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NEBRASKA'S TRADITIONAL CULTURAL PROPERTIES

IN THE SECTION 106 PROCESS

By

Karen A. Steinauer

A THESIS

Presented to the Faculty of

The Graduate College at the University of Nebraska

In Partial Fulfillment of the Requirements

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Under the Supervision of Professor LuAnn Wandsnider

Lincoln, Nebraska

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NEBRASKA'S TRADITIONAL CULTURAL PROPERTIES

IN THE SECTION 106 PROCESS

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University of Nebraska, 2011

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Archeologists engaged in cultural resource management and compliance are charged with measuring “historic” properties against legal standards for purposes of federal protection. This thesis focuses on one kind of property, the Traditional Cultural Property (TCP), within the National Historic Preservation Act (NHPA) Section 106 process, where sometimes in practice the terms TCP and sacred site are used interchangeably. This thesis strives to bring precision to TCPs, provide a concise reference, and, through inspection and analysis of four case studies of Nebraska properties, critique the present process for identifying and evaluating TCPs.

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Any errors or omissions are mine alone.

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## **Chapter 1 Introduction**

Archeologists engaged in cultural resource management are often faced with trying to understand where sites identified as “sacred” fit into the legal requirements for evaluating archeological resources. Sacred sites are addressed in a variety of legal contexts.

Prominent scholar of the Section 106 process, Thomas King, notes that “... one of the biggest problems we face in cultural resource management in this country is the plethora of uncoordinated culturally related laws and regulations” (King 2003:287). This thesis focuses on one kind of property, the Traditional Cultural Property (TCP), within the National Historic Preservation Act (NHPA) Section 106 process, where sometimes in practice the terms TCP and sacred site are used loosely and interchangeably. Through inspection and analysis of several case studies of Nebraska properties, this thesis critiques the present legal structure for identifying and evaluating TCPs, and defines actionable criteria for use by archeologists.

### **Background and Significance of the Study**

Archeologists are frequently called upon to evaluate the significance of material culture for preservation purposes under National Register of Historic Places (NRHP) criteria and render an opinion or make a recommendation. This role may be assumed as part of a survey to inventory properties or as part of compliance work under Section 106, and can include evaluating the significance of a site as a TCP. Timely completion of contractual obligations on projects may hinge upon proper identification and determination and resolution of effect. Generally defined, a TCP is a property eligible for inclusion in the NRHP because of its association “. . . with cultural practices or beliefs of

a living community that (a) are rooted in that community's history and (b) are important in maintaining the continuing cultural identity of the community" (Parker and King 1998:1). Extensively documented areas of extreme cultural importance such as the San Francisco Peaks in Arizona for Native Americans and Honolulu's Chinatown to its Asian community are cited as easily recognizable TCPs (Parker and King 1998:6).

Unfortunately, many other properties under consideration as TCPs are more difficult to evaluate.

Problems in application arise for archeologists in both identifying and evaluating TCPs. In general, the Section 106 process applies to differentially defined archeological sites. Archeological materials can be found in situ or in a secondary context, and can be buried or surface remains (Little et al. 2000:2-3). They can range from habitation sites to features such as hearth and cache pits along with artifactual materials made of stone, bone, or shell, which may be utilitarian or ornamental. Many of these materials are presumed discarded, abandoned or lost by the original maker or subsequent users. Archeological sites may include the locations of rock cairns or petroglyphs or unmarked burials. At archeological sites, associated vegetal remains are collected to determine subsistence practices and charcoal samples collected for radiocarbon dating. Paleosols (or buried soils) and commensal animals are useful for climatic reconstruction. That is, importantly for subsequent discussion of TCPs, such materials can be well-defined spatially and have a tangible material component that is visible and knowable to the archeologist. Generally, archeologists are interested in the research potential of such remains that contain information important in history or prehistory.



In contrast, TCPs may have indefinite spatial references and may lack a material component that is visible and knowable to archeologists. Native American cultural landscapes can include the entire territory occupied by a group with individual places identified as sacred such as those where important events took place or where a group originated, the underground, surface or air; villages; burial places and cemeteries; sites of ceremonial structures; locations of petroglyphs or pictographs; rock features; vision-quest and sweat bath sites; camping areas including those associated with resource procurement; monumental geographical formations; rivers; and, caves, battlefields, trails and roads (Stapp and Burney 2002:156-157).

According to some archeologists, generally most Native American TCPs are not associated with material culture and usually archeological remains are not related to a TCP (Hardesty 2000:42; Stapp and Burney 2002:61). Recently, however, more overlap has been noted. One Nebraska example, to be elaborated on further herein, are properties within the Agate Fossil Beds National Monument (AGFO). Included in the TCP study of the AGFO in Sioux County, Nebraska, are fourteen sites identified by a Lakota tribal consultant based on a combination of in-field observations and extensive understanding of tribal oral histories (Bozell 2004:34; LeBeau 2001). Some of these properties included archeological sites, although a number of others did not receive archeological site designations. The five archeological sites were generally rock cairns on prominent knolls and in one locale a small scatter of lithic debris. The other TCPs identified included depressions, fossil quarries of spiritual and medicinal significance, and natural rock formations. According to Lakota oral history, paleontological resources such as fossil

bone were used in the production of spiritual medicine and some of the sites, such as the depressions and rock cairns, were related to use of fossil quarries. Several of the TCP sites may have predated use by the Lakota or were used by other tribes according to the consultant.

Several intertwined questions emerge revolving around the definition and treatment of a TCP. Can every isolated find, site or landscape be considered a TCP? Can bison bone beds be considered such because of their association with the hunting of buffalo, a sacred activity, or are they just the remains of ephemeral hunting camp? Should an archeological site interpreted as having no research potential, such as a surface scatter or disturbed site, but identified as a TCP by Native Americans be considered ineligible for the NRHP by an archeologist? Who makes decisions about TCPs? Is there a legal mechanism for an “inventory” of TCPs?

### **Scope of Thesis**

This thesis is designed to clarify, explain, elucidate, and illuminate the procedural requirements and ethical concepts that underlie TCPs. The goal is to define actionable criteria, and provide a critique of the present legal structure through application of the criteria to several Nebraska case studies. These properties range from clear (Pahuk Hill, archeological site 25SD24) to more equivocal (EuroAmerican and Native American cemeteries) to challenging (locale with ephemeral cultural remains distributed over a landscape). While this thesis focuses on Nebraska properties, these case studies are illustrative of the issues faced nationwide. With few properties held in federal ownership

and the geographic uniformity of much of Nebraska, some of the problems in application of the TCP concept are more readily visible.

Outside the scope of this thesis, except as is pertinent to TCPs, is other legislation addressing sacred sites such as the American Indian Religious Freedom Act, 42 U.S.C. 1996 dealing with the practice of religion; Executive Order 13007 defining sacred site and requiring Federal agencies to accommodate access to and ceremonial use, and avoid adverse effect to physical integrity; and, the Native American Graves Protection and Repatriation Act of 1990, 25U.S.C. §§ 3001-3013 (NAGPRA) covering burials.

### **Thesis Organization**

This thesis is organized into six chapters. Chapter 1 describes the purpose, scope and need for the study. Chapter 2 sets forth the legal framework focusing on the NRHP and the NHPA. Chapter 3 covers interpretation and guidance from participants charged with implementation including the National Park Service, Courts, Advisory Council, NRHP and the Nebraska State Historic Preservation Office (NeSHPO). Chapter 4 brings to bear the ethical issues and background of interaction between archeologists and Native Americans including current trends that sets the political stage for dialogue between the parties. Chapter 5 applies the known criteria to select Nebraska properties chosen because of their ability to highlight the issues that arise. Chapter 6 reflects on the analysis presented here and provides clarification for TCPs. Chapter 7 concludes this study, suggesting avenues for progress.

## **Chapter 2 Legal Framework**

This chapter identifies federal legislation that is the backbone of historic preservation in the United States. It lays out the statutory and regulatory scheme relevant to this thesis, as well as the scope and intent of the legislation.

### **Section 106 of the National Historic Preservation Act**

The National Historic Preservation Act of 1966 (NHPA) was enacted in recognition of the importance of preserving the National heritage in the face of increasing pressures of growth and development. In addition, it set and continues to set policy for the administration of cultural properties under its control in the spirit of stewardship and trusteeship for future generations (National Historic Preservation Act of 1966, 80 Stat. 915, 16 U.S.C. 470 et seq., as amended). Section 106 of the Act provides that:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking (16 U.S.C. 470f).

Additionally, in order to ensure that all types of historic properties and public interests, including those of Native American and Hawaiian organizations are given consideration, NHPA Section 101 (as amended since 1992) further elaborates that properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register of Historic Places (NRHP) and requires that a federal agency consult with any

tribe or organization that attaches religious and cultural significance to said properties (16 U.S.C. 470a(d)(6)).

