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# Seeking Environmental Justice for Cultural Minorities: The South Lawrence Trafficway of Lawrence, Kansas

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There is “a compact between humans and their surroundings which must be considered when humans make governmental decisions about themselves and their neighbors.”<sup>1</sup>

## I. BACKGROUND

In 1882, Congress established a non-reservation Native American boarding school named Haskell Institute in Lawrence, Kansas, with the pronounced purpose to “civilize” Native American children.<sup>2</sup> Approximately 700 students were enrolled there at one time.<sup>3</sup> During the first decade of its existence, Haskell Institute resorted to force in taking Native American children from their tribal families and prohibited contact between the children and their families.<sup>4</sup> Managing the school authoritatively, Haskell Institute authorities required students to walk in military formation.<sup>5</sup> They silenced the children of their native languages, allowing only English, and attempted to “Christianize” the children’s beliefs by requiring them to attend Christian worship services.<sup>6</sup> When children attempted to speak their native language or practice their traditional religions, many were corporally punished.<sup>7</sup> The school permitted the creation of traditional arts and crafts only when Haskell Institute stood to profit from the commercial sale of such items.<sup>8</sup> Haskell Institute authorities subjected Native American children to hard labor, cultivating many of Haskell Institute’s 1,000 acres with European tools and methods unfamiliar to the children.<sup>9</sup>

Archives describe Haskell Institute as a place of inadequate supplies to feed famished children, deficient medicines to aid the many suffering from pneumonia, tuberculosis,

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consumption, and malaria, and overcrowded facilities that sometimes forced two to four students to sleep on one four-foot by four-foot bed.<sup>10</sup> Haskell Institute officials have estimated that more than 700 students died at Haskell Institute as a result of such conditions, and many believe some of the children were buried in the wetlands located on the southern portion of Haskell Institute's land.<sup>11</sup>

The wetlands resulted from the frequent flooding of the Wakarusa River, also located at the south of Haskell Institute's land.<sup>12</sup> Children often snuck into the wetlands for secret family reunions or to escape.<sup>13</sup> Haskell Institute authorities responded by constructing a small cabin stationed with a watchman.<sup>14</sup> Many elders recount that the wetlands and the Wakarusa River itself became symbolic to the students of a natural power that Haskell Institute could not tame.<sup>15</sup>

Today, Haskell Institute is called Haskell Indian Nations University (hereafter referred to as Haskell), the only multi-tribal university in the United States.<sup>16</sup> It is no longer a place of cultural genocide, but a site of cultural celebration and education. Haskell's campus now consists of 319 acres, which include approximately 200 acres of wetlands, grassland, riparian woodlands, and brush.<sup>17</sup> At the southern portion of its campus, the wetlands have become an outdoor classroom of scientific learning and are still regarded by tribal elders as the "home of their ancestors and an area to find and collect medicinal and ceremonial plants . . ." <sup>18</sup> The wetlands provide a laboratory for biological and ecological research, as well as a place for tribal elders to pass on their tribal knowledge of the land.<sup>19</sup> A medicine wheel and sweat lodges, located on the threatened land to the south, signify sacredness.<sup>20</sup> The wetlands, now in jeopardy, are the last remaining in the Wakarusa Valley area.<sup>21</sup>

In 1964, local and state officials began planning the construction of a fourteen-mile trafficway called the "South Lawrence Trafficway" (hereafter referred to as the SLT), part of which was planned to cut directly through the Haskell wetlands.<sup>22</sup> In 1986, the federal government became involved in the project when the Federal Highway Administration (FHWA) agreed to fund part of the construction of the SLT under the Federal Aid Highway Act.<sup>23</sup> As a result of the federal government's involvement, the project was forced to comply with the requirements of applicable federal laws, such as the National Environmental Policy Act (NEPA).<sup>24</sup> In 1990, the FHWA completed an Environmental Impact Statement, as required by NEPA.<sup>25</sup> However, due to mounting opposition by Haskell, the FHWA later determined that a Supplemental Environmental Impact Statement (SEIS) was necessary before construction could begin.<sup>26</sup> In 1994, in response to a request by the Kansas Department of Transportation (KDOT), the FHWA granted permission to segment the SLT, thus allowing completion of the first nine miles of the SLT's western leg and leaving the controversial eastern five miles that would pass through the wetlands uncompleted, due to the lacking SEIS.<sup>27</sup>

