts (Berger, 2011). This ‘self-governing’ status of Indian reservations has caused much controversy based on allegations of unfairness. The main argument around Indian sovereignty stems from the dual-citizenship issues of AIANs as both U.S. citizens and tribal citizens, which has allowed them to bypass certain state laws, principally state gaming laws which regulate organized gambling, such as casinos.

Alongside the legal and political considerations of federal Indian policies are the psychological ones such as historical trauma – which is both a cause *and* an effect of the ongoing conflicts between European and AIAN cultures. The more AIANs are unfairly treated the more their unfair treatment leads them to respond in a way that furthers discord. A traumatized group may be seen as less capable by the mainstream and deemed ‘defective’. This in turn leads to what Struthers and Lowe (2003) refer to as a ‘cycle of marginalization’ from mainstream society.

Historical trauma is defined as “cumulative and collective emotional and psychological injury over the life span and across generations, resulting from a cataclysmic history of genocide” (Struthers & Lowe, 2003). Symptoms manifest in feelings of deprivation, demoralization, neglect, loss of confidence, and a permanently dispirited state. Historical trauma contributes to high rates of substance abuse including alcoholism, depression, suicide and obesity. AIANs currently have the highest documented rates of diabetes in the world and the worst mental health disparities of all ethnic groups in the United States (Mason, 2001).

**III(C).** **Consequences:**

In response to massive urbanization projects and highway construction following World War II and the subsequent destruction of many sites and buildings of historical importance, President Lynden B. Johnson signed into law the National Historic Preservation Act in 1966. The NHPA created several institutions, including the Advisory Council on Historic Preservation, the National Register of Historic Places, and the State Historic Preservation Office (SHPO) which coordinates an inventory of historic places from each state through appointed SHPO officers (Advisory Council on Historic Preservation, 2010). The NHPA extended greater protection to AIAN historical sites in 1990.

The Native American Graves Protection and Repatriation Act (NAGPRA) of 1990 is largely attributed to the activism of one Native American woman – Maria Pearson – a member of the Yankton Sioux tribe. Her husband worked for the U.S. Department of Transport and came home one day to tell her they had discovered a large number of human remains. The European remains were shipped for re-burial, whereas the Indian remains of a mother and child were shipped to a lab at the Office of the State Archaeologist to be studied. Maria was appalled and petitioned the Governor of Iowa for an audience but was ignored. She was finally granted an audience with then Governor Robert D. Ray after sitting outside his office in full traditional Indian attire. When Governor Ray asked what he could do for her, she replied, “You can give me back my people’s bones and stop digging them up”.

Maria Pearson’s actions led to the Iowa Burials Protection Act of 1976 and ultimately to the NAGPRA legislation in 1990.

Decades after the construction of the Fort Randall Dam (part of the Pick Sloan Project) the remains of dead Indians began to surface as the lakes water level was lowered. Caskets, pots, bones and burial shrouds all floated to the surface of Lake Francis Case (Riley, 2002). Under NAGPRA legislation, the Yankton Sioux tribe was given full rights to rebury the remains in the manner they saw fit and were granted approval to use the U.S. Army Corps of Engineers resources to undertake the reburial. As a caveat, the Court ruled that if a reasonable agreement could not be reached between the Yankton Sioux and the U.S. Army Corps of Engineers within 30-days then the Corps would be responsible for removal of the remains and securing the site. In addition, the lake’s water-levels were not to be raised for a 30-day period. The tribe performed a number of ceremonies over the remains which were ultimately left in place and covered with fabric and rocks. The request for archaeological samples of the remains to be taken in order to validate their age and map their origin were denied based on cultural affiliation, which provides ‘reasonable assumption’ that remains originating from a certain area belong to particular AIAN group. Proof of cultural affiliation relied upon testimonies from tribal members and descendants of local people from the area who attested to the fact that there was an Indian burial ground located at the site.

Among the myriad issues surrounding the case include the Yankton Sioux’s allegations of racism, arguing, “Imagine how appalled you would be if we dug up the remains of George Washington”; scientists and archaeologists counter-argue that the study of ancient human remains is not racist as it would still be a matter of scientific interest even if the bones were White, African, Asian or any other race; further arguments from AIAN representatives cite the violation of the Indian Freedom of Religion Act. A fundamental belief among many tribes is that there are living and spirit worlds, and if the human remains are disturbed, the spirit becomes trapped in the living world, where it can do evil. Disturbing or preserving the remains is thus a sacrilege. Maria Pearson made a valid point that funds dedicated to studying Indian remains would be better spent on helping preserve the health and well-being of contemporary Indians by studying alcoholism, fetal alcohol syndrome, diabetes, and suicide. To this, scientists argue that the study of bones leads to information about diet and nutrition which may yield better health-care for present-day Indians (Lewis, 1986).

**III.(D). Solutions:**

NAGPRA imposes various obligations on responsible federal agency officials who receive notification that Native American cultural remains have been inadvertently discovered on federal lands. Officials must, within three working days from notification: (1) certify receipt of the notification; (2) take immediate steps to further protect the cultural items, including, as appropriate, stabilization or covering; (3) notify Indian tribes which might be entitled to ownership or control of the cultural items under the Act; (4) initiate consultation on the inadvertent discovery; (5) follow the provisions governing intentional excavation or removal if the cultural items must be excavated or removed; and (6) ensure that the disposition of the cultural items is carried out following 43 CFR § 10.6 which states that excavation and removal “must respect traditional customs and practices of the affiliated Indian tribes or Native Hawaiian organizations” (U.S. Department of the Interior, 1990).