Thus, Federal agencies with jurisdiction over a federal or federally-assisted undertaking or project such as those on federal land, expending federal funds, or requiring federal permitting must make a determination of the impact of the project on cultural resources eligible for inclusion in the NRHP including traditional cultural properties. The rules and regulations implementing the NHPA, 36 CFR Part 800, require agency officials to enter into consultations with parties of interest or stakeholders (36 CFR 800.2). These include State Historic Preservation Officers/ Tribal Historic Preservation Officers, local governments, tribes, licensees/permittees, others with legal or economic interests and the public. Government-to government consultations are required with federally recognized tribes (*Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207 (9th Cir. 2008); *San Juan Citizen's Alliance v. Norton*, 586 F.Supp.2d 1270 (D.N.M. 2008). Fundamentally a planning tool, Section 106 is essentially a “stop, look, and listen” provision that requires federal agencies to consider the effects of its programs (*Narragansett Indian Tribe v. Warwick Sewer Authority*, 334 F.3d 161 (1st Cir. 2003); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999) (per curiam)). As part of this, Section 106 requires agencies to solicit the Advisory Council's comments and take into account the effect of the undertaking. It is basically a procedural statute that imposes no substantive standards on agencies (*Prairie Band Pottawatomie Nation v. Federal Highway Admin.*, 751 F.Supp.2d 1174 (D.Kan. 2010); *Narragansett Indian Tribe v. Warwick Sewer Authority*, 334 F.3d 161 (1st Cir. 2003); *National Min.*

*Ass'n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003); *City of Alexandria v. Slater*, 198 F.3d 862 (D.C. Cir. 1999)). Further, there is no obligation on a federal agency to affirmatively protect preservation interests, but rather the NHPA encourages preservation considerations through facilitating dialog and consultation. The agency's duty also is to keep the Advisory Council informed on the effects of undertaking and allow it to make suggestions to mitigate adverse impacts on historic sites (*Waterford Citizens' Ass'n v. Reilly*, 970 F.2d 1287 (4th Cir. 1992)).

### **The National Register of Historic Places**

The standard of review under Section 106 is whether a property has the historical and/or cultural significance and physical integrity to consider it eligible for listing on the NRHP, the official federal list of properties that contribute to the understanding of the nation's historic and cultural foundations. This is administered by the Secretary of the Interior, through the National Park Service, who is authorized to:

.... expand and maintain a National Register of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering and culture. The regulations herein set forth the procedural requirements for listing properties on the National Register (36 CFR 60.1(a)).

The criteria for evaluation are designed to be inclusive of a wide diversity of resources:

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

- (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
- (b) that are associated with the lives of persons significant in our past; or
- (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history (36 CFR 60.4).

Additionally, certain classes of properties are considered ineligible for listing. To override the presumption certain exceptions, called Criteria Considerations, can be met. These special requirements to establish eligibility for listing are applicable to, among others, religious properties, graves and cemeteries, commemorative properties, and properties achieving significance in the past 50 years (36 CFR 60.4).

National Register Bulletins developed by the National Park Service provide technical information relating to the assessment, evaluation, registration and preservation of properties for listing on the NRHP. Traditional Cultural Properties are not specifically mentioned in the federal rules governing the NRHP. And, rather than referred to as a “property” as under NHPA Sec. 101 (16 U.S.C. 470a(d)(6)), properties of traditional religious and cultural importance to an Indian Tribe or Native Hawaiian organization are considered an “area of significance” in National Register Bulletin 38, the guidelines for evaluating and documenting a TCP. This cultural significance is derived from its “. . . association with cultural practices or beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community” (Parker and King 1998:1). Culture is further defined as “the traditions, beliefs, practices, lifeways, arts, crafts, and social institutions of any community, be it an Indian tribe, a local ethnic group, or the people of a nation as a whole” (Parker and King 1998:1).

Additional guidance is provided in other National Register Bulletins specific to a property type such as archeological properties and cemeteries/burial sites or general

guidelines on completing forms and applying criteria. With regard to evaluating an archeological property that is also a TCP, these National Register Bulletins are often times difficult to reconcile with one another, as discussed below.

### **Conclusion**

This chapter introduced the Section 106 of the NHPA, which provides the foundation for the discussion of TCPs. The Act includes the first mention of properties of traditional cultural importance and also created the NRHP, the standard by which historic properties are evaluated.



### **Chapter 3 Interpretation and Implementation**

This chapter presents differing interpretations and applications of the National Historic Preservation Act (NHPA) through the eyes of the participants charged with its implementation. It begins by examining the guidance provided in the National Register Bulletin 38 (Bulletin 38), particularly in areas where the application of the criteria seems inconsistent or contradictory to the guidance in related National Register bulletins. Next, some definitive measures are presented that the courts have articulated in interpreting the NHPA and Section 106, followed by Advisory Council guidance on sacred sites. Last, the limitations of the National Register of Historic Places (NRHP) and the Nebraska State Historic Preservation Officer (NeSHPO) records for informing on Nebraska properties presently listed as TCPs are observed.

#### **Bulletin 38 Guidance**

One cannot help but have the impression that TCPs, which were not addressed specifically in the NHPA prior to 1992, do not fit squarely into the legal structure that had been created 26 years earlier. Though the NHPA Section 101 states properties of traditional religious and cultural importance may be considered eligible for the NRHP, a TCP is not a separate property type; it must fit into a category of district, site, building, structure, and object in preparing the NRHP nomination form. Nor has a separate criterion of significance been created for a TCP—it must meet one of the present Criteria A through D, with the area of significance choices likely fitting under Ethnic Heritage, Religion, or Other (National Park Service 1997b:14-41).

That said, much of Bulletin 38 relates to discounting or over-riding the eligibility criteria established for other historic properties. This latitude is perceived necessary by the National Park Service to avoid an ethnocentric bias and discrimination against Native Americans. Bulletin 38 begins by cautioning that it is not the only appropriate source of guidance on TCPs nor should it be rigidly interpreted (Parker and King 1998:3).

Following are areas identified where this Bulletin is particularly difficult to decipher in relation to the others.

Generally, an eligible property must have physical integrity, or the ability to convey its significance, in several, if not most, of the five aspects of integrity: location, design, setting, materials, workmanship, feeling, and association (National Park Service 1997a:44). Bulletin 38 does clearly state that property can be individual objects, buildings, structures or sites, alone or as districts or landscapes, but must have a tangible presence and not be a cultural practice only. However, a property may retain its traditional cultural significance even though it has been substantially modified so long as the integrity has not been lost in the eyes of the traditional practitioners. Setting also may have changed considerably. Philadelphia's First African Baptist Church Cemetery is cited as an example of a property that has retained cultural significance even though the graves had been buried under modern construction for decades (Parker and King 1998:11-12).

The application of Criteria Considerations is also lenient under Bulletin 38. It advises the "religious exclusion" should be applied carefully noting that in many traditional societies there is no clear distinction between the religious and the secular. Even though

a property is discussed in religious or sacred terms, it may still be historic and significantly associated with traditional cultural values (Parker and King 1998:14-15).

Burial grounds and cemeteries are generally not considered eligible for the NRHP unless Criteria Consideration D is met— deriving its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events. Cemeteries or properties containing cemeteries may be reflections of long associations with an area under Bulletin 38 (Parker and King 1998:17); yet, cemeteries associated with an area's settlement by a cultural group are not eligible if the impact on the area is not established, or if there are other extant properties that can better convey the association with the group, or the information the cemetery holds is available in documentary sources under Bulletin 15 (National Park Service 1997a:35). To compound the matter, Bulletin 41 states that burial places evaluated under Criterion D (Research), such as archeological sites, do not have to meet the requirements for the Criteria Considerations (Potter and Boland 1992:14). However, as a practical matter, other state and federal burial protection measures and professional ethics rarely allow for archeological or physical anthropological research at cemeteries. Whether an indigenous cemetery or burial ground then may still be eligible, even though potential research is effectively prevented as a matter of law, is another unanswered question. Burials also bring up cultural affiliation issues that surround ancient remains (See *Bonnichsen v. United States*, 217 F.Supp.2d 1116 (D.Or. 2002), commonly referred to as the Kennewick Man case, for further discussion of cultural affiliation).