In addition to Haskell's opposition to the SLT's designated route, debates heated up between Douglas County and KDOT officials regarding the path of the SLT's eastern portion, thereby stalling the SEIS process further.<sup>28</sup> In 1997, Douglas County, KDOT, and the FHWA decided to de-federalize the project by rejecting federal financial aid, which would allow the SLT to continue in the absence of a completed SEIS.<sup>29</sup> In *Ross v. Federal Highway Administration*, the Tenth Circuit agreed with Haskell students, wetlands preservationists, and the other named plaintiffs that the SLT could not be de-federalized because federal involvement had become pervasive, thus requiring the SEIS to be completed.<sup>30</sup> Today, the SLT remains unfinished. The eastern portion has not been built, though discussions and debates continue.

On September 12, 2002, Colonel Donald R. Curtis, Jr., district engineer for the U.S. Corps of Engineers, who will ultimately decide the route of the eastern portion of the STL, held a public hearing, which more than 700 members of the Lawrence community attended.<sup>31</sup> Curtis is considering two different alignments, both of which will cut through the wetlands.<sup>32</sup> Curtis has not yet selected which of the two routes the SLT will take; however, Kansas highway officials have already applied to have approximately sixty acres of the wetlands filled and have ordered appraisals for land situated along the proposed SLT paths.<sup>33</sup>

## II. INTRODUCTION

As the Haskell wetlands illustrate, the "environment" encompasses not only our physical surroundings, both natural and manmade, but also the indivisible relationship human culture, economy, sociology, and history has with our natural setting. As then-president of Haskell, Bob Martin wrote in an editorial in a local Lawrence paper in 1994, "I am requesting that the Lawrence community understand that our point of view cannot be separated from a cultural and historical context."<sup>34</sup>

Webster's Dictionary defines "environment" as "the circumstances, objects, or conditions by which one is surrounded; the complex of climatic, edaphic, and biotic factors that act upon an organism or an ecological community and ultimately determine its form and survival; the aggregate of social and cultural conditions that influence the life of an individual or community . . . ."<sup>35</sup> To most, the naked term "environment" readily invokes poignant images of natural wildlife, thick vegetation, and serene landscapes. But a person does not have to travel to find the "environment." Each one of us lives in a unique environment that shapes our daily lives, no matter whether that environment is a crowded city, sprawling suburb, or rural town. The Haskell wetlands illustrate how our cultural experiences and historical background can become so tied to a certain land or location that the physical place becomes inseparable from such associations.

Our human creations and drive for progress impact the human and physical environment in infinite ways. Effects may include harms such as polluted air, decreased water and soil qualities, increased traffic and noise, and degradation of human health. Interrelated to these somewhat physical, or testable, consequences, are social repercussions, such as aesthetic decay, demise of cultural rituals, destruction of communities, and dilapidation of historical areas. The American legal concept of “environmental law” encompasses not only the conservation and preservation of the natural world, as if in a vacuum, but also recognizes and protects our human connections with the natural world.