However, despite federal legislation guidelines set out in NAGPRA, Indians, anthropologists and archeologists remain wary of attempts to impose broad, legal solutions to the problem, agreeing, in general, that the best solutions will be made on a local level after taking into consideration factors such as the scientific importance of the site and the religion and beliefs of the ancestral and modern Indians (Lewis, 1986).

Strategies to improve collaborative efforts between all parties include addressing the disproportionate lack of AIANs in the fields of Science and Engineering. In a 1996 study, less than 0.003% of the population holding doctoral degrees in Life and Social Sciences were AIANs (Manson & Buchwald, 2007). To improve the relationship between the science community and AIANs the former must address the under-representation of AIANs. Once this imbalance has been resolved, the consensus among existing studies of strategies for improving collaboration between culturally diverse groups recommends investment in more research to increase knowledge of the issues surrounding the struggle between economics and ethics in heritage conservation.

Thomas et al (2011) emphasize that each AIAN community may have a unique process for how it wishes it’s cultural heritage to be preserved and a ‘one size does not fit all’ approach must be incorporated into legislation to allow for local tribal governments to have ultimate self-determination over the outcome. Nespers’ 2007 study on establishing tribal jurisprudence highlights the evolving nature of tribal sovereignty as a symbiotic process which emerges as new legal boundaries are identified and codified. Nesper identifies a trend for individual tribal governments to be modeled on a form of statehood. Berger (2010) contends that denial of AIANs the right to self-governance is a form of racism that the government has dodged responsibility for by treating AIANs politically as ethnic groups.

Philanthropic, inter-religious charities such as the Return To Earth (RTE) Project have played a vital role in bridging the cultural gap between the AIAN population and mainstream society. The RTE Project provides resources and financial assistance to purchase land exclusively for the reburial of AIAN human remains. To date, the RTE Project has assisted in burying over 118,000 unidentified Native American human remains (Hart, 2008). This kind of philanthropy has enormous beneficial effects in working towards resolving AIAN historical trauma. The U.S. Department of the Interior provides financial assistance to the RTE Project and consults with them on individual NAGPRA cases (U.S. Department of the Interior, 1990).

**IV. CONCLUSION:**

The existing legislation which governs inadvertent discovery of AIAN remains under or on the surface of Federal lands and the recommended resolution process clearly favors the method of cultural affiliation as a legitimate means of proving the identity of Indian remains without undertaking carbon-dating or bone mapping which may violate AIAN religious beliefs (U.S. Department of the Interior, 1990). Once the cultural identity of the remains is established, NAGPRA clearly cedes the disposition of inadvertently discovered human remains to the lineal AIAN tribe to which they belong. In the instance of the Yankton Sioux tribe, the decision was made by the tribe to leave the remains in situ and cover them with fabric, rocks and soil as a temporary measure until more permanent means of securing the site could be developed. If the specific tribal religious beliefs permit, reburial at an alternative location is still a viable option.

On a societal level, the provision of scholarships for AIANs to enroll in doctoral degrees directly related to archaeological and anthropological studies, such as the Robert Wood Johnson Clinical Scholars Program would clearly help address the under-representation of AIANs in the voice of mainstream science and help overcome the legacies of historical trauma that persist today. The paucity of existing AIAN researchers is at the core of the disharmony which persists today.

Kirsch (2011) points out that scientists tend to view human remains primarily from the perspective of property rights, whereas AIANs view human remains as ancestors or kin to whom they have a sacred responsibility and perhaps most importantly they view the repatriation of these remains a political act of decolonization. This reaffirms the role of heritage conservation as a means of meliorating historical trauma.

Effective heritage conservation relies heavily on neutral mediation. In Thom et al’s 1993 study of mediation between AIANs and non-Indians in the repatriation of human remains, two major agendas were identified – the need for the mediator to be sensitive to AIAN spiritual needs and the non-Indian concerns over the cost and time involved in the repatriation process. The mediators’ role is to facilitate the gap between spiritual and business perspectives. They should understand the differences between the two parties’ agendas but also realize that these two worlds are on a course to diverge. It is the mediators’ job to ensure this diverging path takes the route of least resistance.

Finally, the stereotype of AIANs as pioneers of environmentally friendly ethics needs to be dispelled. While AIANs were historically proponents of resource conservation the common portrayal of AIANs as holding a view of the Earth as sacred and similar romantic environmentalist beliefs is inaccurate and belittles there true cultural heritage. AIANs transformed the North American landscape through deforestation and farming. Sometimes the changes were beneficial to the environment (reports of wooded areas being burnt to clear undergrowth and increase forage for deer and elk), sometimes they were not (buffalo were sometimes herded over cliffs, resulting in tons of meat being left to rot or to be eaten by scavengers). But they were a rational response to abundance and scarcity of resources. Like Europeans, AIANs responded to incentives (Anderson, 1997). The success of both cultures can be largely attributed to good stewardship of resources. Perpetuating the romantic myth of AIANs as the original environmentalists only serves to negate their true cultural heritage and to fortify stereotypes which have only contributed to an ongoing lack of understanding and mutual animosity.

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