Properties that have become significant in only the past 50 years are also generally not eligible unless criterion considerations are met. This is important in evaluating indigenous resources, particularly when present-day Native Americans were unaware of a property's presence until recently discovered, or for properties where there has been a long period of disuse which may be due to denial of access to resources on private property, or by government action such as relocation. Under Bulletin 38, a property that has not been used for many years until recently may still be eligible, and no objective standard need be established for the length of time it has been in use. Indirect evidence and inference may be used to determine the period of significance, which can be thought of in two ways: as the period in which the property gained its original significance or as the period of its use for traditional purposes (Parker and King 1998:17-18). One interpretation of this is of "continuing use," that is, a TCP is unique in that it must be important in community *today*, served for at least fifty years in the same role, and the period of significance must come up to the present. Use need not be continuous but the association must be strong and direct (Hardesty and Little 2000:42). Another interpretation provides that "the objective of cultural resource management policy should not be to ensure the strict perpetuation of earlier practices, or to demand an unbroken continuity of ritual observance . . . Rather promote and extend access to those resources and landscapes through which traditions can be adapted and renewed (King 2003:225 citing Winthrop 1998:25-27).

Also problematic is the notion that archeological sites that have yielded information in the past, but no longer retain research potential, may have associative value under

Criterion A (Events). That is, under Bulletin 36, a site may be significant because of the importance as the repository of important data gained or its historic role in the development of anthropology/archeology or other discipline (Little, et al. 2000:7-8). Thus, an excavated archeological site may still be eligible.

### **Court Precedents**

Courts have provided some direction in construing NRHP criteria for TCPs. In reviewing the eligibility of a single, 250 year old oak tree in Georgia, known as the Friendship Oak, it was held there was little or no factual support for its eligibility based only on its status as a single, unaltered tree remaining from a time period. Without some verifiable historic characteristics and direct associations, the tree merely standing witness to events without playing a direct role in them, did not meet NRHP criteria. Two other lone trees identified through a review of the “tree” listings on the NRHP were distinguished in that, though there was no human alteration, there was a well-documented history of direct and significant involvement in ceremonial and/or judicial practices of Native American societies to support eligibility. Additionally, the Court noted current popularity and controversy itself could not be used to create historic significance (*Hatmaker v. Georgia Dept. of Transp. By and Through Shackelford*, 973 F.Supp. 1058 (M.D.Ga. 1997)).

For a historical “site” to qualify, there must be good evidence of where the site is located and its boundaries. Identifying a general area where something important happened without some identifying physical features was not enough to make the wide swath identified as the route of Kiks.adi Survival March through the Tongass National

Forest eligible for registration. The actual location of the route was unknown and a “symbolic” location did not meet NRHP criteria (*Hoonah Indian Ass’n v. Morrison*, 170 F.3d 1223 (9th Cir. 1999)). Also, there must be a concrete, geographic nexus to the area considered a traditional cultural property for a party to have standing to bring a claim under NHPA. An allegation that there is cultural injury based only on the past use of a TCP by ancestors is not sufficient, past or present use or the intention to visit or use the resource in the future is required. However, in establishing standing, the precise nature of the resource need not be certain as NHPA is intended not only to protect previously identified resources but also make attempts to discover and identify previously unknown eligible resources (*Slockish v. United States Federal Highway Admin.*, 682 F.Supp.2d 1178 (D.Or. 2010)).

And finally, Bulletin 38 merely establishes guidelines for identifying traditional cultural properties and does not impose a mandatory procedure. Failure to follow the guidelines, absent more, probably does not constitute a NHPA violation so long as a reasonable and good faith effort is made to identify historic properties (*Muckleshoot Indian Tribe v. United States Forest Service*, 177 F.3d 800 (9th Cir. 1999)).

### **Advisory Council**

The Advisory Council created under the NHPA is an independent board whose purpose is to advise the President and Congress on national historic preservation policy and be the historic preservation voice in federal decision-making. It is allowed comment on federal agency actions impacting historic properties under Section 106, and may elect to participate in consultations on those that are controversial or precedent-setting (ACHP

2011). Regarding sacred sites in the Section 106 process, the Advisory Council offers the following clarification. Indian Sacred sites, as narrowly defined in Executive Order 13007 (which requires accommodating access to and ceremonial use by practitioners, and avoidance of adverse effects by Federal land managing agencies to sacred sites) may and are encouraged to be included in Section 106 consultations between agencies and tribes to promote efficiency and timely consideration of all issues and values. However, “It is important to note that a sacred site may not meet the National Register criteria for a historic property and that, conversely, a historic property may not meet the criteria for a sacred site” (ACHP 2005:2). Thus, it would appear that sacred sites and TCPs are not interchangeable.

### **The National Register of Historic Places and Nebraska State Historic Preservation Officer**

The NRHP is the official Federal list of properties that are historically significant at a national, state or local level (National Park Service 1997b:1). Through a review of Nebraska properties listed on the NRHP, Adams (2010) identified three preservation ethical eras that reflect transformations in the NRHP program since its inception. The first or Settlement Era (1966-1975) shows a listing of properties with an interest in preserving the frontier, such as military forts, aboriginal, early government and pioneer related historic sites (Adams 2010:52). This era has archeological sites as the highest percentage of total sites listed (43%); Information Potential (Criterion D) was cited most as the basis of eligibility (36% of total of all properties). This was largely due to the fact that the first NeSHPO, Marvin Kivett, was an archeologist (Adams 2010:56-71).

The second or Commercial Architecture era (1976-1991) shows considerable influence by shrewd private citizens and businesses on the selection of properties nominated precipitated by tax advantages under the 1976 Tax Reform Act. Only 2% of the total properties listed were archeological; and 49% of the total properties listed were eligible under Architecture or Engineering (Criterion C) (Adams 2010:84).

The third or Progressive era (1992-2010) is a movement toward use of the NRHP as a tool for urban renewal and planning. Archeological sites (most with a EuroAmerican focus) comprised 8% of the total with Bridges and Roads and Non-Military government combined totaling 40%; Events (Criterion A) and Architecture and Engineering (Criterion C) were the most cited for eligibility, 51% and 44% respectively. This is attributed to the “aging-out” of many Public Works Administration and bridge properties (Adams 2010:144-170).

While Native American involvement increased during this last era, the registration of TCPs in Nebraska did not. Because Native Americans want to keep commercial and tourist activities away from TCPs, and because they do not have ownership of many of their sacred sites, most are not listed. Instead, Tribal Historic Preservation Officers (THPOs) are economically motivated to identify aging EuroAmerican architecture and Nebraska tribes tend to follow general pre-THPO program patterns by processing nominations through the NeSHPO (Adams 2010:178-179). Further, there is no mechanism to track the nationwide listing of TCPs on the NRHP as it is not a separate category, but rather an area of significance under the umbrella of Native American or perhaps Religious (Adams 2010:250). According to the NeSHPO archeologist, there is



no additional mechanism or index maintained by his office to track or sort out TCPs in Nebraska currently listed on the NRHP, nor is there one in place for separately recording TCPs recommended as “eligible for listing” that come under his review. This again, is due to reluctance on the part of tribes to list properties, but also because tribal consultations under Section 106 are government-to-government and the NeSHPO is not often involved (Dr. Terry Steinacher, personal communication 2011). In fact, the Deputy NeSHPO indicates there are absolutely no TCPs in Nebraska listed on the NRHP as such, although some previously registered sites could later be justified to be TCPs such as Pahuk Hill (L. Robert Puschendorf, personal communication 2011). Very recently the Office of the State Archeologist, the repository of the state’s Master Archeological Site Files, received survey recommendations from the National Park Service, Midwest Archeological Center, that an area be considered a TCP and further investigation warranted (De Vore 2011). No archeological site form was submitted or archeological site number assigned, and the present database does not accommodate recording of TCPs. TCPs are perhaps more suited to be tools of land use planning rather than as “historic properties” as originally contemplated by the NHPA for listing in the NRHP.

### **Summary Observations**

Thus, in looking to the Bulletins it is apparent that TCPs may be eligible/ineligible under more than one criterion or exception, and that professionals may disagree on the eligibility of a particular property. With guidance inconsistent and seemingly ad hoc, i.e. rendered on a case-by-case basis, the only clear guidance seems to be that a TCP (sacred or otherwise) must have well defined boundaries and identifying physical features

accompanied by a well documented history of direct and significant involvement in cultural practices by a living community which has had past or present use of the property or intends future use.

Since TPCs are not a searchable category, the NRHP and records of the NeSHPO do not readily serve as a basis for comparison to similar properties to assess the physical or temporal integrity of a TCP, or provide a context for weighting historical significance. Alternatively, Bulletin 38 does encourage consultation with groups and individuals who may have special knowledge about the history and culture of an area, particularly those native to the area or long term residents, in conjunction with field inspections and recordation of properties identified. It advises a background review of previous ethnographic and ethnohistorical research be undertaken keeping in mind that the significance of some TCPs is confidential and that there are other motivations to promote or downplay significance such as economic interests and differing values among informants (Parker and King 1998:6-10).