This expanding concept of “environmental law” is evidenced by the federal government’s recent recognition of the environmental justice movement as an important policy objective in President Clinton’s Executive Order 12898.<sup>36</sup> After a wave of environmental laws and regulations was enacted in the 1960s and 1970s, the environmental justice movement was born with roots in a hybrid between the civil rights movement and social justice concerns.<sup>37</sup> The environmental justice movement, typically a grassroots effort within local communities, addressed the larger social issues, then at the periphery of the broader environmental movement.<sup>38</sup> The environmental justice movement pointed to disproportionate siting of manmade environmental hazards located in minority and low-income areas, and discriminatory decision-making in the environmental law arena.<sup>39</sup> It sought to raise awareness beyond impacts on the natural environment to an awareness of possible bias behind such decisions and subsequent, inequitable distributions of negative impacts on human communities resulting from environmental decisions.<sup>40</sup> In 1994, the Clinton Administration endorsed this movement with Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations.<sup>41</sup>

However, the SLT is one example of how the government has failed to adopt adequate protections for environmental justice, particularly in regard to minority cultural and historical ties to the environment. After defining environmental justice, this article will discuss the specific issues of environmental justice raised by the SLT. Next, this article will explore two potential sources for the protection of environmental justice in regard to culturally and historically significant lands: NEPA, and the National Historic Preservation Act (NHPA). Although both of these sources purport to protect cultural and historical sites, this article will argue that they do not provide the necessary protection because both lack substantive force, and therefore, both fail to account for inherent barriers of cultural differences that cannot adequately be addressed by NEPA’s required disclosures or the NHPA’s required consultations. In conclusion, this article will suggest the federal government should give substantive force to environmental justice principles, as expressed in the 1996 Executive Order.

### III. DEFINING ENVIRONMENTAL JUSTICE

In the context of the entire environmental movement, environmental justice can be distinctively characterized by its societal focus. Instead of only considering how environmental decisions affect the physical environment, environmental justice principles also evaluate these impacts in terms of societal burdens. Generally, environmental justice is rooted in two basic concerns: first, the disproportionate siting of environmental hazards or undesirable land uses in minority-populated and low-income areas, and second, the discrimination in the decision-making process that leads to such disproportions.<sup>42</sup> Rooted in these two primary concerns, the environmental justice movement encompasses a broad scope of ecological, economic, sociologic, political, religious, and civil rights issues.

Perhaps some of the earliest instances of large-scale environmental justice activism were the Warren County demonstrations in North Carolina in 1982.<sup>43</sup> In response to the county's decision to locate a toxic waste dump in a predominantly black neighborhood, protestors gathered to block PCB-laced dirt from being dumped.<sup>44</sup> Spurred by the events in Warren County, a 1987 survey found that "forty percent of the American toxic landfill capacity was concentrated in three communities, each of which was at least seventy-eight percent minority."<sup>45</sup>

Just five years later, the National Law Journal published a comprehensive study of environmental lawsuits since 1985, concluding that "the EPA was slower to clean up waste sites in minority communities and less likely to remove abandoned waste as opposed to capping a site."<sup>46</sup> Additionally, the study showed there were "higher penalties under hazardous waste laws at sites in white communities as compared to black neighborhoods," and "abandoned hazardous waste sites in communities of color . . . took twenty percent longer to be placed on the National Priority List . . . than those in white areas."<sup>47</sup>

Many of the foundational principles of the environmental justice movement were articulated when representatives from grassroots organizations, law schools, Native American tribes, and the Department of Housing and Urban Development gathered in Washington, D.C. in 1991 at the First National People of Color Environmental Leadership Summit.<sup>48</sup> The Summit attendees drafted the Principles of Environmental Justice, and stated their purpose in the Preamble: "[t]o begin to build a national and international movement of all peoples of color to fight the destruction in taking of our lands and communities, [we] do hereby establish our spiritual interdependence to the sacredness of our Mother Earth . . ."<sup>49</sup> It continued, setting forth as other goals, "[t]o respect and celebrate each of our cultures, languages and beliefs about the natural world and our roles in healing ourselves; to insure environmental justice; [and] to promote economic alternatives which would contribute

to the economic and cultural liberation . . . .”<sup>50</sup> The First National People of Color announced objectives that echoed the cries for cultural consideration by minority groups struggling to make the environmental laws do what they were designed to do—consider the environmental impacts of federal action. The Preamble stated that “[e]nvironmental justice affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples . . . . Environmental justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias . . . . Environmental justice affirms the sacredness of Mother Earth . . . .”<sup>51</sup>