The identification and evaluation of TCPs is from the perspective of the “living community” and necessitates incorporating that perspective into any objective review by an archeologist of the material culture. With that, the evaluation and identification of a TCP turns toward political and ethical influences.

## **Conclusion**

This chapter exposed the elusiveness of TCPs within the legal framework through a review of the Bulletins, court precedents, an ACHP Guidance Statement, and the registration system. The varying perspectives and agendas of the participants responsible

for implementing the NHPA have created divergences in guidance. There are only a few eligibility criteria for the identification of TCPs that are certain and have a coherent, consistent application which is required when a unit is being planned for or protected.

## **Chapter 4 Negotiating the Terrain: Consultation**

As discussed in chapters 2 and 3, consultation is required between a federal agency and federally-recognized tribes on a government-to-government basis under Section 106. Further, Bulletin 38 encourages contact with living communities to identify and evaluate TCPs from their perspective. In both interviews with informants and in consultations with tribes, cultural differences provide a backdrop for communication and can present ethical dilemmas. These revolve around the history of interactions between the parties and struggles over control of the resource, incongruent views of what is considered sacred, and differing goals and objectives. This chapter begins by providing a summary of the historical interaction between archeologists and Native Americans, especially focusing on views of the sacred, and then presents some changed responses and insights that have developed over time.

### **Polarities**

Dialogues between Native Americans and archeologists regarding TCPs have the potential to be polemical because of basic differences in viewpoints. Those in particular that relate to TCPs include divergent beliefs on science and religion, ownership and bases for acquiring knowledge. At the forefront are issues of social justice resulting from colonization. Various modes of interaction can develop that influence the control of information, identification of research and management goals, and the ultimate satisfaction of needs. Interactions can range from the extremes of colonial or indigenous control, to resistance, to a middle-ground of participation or collaboration (Ferguson

2009:186-191). Archeology, science and politics are inseparable in a democratic society (Leone and Preucel 1992:132)

The history between archeologists and Native Americans is often marked by poor relations and mutual mistrust. Native Americans repeatedly ask what anthropology has done for them. Western science and archeology are found to be irrelevant and suspect as contrary to the creationist stories passed through their oral histories, and seen as another religion with the same standing as their own. Native Americans do not want to be objectified by scientific study and fear the results that in the past have been used to justify racist theories of inferiority and oppression. Research is resisted that may show them not to be the original colonizers of the New World, thus jeopardizing their claims to sovereignty and other rights (Seidemann 2004:1-5). However, it “is an irony lost upon many that material objects of tribal patrimony often exist as such precisely because they did once become part of a museum collection” notes Hall citing Francis LaFlesche’s life work in recording the oral traditions of the Osage and arranging for the preservation of the Sacred Pole of the Omaha at Harvard’s Peabody Museum when the custodians of the tribal traditions no longer had any prospect of continuity for the preservation of the sacred literature or objects (Hall 1997:ix, 102-103).

Under today’s standards, very serious ethical violations by research archeologists have occurred in the past, particularly those involving the study of human remains. The dissection and curation of Eskimo remains by Aleš Hrdlička (a pioneer in American physical anthropology) and mistreatment to the remains of Ishi, the last living Yahi Indian of California, by anthropologist Alfred Kroeber around the turn of the century, are

the most notorious. Disinterment of human remains for study and publication of photographs have also been the source of much ill-will. Seen as disrespectful and an indignity to their ancestors, and feeling treated as less than human, the lack of protection and respect for human remains exhibited by scientists appears to have stemmed from Euro-American common law and codified principles that were applied to all human remains, including their own. These proscriptions provided for differential treatment of the recently deceased or cadavers and marked graves, as opposed to those for persons long buried or decomposed to the point of being only skeletal remains, and unmarked/unknown graves and abandoned, indiscernible plots (Seidemann 2004:1-5; Cunningham 2005:539-599).

Native peoples view the early discipline of anthropology and archeologists as Colonialist and Imperialist, and justly so. “The study of the past in colonial setting has always been a highly ideological activity that most often seeks to justify the seizure of land and the exploitation of indigenous peoples” (Trigger 2006:114). In the Americas, some early Spanish colonists viewed Native Americans as not having souls until the Catholic Church, in order for Spain to exercise control in the New World, made a pronouncement otherwise. Speculation on Native American origins and evolutionary status continued for centuries based on the religious and cultural biases of European Settlers. In North America, archeological remains went unnoticed until the late 18<sup>th</sup> century because it was not believed that the histories of the people pushed aside or assimilated (savages) had any significant informative value (Trigger 2006:114-118). In today’s terms this is characterized as racist, and Native Americans have a perception that

this attitude prevails as evidenced by the cultural insensitivity of archeologists, although it is changing (Watson 2000:69).

In the United States, unlike other many other countries, history is divided into two parts, Indian history and Euro-American history. There is no genetic continuity between the dominant political community and the prehistoric Americans, which has resulted in the lack of clear legal definitions of ownership (Goldstein 2000:118-125). Vine Deloria, Jr., a noted Native American activist, finds archeology enmeshed in the western, materialistic social milieu, and until it can use the study and observations of tribal peoples to critique itself and its shortcomings, will remain as such. In his view, rather than fight over credentials, we should be talking about issues and how our knowledge of other lifeways might transform western society (Deloria 1997:220-221).

On the other hand, Native Americans promote a cultural nationalism, claiming “ownership” of all property once held by them. This is not a new dilemma, but one faced by other countries as illustrated by the Elgin (or Parthenon) Marbles. These sculptures, purchased by Britain in 1816, were removed from the top the Acropolis in Athens and are currently housed in the British Museum. Greece claims there is a legal and ethical duty to return them to the country of origin in order to preserve its shared cultural identity. Additionally, refusal is offensive to the Greek national pride. Britain maintains that enjoyment does not require possession, and the sculptures are available for use. Further they have become integrated into culture of Britain and define and give identity and community to British life. Museums argue they contribute to the context of diversity, which broadens understanding and significance showing unity and connectedness of

human history and are the patrimony of all mankind, and discredit myths of racial and national superiority in cultural achievement. The Elgin Marbles are cited most as an example of the issues revolving around cultural property/patrimony, and is seen as symbolic of all un-repatriated cultural property in the world's museums (Cunningham 2005:478-501; Hutt 2004:22-23 ).

Religious backgrounds also make reconciliation difficult. Christian monotheism, with humans superior to all other creation, is in sharp contrast with Native American religions with animistic or holistic views where all of nature is interrelated. Science can be seen as an extrapolation of Christian theology, and modern technology explained as the extension of Christian dogma that reinforces man's power and right over nature to serve him. Such a view characterizes a tree as a physical fact, making concepts such as "sacred groves" idolatrous and alien to Christianity. Such representations of spirit in nature have been targeted for destruction by missionaries since nearly the beginning of Christianity (White 1974:5). Christianity also has deeply embedded notions that the only holy place is a built church even though Biblical scripture places many great visionary encounters in deserts, wilderness, mountains, rivers and seas. A dualism underlies Christianity between Creator and creature, body and soul, spirit and matter, religion and nature (Berry 1993:4-7). Many, if not most, Native Americans are also Christian. However, traditionally Native Americans view *all* of Mother Earth, in entirety, to be sacred although certain places may be more spiritually powerful than others (Stapp and Burney 2002:153). A geographical area linked with a mythological tradition is as significant as the continual rituals consecrating it. For many Native Americans, self-identity is tied to places that were



inhabited by their ancestors (Forbes-Boyte 2004:599). Yet, since the activism of the 1970s, there has been a popularization and resurgence of interest in Native American religions that has led to a bastardization of traditional tribal religions thereby diluting their sanctity. “. . . (A) self-righteous piety has swept Indian country, and it threatens to pollute the remaining pockets of traditionalism and produce a mawkish unreal sentimentalism that commissions everyone to be ‘spiritual’ whether they understand it or not” (Deloria 1997:212-213).

Since Native Americans see all as belonging to Mother Earth, if the cultural criteria for listing on the National Register of Historic Places (NRHP) cannot be met, it is still within the religious realm, under the umbrella of the ubiquitous “sacred.” This is a difficult concept laden with cultural baggage according to Thomas King, a cultural resource specialist and co-author of Bulletin 38, who recommends using the term “spiritual” as it does not attach with it connotations of the resource being inviolate (King 2003:287). To avoid Constitutional First Amendment implications under the Establishment Clause and Free Exercise Clause, spiritual property is seen as eligible for the NRHP because of the important roles the beliefs about it have in the cultural life of a community, not that the government endorses it (King 2004:122). The use of the word spiritual can encompass cultural ties arising from common lineage or shared history rather than a religious teaching. Belief in a supreme being is not required to have a feeling of spiritual closeness with or attachment to ancestral remains (See *Lumni Nation v. Golder Associates, Inc., et al.*, 236 F. Supp. 2d 1183 (W.D. Wash. 2002), although this was in context of the State of Washington’s Indian Graves and Records Act).

Finally, the objectives of archeologists and Native Americans for access to material cultural remains can differ. The tribal interest in the archeological record is not in information potential but rather to protect the spiritual integrity of their ancestors and the unborn or for locations where elders can pass their knowledge on to children. TCP locations are culturally sensitive and often undocumented. Information may be controlled by certain families and not shared under their traditions with other tribal members or other tribes. While archeologists want to catalog, publish, photograph and record information, native peoples do not wish to publicize the location or may not even be explicit about it. There may be a variety of religious traditions, experiences, stories and attachments that may be associated with a location, which may be confidential and under tribal control (Stapp and Burney 2002:105-168). These tribal views make it difficult to protect a property that one does not know is there.

Western science and law considers itself objective and requires facts, standards of proof, and evaluation under prescribed rules concerning the relevance, foundation, credibility, authenticity and reliability of the evidence. Native Americans rely on oral histories and narratives that courts have found are of limited reliability in determining truly ancient events due to their adaptability and political utility, though useful in providing insights into the people who originated and conveyed the narratives (*Bonnichsen v. United States*, 217 F.Supp.2d 1116 (D.Or. 2002) at 1153). To Native Americans, oral traditions have a spiritual aspect and are seen as the source for holistic truths (Echo Hawk 1997:88-102). There is a presumption of inherent historicity in oral traditions that can contribute to scholarship and the understanding and interpretation of

the ancient past with the application of appropriate analytical criteria (Echo Hawk 2000:270-274, 287-289). Recently, archeologists have acknowledged that oral histories and traditions may be a useful complement to the archeological record and can have such embedded historical components. For example, a 200 year old Abenaki account of the attack on the village of St. Francis was compatible with both the French and English accounts and yielded additional information that could only have been known to the Indians. Likewise, the prediction by several Hopi Indians of finding grave goods unique to a ceremony that had not been performed for a half a century in an 800 year old burial at the Ridge Ruin site near Flagstaff, Arizona demonstrated the continuity of symbolic meaning in oral traditions (Mason 2006:59-61, 166).

### **Inroads**

The struggle over right to access to archeological resources is moving toward an ethic of stewardship. The Society for American Archeology adapted revised ethical principles in 1996 which advances goals for professional behavior rather than prescriptive standards of minimally accepted behavior. While not enforceable or detailed, two principles are pertinent to relations with the indigenous peoples:

#### **Principle 1: Stewardship**

The archeological record, that is, in situ archaeological material and sites, archaeological collections, records, and reports, is irreplaceable. It is the responsibility of all archaeologists to work for the long-term conservation and protection of the archaeological record by practicing and promoting stewardship of the archaeological record. Stewards are both caretakers of and advocates for the archaeological record for the benefit of all people; as they investigate and interpret the record, they should use the specialized knowledge they gain to promote public understanding and support for its long-term preservation.

## Principle No. 2: Accountability

Responsible archeological research, including all levels of professional activity, requires an acknowledgement of public accountability and a commitment to make every reasonable effort, in good faith, to consult actively with affected groups(s), with the goal of establishing a working relationship that can be beneficial to all parties (Society for American Archaeology 2000:11).

A basic contradiction, however, is seen by some between the principle of stewardship and accountability. Inherent in stewardship is a notion that it is only archeologists who are qualified to deal with archeological materials. Yet, accountability assumes there are many other communities with a diversity of interests and ways of understanding.

Archeologists are needed to offer scholarship to their client communities as experts in dealing with an archeological record, but they are also urged to become involved in the politics of these communities and make a commitment to the Indian peoples of the region (McGuire 1997:63-91).

Ferguson (2009) sees also the ethical principle (2) of consultation to be a professional responsibility that is separate from, and not a substitute for, the consultation required by a federal agency under Section 106. The archeologist is urged to exercise autonomy in fulfilling this duty, and recognize that such a scholarly consultation may have advantages such as the latitude to independently retain a qualified tribal monitor (Ferguson 2009:182-183).

The growing number of sites impacted by modern urban development and the increasing commercial value of archeological objects within the art market has led to increased looting. Good stewardship should revolve around efforts toward protecting the in situ preservation of the archeological record in recognition that it is a finite, non-

renewable, irreplaceable resource. Lynott (2000), following Lipe (1974), proposes a conservation model of archeology wherein a representative body of intact sites should be preserved, not only from looting and development, but also exploitation for present archeological purposes. Research priorities and practices must be responsible and balanced with other competing interests and conflicts over the use of the archeological record. Ultimately, stewardship should place the highest value on the preservation of the record and avoid any impression that stewardship can be conceived as a claim of control over or special privilege of access to the record (Lynott 2000:26-34).

There has also been a trend in both archeology and tribal cultural resource management toward a concept of landscape, shifting a view of the resource as individual sites to larger areas that can include interrelated sites. This has led to a shift from assessing direct impacts to indirect impact to a larger area such as audible and visual effects (Stapp and Burney 2002:152-154). Archeologically, a landscape approach has been employed and seen as crucial in some areas, especially where the only remains might be surface scatters of small-single occupation campsites (MacDonell and Wandsnider 2003:89-107). Distributional approaches in archeological field methodologies which emphasize the continuous nature of resources on the archeological landscape may result in increased research potential in landscapes (Wandsnider 1997:104-105). The approach has also been used combining landscape features and archeological materials which has aided in the recognition of significant places, and sacred areas when accompanied by oral traditions (Sundstrom 2003:258-300).

**Conclusion**

This chapter gives a sense of the climate of the relationship between Native Americans and archeologists. It began by setting out the contentious points that are a source of divergence and conflict between the two historically. It then introduced shifts in thought concerning conservation and stewardship and a changing view of the archeological record.

## **Chapter 5 Application to Case Studies**

Chapters 2, 3, and 4 identified and described the challenges posed by TCPs and the basic legal, administrative, and ethical parameters for evaluating a TCP. Chapter 5 illustrates the process as applied to four Nebraska case studies spanning the continuum from a well-defined TCP to one that does not easily meet Section 106 requirements. In doing so, basic concepts such as significance are discussed, as well as an alternative view of protecting TCPs as cultural landscapes, which are versant nationwide.

### **Pahuk Hill**

Pahuk Hill (archeological site 25SD24), or Mound on the Water, was listed on the National Register of Historic Places (NRHP) in 1973. The NRHP nomination indicates it is of 18<sup>th</sup>-19<sup>th</sup> century significance in the area of Aboriginal (Historic), Political, and Religion/Philosophy. Although listed, the eligibility criteria are not given, which is not unusual for early Nebraska nominations. But it is interesting to note that that the primary significance given is couched in terms of sacred and its relationship to mythology. It is the last one of the five sacred places (“animal lodges”) in Nebraska and Kansas of the Pawnee that has not been adversely impacted or destroyed. Located on a high bluff along the south side of the Platte River, its north edge drops about 46 meters to the river. A graded road bisects the hilltop, the highest point for several miles, ending at the bluff edge. The approximately 914 meters (east-west) and 274 meters wide area is under cultivation with pastureland slopes. A cave in the side of the bluff has been sealed by construction or destroyed (Jensen 1973). Varied ethnographic accounts of the Pawnee animal lodges begin to appear as early as 1889 and each included Pahuk. Pahuk was

identified by White Eagle, an elderly Skidi Pawnee, as “holy ground” and recorded on location with confidence by Melvin Gilmore in 1914. According to White Eagle, Pahuk, a young boy, was rescued from the Platte River by the Sacred Animals (Nahu’rac) and revived in an animal lodge in the side of the hill. He then practiced and taught others the use of the healings rituals that each of the animals had taught him (Jensen 1973, Parks and Wedel 1985:144). Considered the first animal lodge, Pahuk is the source of the Skiri Medicine Lodge and bestows healing powers (Parks and Wedel 1985:153).

Traditionally, Pawnee doctors would visit this site annually for renewal and in gratitude to the mythic beings (Forbes-Boyte 2004:599). Wedel in 1936 again documents that the sacred places of the Pawnee are areas, all associated with streams, where the Nahu’rac meet for council (Wedel 1977:6), and in 1966 Harry Mad Bear, the grandson a prominent Skiri doctor, confirms that Pahuk is a bluff (Parks and Wedel 1985:154). Pahuk Hill is sometimes translated literally as “ground sacred” by both the Pawnee and the Omaha who revere it because of its significance to the Pawnee (Jensen 1973). The Pawnee now live in Oklahoma but tribal members still travel to Nebraska and visit their ancestral homeland. Pahuk, along with Massacre Canyon in Hitchcock County and their last village complex near Genoa, remain the most important and revered places that contemporary Pawnee identify with their homeland (Rob Bozell, personal communication, 2011).

This site meets the most basic of NRHP criteria for a TCP. It has well-defined geographical boundaries, and a well-documented history of direct and significant involvement in the present cultural practices of a living community. The site retains



physical integrity compared to the other related sacred sites and has a high level of significance. It should be noted that the animal lodge sites on the Plains are typically geomorphologically unusual locations, most situated on a bluff above a river or near water such as a spring. Having gained mythological status, the exact locations and geographical features of many of the sacred lodges are lost and probably were not unambiguously known even by the end of the 1800s due to lack of distinctive features and shifting geographical features (Parks and Wedel 1985:172). As previously mentioned, Pahuk is considered by the Nebraska State Historic Preservation Officer (NeSHPO) to be a presently listed site that in retrospect seems to meet the eligibility requirements of a TCP, but has not been formally designated as such.

### **The Columbus Cemetery**

Cemeteries are generally not eligible for inclusion on the NRHP unless Criteria Consideration D is met— deriving primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events. In 2008 NeSHPO, in a consensus determination in conjunction with a proposed federally-funded transportation project, concurred with the recommendation by a cultural resource management consultant that the Columbus Cemetery was eligible for listing on the NRHP as a TCP. This public cemetery, dating from 1865, is associated with the City of Columbus, Nebraska. At that time the historic property survey report recommended that the cemetery was eligible as an historic district under criteria A, B, C, and D through its association with Columbus' early settlement and development, prominent citizens, architectural elements, and research potential. It was recommended

as possibly eligible as a TCP “because it serves a vital role in preserving community heritage especially during Memorial Day and Veteran’s Day Observations” (HDR 2008:67).

In 2010, the lead federal agency, the Federal Highway Administration (FHWA), in consultation with the Nebraska Department of Roads and the Nebraska Highway Archeology Program, reconsidered its position applying National Park Service guidelines to the criteria. The reconsideration was a step-by-step process to critically evaluate eligibility under each criteria and its accompanying exception. Under Criterion A (Events), cemetery monuments though associated with early settler’s lives, do not convey a unique or atypical association with early local settlement that could contribute more than the many other local cemeteries throughout Nebraska (Maiefski 2010). The prominent individuals buried there (Frank Scott, frontier scout and showman, and prominent politician Edgar Howard ) were not exceptionally significant or outstanding to the historic patterns they were participating in and did not meet Criterion B (Persons). The cemetery’s landscape design is a typical grid, and even with the addition of the unique designs in the front gate and diversity of headstone forms is not enough to warrant eligibility under Criterion C (Architecture). Research potential (Criterion D) was eliminated because of the availability of archival information on the demographics the tombstones could provide, and because burial laws and professional ethics effectively no longer allow for archeological or physical anthropological research. The FHWA further argued that the Columbus Cemetery was not eligible as a TCP because, even though reflecting some community history and identity, it is not unique or exceptional for this

property category (Maiefski 2010). On December 3, 2010 the NeSHPO concurred with the FHWA determination that the Columbus Cemetery is not NRHP eligible under any criteria or as a TCP.

In this instance, a straightforward application of the criteria and criterion considerations was made. In all instances, the level of significance was not high enough when compared with other resources of the same type. Although physical integrity was very much intact, the property could not make a significant contribution to an understanding of the past, and the community events were commonplace. This case also shows the wide range of consultant opinion that may be encountered.

### **The Holy Fireplace Ossuary**

The Holy Fireplace Ossuary or Gillman site (archeological site 25TS5) was initially recorded and excavated in 1938. In 2010, the Augustana College Archeology Laboratory (ALAC) completed a NeSHPO-sponsored survey to inventory archeological resources along select portions of the Missouri River bluffs of northeast Nebraska (Buhta et al. 2010). ALAC recommended that the site is potentially eligible for listing on the NRHP as a TCP as defined by Bulletin 38 although specific criteria were not discussed (Buhta et al. 2010:73). Located on the Omaha Indian Reservation south of Macy, Nebraska, the Holy Fireplace Ossuary is along a high ridge overlooking the Missouri River floodplain. It has been impacted, but certainly not destroyed, by modern road construction and refuse disposal. There are two components identified at the site: 1) the excavated burial remains (402 fragments of culturally or tribally unaffiliated human bone were recovered),

and 2) an ideological or traditional component associated with the Omaha tribe. There is no evidence that the two components are culturally or temporally related.

Cooper documented in the report of his 1939 field investigations that Holy Fireplace Point had a breathtaking panorama of the river where young Omaha men fasted in quests for dreams (Cooper 1939:135). The site is marked today with a sign and fenced, and it is still used as evidenced by tobacco pouches that were observed hanging from the trees in 2010 (Buhta et al. 2010:73). In 2010 and 2011, Omaha tribal members (including Omaha THPO Tony Provost, Dr. Dennis Hastings of the Omaha Tribal Historic Research Project, and Dr. Rudi Mitchell, Creighton University Native American Studies Faculty and past Omaha Tribal chair) reported to ALAC and Nebraska State Historical Society staff that the site had been sacred to the Omaha since at least the early reservation era. The excavated burials were not clearly culturally affiliated as pre-contact or Omaha, but it is speculated that there are other burials along the bluff for miles in this vicinity (Buhta et al. 2010:73).

While the temporal depth of the Holy Fireplace Ossuary is not certain as is the Columbus Cemetery, there is early written documentation of its use. Omaha tribal members further corroborate Cooper's 1939 report and extend the temporal depth to the early reservation era. Burials indicate an even older presence and use, but by whom is not known. This site as a TCP would arguably meet NRHP Criterion A and its Criteria Consideration D, an association with historic events of the early-Reservation Omaha. While the cemetery is an excavated archeological site, it does not diminish its integrity of association with use by the Omaha as a vision quest location. It is a discrete location and

still utilized today. With further documentation, the Holy Fireplace Ossuary could comfortably be nominated for listing on the NRHP as a TCP.

These middle two case studies are instructive on the degree of significance required for listing on the NRHP. The level of significance of the Columbus Cemetery could not rise to meet that required for nominating a property to the NRHP while that of the Holy Fireplace site did. Under Section 106, there is no “potentially eligible for listing” category, a resource is either eligible or ineligible, even though there can be a substantial difference in the level of documentation and scrutiny made for recommendations made as consensus determinations of eligibility as opposed to actual nominations for listing on the NRHP. It has been observed that at times in consensus determinations between a federal agency and SHPO, sites may be called eligible for listing, when in fact a nomination could not be made, in an effort to preserve the resource from destruction (Sebastian 2009:96-114). Further, Tainter (1983) maintains that the NRHP is unworkable because it treats significance as an inherent quality, when in actuality it is an assigned quality, which can vary among individuals and time periods as well as be contingent on the archeological theories in vogue. Potentially, archeological sites could cycle on and off the NRHP over time (Tainter 1983:714). The NRHP has no provision for future achievement of significance, thus precluding consideration of future data requirements that at present may not be knowable. In fact, assigning significance according to contemporary criteria to resources that are not threatened may prematurely and unfavorably prejudice their future potential and significance (Tainter 1983:715-716). Tainter (2004) also maintains that cultural resource managers have a perceptual bias in

favor of salient sites, or the unique or superlative, as being the most worthy of protection or study. These sites, however, are unrepresentative of much of commonplace human experience, particularly by hunter-gatherers, subsistence agriculturalists or the materially impoverished, where high frequency of land use can leave but a minimal archeological record. Disregard for these non-salient sites is distorting the record being shaped and produced for future generations (Tainter 2004:60-69). TCPs are recognized as being effective in protecting small places of extreme cultural significance, but it is questionable whether it is the best way to protect Native American cultural resources (Stoffle 1997:230).

### **Agate Fossil Beds**

This last case study of the Agate Fossil Beds National Monument (AGFO) provides a TCP from a Native American perspective. AGFO, comprising 3055.2 acres, is located in Sioux County in the upper Niobrara River Basin in northwestern Nebraska. This national monument was established to preserve its Miocene age fossil deposits associated with paleontological research in the United States and to provide for an exhibition center for these and the significant ethnographic collection of the 19th century Lakota, amassed as a result of the relationship between Captain James Cook and Lakota and Cheyenne leaders, including Red Cloud, at his Agate Springs Ranch (Act of June 5, 1965, Public Law 889-33, 79 Stat.123).

A large body of literature exists on the various resource inventories previously undertaken by the National Park Service since 1966, including a 1997 intensive survey with test excavations (Wandsnider and MacDonnell 1997) and a 2003 Red Cloud Camp

Cultural Landscape Inventory (Young 2003). The details of these are summarized in a park-wide archeological overview and assessment (Bozell 2004) but will not be addressed here except as necessary in the treatment of TCPs. In 2001, a TCP study of AGFO was conducted by consultant Sebastian LeBeau, a Cultural Preservation Officer for the Cheyenne River Sioux Tribe of Indians, who identified fourteen TCP sites. In identifying the TCPs, Le Beau adapted a system utilized by the tribe that is composed of three site categories: Sacred sites, Offering sites, and Gathering sites. Sacred sites include those where individual or group ceremonies occur or where a landform serves as an altar or a manmade one is present. Offering sites are inconspicuous land features where an individual may set out an offering or receive a gift, either a material thing or knowledge. Gathering sites are areas used for the procurement of natural resources such as plants for dietary or medicinal purposes (LeBeau 2001:2-4). Of the fourteen TCP sites identified at AGFO, there were five formally designated as archeological sites, which were generally rock cairns on prominent knolls and in one locale a small scatter of lithic debris. None were temporally diagnostic or associated with specific cultural complexes. Some of these may be eligible for listing on the NRHP (Bozell 2004:68). The other TCPs identified included depressions, fossil quarries of spiritual and medicinal significance, and natural rock formations.

Subsequently, LeBeau (2009) provides a more complete methodology and taxonomy for identifying TCPs from a Lakota viewpoint in his development of the Identification and Typing System for Traditional Cultural Property Sites (ITS-TCP). Therein he acknowledges first of all that not all properties that may be TCPs are eligible for the

NRHP (LeBeau 2009:8). He challenges the use of the NRHP and Bulletin 38 as a standard for evaluation as ethnocentric and explains that a TCP to the Lakota is one that communicates knowledge of the traditions through meaningful features on the landscape that allow or facilitate the performance of significant cultural activity. They exist “because we created and continue to create them through prayer, ceremony, and activities our people perform in the landscape” (LeBeau 2009:1, 107). LeBeau advises that when he observes a sacred site, it is not the land itself, rather it is its potential for use in ceremonial activity or the collecting of a resource. Evaluation includes looking at the inter-related physical features of a landscape to understand “why an activity was or can be performed there in the first place” (LeBeau 2009:15). The ITS-TCP is a predictive model of 12 different site types based on site type or use and details their accompanying natural features or physical signatures. For example, the natural features for a Type I “Prayer place”, of the site type “to cry for a vision” include small conical shaped hills, promontories, humped backed hills, saddle-bow, ridge and flat-top type hills (LeBeau 2009:114-121). A traditional spiritual leader or vision carrier, LeBeau uses his in-depth knowledge of Lakota traditional culture to assess site potential as a TCP. This can be seen reflected in his field notes for AGFO where factors such as feelings, energies, and signals, along with oral traditions, expert opinion from other elders and spiritual practitioners, and physical characteristics, are taken into account in discerning landscape use as a TCP (LeBeau 2001; LeBeau 2009:35). Another member of the Cheyenne River Sioux (Lakota) tribe and National Park Service Historic Preservation Specialist Representative, Albert LeBeau, however, disputes some of these TCP designations. The



ITS-TCP is overbroad so as to be inclusive of everything a tribal member does, but also lacking in that resources that could not be accessed are not included such as sacred sites of other bands or women's groups. Fitting TCPs into a taxonomic system is "nearly impossible" (Albert LeBeau, personal communication 2011).

This type of evaluation falls into yet another Catch-22 of the National Register Bulletins. Those TCPs hinging on a potential or suitability for use will not meet the criteria under Bulletin 38, as there is no defined boundary or discrete location or identifying physical features that take it beyond merely being a symbolic location or a practice only that can be performed in other locations. There is no showing that the use is rooted in the community's history. Likewise, the requirements for consideration as a cultural landscape under Bulletin 30 are not met either as tangible characteristics showing the shaping of the land that has resulted from historic human use are required, although some natural resource procurement may fit that definition (McClelland et al. 1999:2-3).

The ITS-TCP model does have the potential to provide a measure of physical integrity and degree of significance for evaluation of a TCP. LeBeau's approach, then, is similar to approaches offered by others (King 2003:287; Sebastian 2009:110-114). These approaches call for a disengagement of TCPs for Section 106 planning purposes from the NRHP. Cultural surveys by tribes to identify and evaluate TCPs are useful in providing important information in consultation and interpreting archeological sites (Ferguson 2009:177-179). Federal agencies may support such surveys and take into account tribal inventories to minimize impacts of projects on valued resources (Klein et al. 2005:12-15).

Sebastian (2009) proposes a shift from an eligibility-based to a significance-based model of management for archeological sites and TCPs. Sites could be classified and impacts addressed through a general treatment strategy based upon their significance and integrity. For example, for archeological sites ranking would depend on the degree of research potential, and treatment strategies could range from data recovery to reserving a representative sample. Sites with high traditional cultural value as identified by descendant communities could be preserved undisturbed. This ranking of significance approach is seen as a solution to the patchwork of sites that federal land managers face (Sebastian 2009:97-109). Similarly, LeBeau's ITS-TCP model may serve as a basis for a ranking of TCPs, which in turn could lead to programmatic agreements for certain classes of properties. Additionally, cultural significance has been calculated through scientific procedures such as using numeric values for indigenous plants, animals and artifacts by land managers. This is what Stoffle (1997) refers to as "cultural triage" and is a parallel approach toward a common goal of maximizing protection of significant resources, but does not replace Native American styles of expression. Cultural landscapes, rather than TCPs are viewed as the best means for protecting Native American cultural resources (Stoffle 1997:230, 242).

While this appears feasible for land-owning federal agencies or tribes in establishing management plans, as a substitute for eligibility standards of the NRHP it would have less overall utility. In Nebraska, most resources evaluated are only those found in the narrow area of potential effect of a federal undertaking. The bulk of the "landscape" is in private ownership as there are few federally-owned lands and tribal reservations in

Nebraska. These demands call for a concrete standard rather than relativity to other resources.

### **Conclusion**

These four Nebraska case studies have provided instructive examples of the variation in the identification and evaluation of TCPs. Certain sites, like Pahuk, are well-defined examples of TCPs as contemplated under Bulletin 38 and are easily evaluated. In the mid-range are sites like the Columbus Cemetery and Holy Fireplace Ossuary, the eligibility of which depends on the strength or level of its significance. Those “projected” TCPs based on a model, such as the ITS-TCP model used at AGFO are the most difficult to evaluate and show the different perspectives that the term TCP generates. TCPs that encompass both historic and sacred or cultural resources demonstrate a need by tribes to protect zones of resources for future use to perpetuate their culture. It also shows the need for a land-use planning tool for cultural resource managers to assess resources worthy of protection. However, this use of “TCP” does not fall within the purview of the present NRHP eligibility requirements based on historicity, and does not readily fit in the Section 106 process as presently practiced.

## **Chapter 6 Results and Analysis**

This chapter will deal further with the misconceptions that have been identified in this thesis. And, while it has been demonstrated that there is an array of interpretive guidance in identifying TCPs, this chapter will provide the criteria that is required to be applied. Lastly this chapter will summarize the current state of affairs for TCPs critiquing the current system in doing so.

### **Common Misconceptions**

In sorting out the various laws, administrative rules and bulletins, court precedents and other literature on TCPs, several prevalent misconceptions were identified and resolved. These misconceptions are enumerated below.

*Misconception One. A TCP is, in and of itself, a property type or separate criterion.*

A TCP must fit into one of the established property types: district, site, building, structure or object. It must be significant in American history, architecture, archeology, engineering or culture and possess physical integrity. It must also meet one of the eligibility criteria: an association with A (Events), B (Persons), C (Design) or D (Information Potential). A TCP is regarded as an area of significance only for a property type that meets one or more of the eligibility criteria.

*Misconception Two. A TCP is automatically eligible for the National Register of Historic Places (NRHP).*

As explained above, there are TCPs that may not meet the eligibility rules for the NRHP. Contributing to this misconception perhaps is that practitioners are trained to speak in

terms of “historic” properties as only those that qualify for the NRHP based on a Sec. 106 definition. That is, for purposes of Section 106, the term “historic property” equates with a property included in or eligible for inclusion in the NRHP. This includes TCPs that meet NRHP criteria (36CFR 800.16(l)(1)). Tribal typing systems, such as the ITS-TCP model, have been used that have an expansive view of TCPs, but even these recognize that not all TCPs it defines are eligible for the NRHP.

*Misconception Three. Sacred site is synonymous with TCP.*

Sacred site, as discussed earlier, is defined under an executive order requiring accommodation for religious practices. Such sacred sites may not meet NRHP criteria for a historic site or a historic property may not meet the criteria for a sacred site.

Another source of confusion on this issue is that federal agencies, in efforts to streamline and make comprehensive assessments, will in consultation with tribes be addressing Section 106 requirements in coordination with others such as the executive order on sacred sites. Additionally, National Environmental Policy Act work, which has other requirements (including assessments for cultural and social effects), may be being substituted for Section 106 (Hardesty 2000:79-84; King 2003:142-144; King 2004:291-299).

*Misconception Four. “Potentially eligible” is an intermediate designation between “eligible” and “ineligible.”*

Potentially eligible may mean that more information is required before a determination can be made, but it is not a formal determination under Section 106. Within the framework of practical use of the Section 106 process, a property is either eligible or

ineligible. A corollary to this misconception is that the eligibility standard is lower for properties that are “eligible for listing” in consensus determinations than for those to be listed. A property should have the qualities needed for a nomination and listing before it is considered eligible. The level of significance must be high enough to have the ability to make a significant contribution to an understanding of the past as seen in the Columbus Cemetery case study. There is no sliding scale of eligibility under Section 106.

### **Actionable Criteria for Practitioners**

The nebulous quality and the lack of a clear definition of a TCP has been shown. The most basic criteria and the bottom line is that a TCP is:

- a property of traditional religious and cultural importance that *may* be determined to be eligible for inclusion on the NRHP (NHPA);
- shows well-defined boundaries and identifying physical features accompanied by a well-documented history of direct and significant involvement in cultural practices of a living community who has had itself past or present use or intends future use (Courts);
- is rooted in a community’s history and important in maintaining the cultural identity; and, has physical integrity, a high level of significance, and temporal depth (Bulletin 38).

For properties that may be somewhat compromised in significance or integrity, Bulletin 38 offers some guidance but is at best, flexible, and at worst, circular, ambiguous and inconsistent.

Archeologists, federal land managers and resource compliance specialists are handicapped when identifying TCPs. Those listed on the NRHP are not easily observable. Models based on certain landforms—high hills with caves, peneplains, unusual features, etc.—are informative, and can provide some historic context, but may not necessarily be focused on NRHP eligible properties. Tribal consultant opinion may vary as well.

### **Critique of Present System by Case Studies**

TCPs as historic properties included or eligible for inclusion on the NRHP are difficult to conceptualize. Tribes are not willing to list TCPs, and some would prefer to use TCPs as planning guides not tied to the traditional approach as a historic property.

Archeologists, and those they provide cultural resource management services to, find it difficult to identify TCPs with no bright-line guidance. Under NHPA, a listed property and one eligible to be listed have the same standard, but it has been suggested that, realistically, less documentation is done in eligibility reviews for consensus determinations. For these reasons, some proponents for separation of TCPs from the NRHP argue that the NRHP is for listing the nation's premiere properties, while Section 106 is more of a planning tool. Another sees the effects of the marketing and planning ethics on the NRHP as unfavorably diluting its original mission and purpose as a federal listing of historic properties (Adams 2010:223-4). Ultimately, this is a clash between history and heritage. Truscott addresses balancing the values inherent in the management of the physical nature of a place and the intangible associations and meaning it may have. Her use of two case studies, the repainting of an indigenous Australian rock art site and

the building of a replica alpine hut, demonstrates the tensions and mixed results that can occur in maintaining the tangible fabric (or the real and factual history) and the continuity of intangible values through revival, recreation, or fantasy to perpetuate cultural identity (Truscott 2003). These are important and germane issues but further practical consideration would likely involve a significant overhaul of the Section 106 process.

Underlying these differences in perspectives are two important considerations. First, planning may be appropriate on federal lands or Indian reservations, however many threatened sites are often on private property. This brings into play constitutional prohibitions against the taking of private property, although some would argue that all archeological resources should be declared national patrimony regardless of land ownership (Anyon 1991). Second, it must be remembered that it is the consultation *process* that is mandated, and that the characterization of a property as a TCP does not guarantee its protection. However, once it is determined that a historic property is to be adversely affected, consultation over the resolution of those effects may result in an executed memorandum of agreement which is seen as an incentive for having a property addressed under Section 106 (36 CFR 800.6).

One provision of the NHPA, the establishment of Tribal Historic Preservation Officers (THPOs), has only recently begun to have effects in Nebraska. There are six resident tribes in Nebraska (Winnebago Tribe of Nebraska, Iowa Tribe of Kansas and Nebraska, Omaha Tribe of Nebraska, Santee Sioux Nation, Ponca Tribe of Nebraska, and the Sac and Fox Nation of Missouri and Kansas and Nebraska) and approximately 24 more tribes with ancestral connections to Nebraska that are potential consulting parties for



undertakings in Nebraska (Bozell 2011). Of the resident tribes, the Santee Sioux Nation and the Ponca Tribe of Nebraska have certified THPOs, the first in 2009. The Omaha Tribe of Nebraska, Winnebago Tribe of Nebraska and the Iowa Tribe of Kansas and Nebraska are in varying stages of the application process. The Pawnee Indian Tribe of Oklahoma, with strong ties to the archeological record in Nebraska, also has a certified THPO (L. Robert Puschendorf, personal communication 2011). THPOs serve as a single point of contact with tribes during consultation and are beneficial in the early identification of TCPs and other historic properties. More particularly, THPO-sponsored TCP surveys are useful in locating sites archeologists may have missed, and in explaining or clarifying the functional attributes of enigmatic features. This can assist with data recovery by providing testable hypothesis and interpreting the archeological record (Ferguson 2009:178-179). More involvement by THPOs in Nebraska may alleviate some of the confusion regarding TCPs.

### **Conclusion**

This chapter provided a synthesis of the common misconceptions surrounding TCPs that have been resolved and articulated the known criteria that is constant in the evaluation of all TCPs. A critique of the present process was also presented that highlighted its positive and negative aspects and suggested the need to balance history and heritage.

## **Chapter 7 Conclusion and Recommendations for Potential Change**

In this thesis, I sought to understand TCPs in the Section 106 process and found there is no clear cut answer to what exactly constitutes a TCP when assessing Native American archeological resources for purposes of Section 106 review. A number of factors were found to be contributing to this lack of understanding. In chapter 2, which set out the underlying federal purpose and statutory and regulatory schemes, it was demonstrated that the legislation that created TCPs was made in hindsight. Chapter 3 presented the varying goals of those participants responsible for implementation of Section 106 and how that has created a miscellany of guidance. Chapter 4 covered the dynamics inherent in the consultation process due to past tensions and frictions, but also suggested avenues where growth is being seen. Chapter 5, the case studies, provided illustrations of TCPs ranging from a well-defined example to those falling well short of meeting National Register of Historic Places (NRHP) criteria. Chapter 6 addresses the misconceptions participants often have, articulates the baseline criteria, and evaluates the system.

So is all archeological material culture a TCP for purposes of Section 106? The answer is no. While a TCP may be in the eye of the beholder or from the perspective of a living community, the NRHP provides a fairly rigorous process that must be followed for a TCP to be determined a historic property. This application should not be confused with identification of cultural or religious properties for other purposes under other laws, orders or regulations. It must also be recognized that recognition of a TCP does not

guarantee its protection. It is the due process component of the NHRP, consultation, that ultimately is required.

Under pressures of urban growth and other development, archeological resources are increasingly lost to posterity necessitating a move from debates over control and ownership to stewardship and plans for the long-term conservation of archeological resources. Accountability is needed on both sides. Archeologists should accept the fact that there may be other uses of the archeological record. Native Americans should preserve the scientific value of the resources under their control for its own future generations as well as the collective, global community. Partnerships and collaboration between Native Americans and archeologists is necessary for the continued development of or archeology and cultural resource management (Ferguson 2009:185, 193)

As archeological resources dwindle, those remaining sites become more significant. The deficiencies in use of the NRHP as a land-use planning tool have some advocating for a separate system of evaluation for that purpose. Local zoning and ordinances may be called for (Sebastian 2004:15) or legislation could provide more definitive temporal limitations and parameters for determining cultural affiliation, significance or integrity (Seidemann 2004:588). However, a major revamping of the system would be required to segregate the protection of threatened sites through Section 106 based on historicity from preserving non-threatened sites based on heritage. Or perhaps the balance between the two values is struck through the evaluation under the Section 106 process and quite deliberate on the part of Congress.

Given the varied nature of archeological and cultural resources as well as the diversity of consultant opinions on TCPs, a definitive standard may by necessity be only very rudimentary; and archeologists and land managers will have to live with the uncertainties, inconclusiveness, and varying degrees of probability that are inherent in the study of history (Wilson 1887:6-8).

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## APPENDIX A

**Table of Cases**

*Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207 (9th Cir. 2008).

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