The Environmental Protection Agency defines “environmental justice” as “[t]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including a racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences . . . .”<sup>52</sup> Enveloped in environmental justice is the theory of environmental racism, which exists when “any policy, practice, or directive . . . differentially impacts or disadvantages [whether intentional or unintentional] individuals, groups, or communities based on race or color.”<sup>53</sup>

In 1994, the Clinton Administration’s Executive Order 12898 formally recognized environmental justice policy objectives. Although it is not judicially enforceable, the Order requires each federal agency, “[t]o the greatest extent practicable and permitted by law . . . make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations . . .” and enhancing public participation and information on such issues.<sup>54</sup>

#### **IV. ENVIRONMENTAL JUSTICE ISSUES RAISED BY THE SLT**

At its most fundamental level, the environmental justice movement seeks to protect *minorities* from bearing a disproportionate amount of burdens imposed by federal activities. It recognizes the concentration of environmental toxins in predominately minority-populated communities. It seeks to empower minorities with a voice in the decision-making process and stop federal agencies from burdening yet another minority community with the brunt of pollution, contamination, and demolition by showing that it “makes the most sense” economically, financially, or politically.

The Native Americans fighting against the construction of the SLT exemplify a minority in need of protection. In a narrow sense, the Native Americans fit the

paradigm of the environmental justice movement in that they constitute a racial minority. In fact, within their identification as an Native American minority, Haskell enrolls members from over one hundred diverse Indian nations, each one arguably a threatened minority group.<sup>55</sup>

In a broader sense, the Native Americans of Haskell also constitute a cultural and “historical” minority. While the Native Americans opposing the SLT do not live on the threatened land and do not make up a physical neighborhood that will be destroyed by the SLT, their connection to the property is much deeper than mere residence. They have religious, cultural, and historical ties to the threatened land that are distinct from mainstream perceptions of property. As the background section of this article detailed, Haskell’s history as a militant boarding school founded by the federal government to extinguish and assimilate the traditional Native American culture is inextricably woven into the Native American perception of the land. The significance of this land is evident in their lives today as they gather on the land for ceremonies, tribal education, and to celebrate their heritage.

In addition to its focus on minorities, environmental justice principles are implicated, in the words of the Executive Order, by “disproportionately high and adverse human health or environmental effects of its programs, policies, and activities . . . .”<sup>56</sup> In a general sense, the Native Americans’ fight against the federally funded SLT is indicative of disproportionate burdens—the taking and use of their land—to which Native Americans have been subjected since the colonization of America. An underlying theme of disregard for the Native American relationship to land has permeated the American legal system. For example, Congress’ power to extinguish aboriginal possession has been held to be supreme, “whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise . . . .”<sup>57</sup>

Just a sampling of recent cases illustrates how this trend of burdening Native Americans and their cultural and historical lands continues today. In *Sequoyah v. Tennessee Valley Authority*, Native Americans unsuccessfully challenged the flooding of an Indian burial site as a result of federal construction of Tellico Dam.<sup>58</sup> In *Badoni v. Higginson*, Native Americans unsuccessfully challenged federal operation of Rainbow Bridge National Monument under the American Indian Religious Freedom Act.<sup>59</sup> In *Wilson v. Block*, Native Americans unsuccessfully sought to halt expansion of ski facilities in the San Francisco Peaks, which are sacred to Hopi and Navajo tribes.<sup>60</sup> In *Crow v. Gullet*, Native Americans unsuccessfully challenged restrictions on Indian access to the Bear Butte State Park in the Black Hills and public desecration of ceremonial sites located there.<sup>61</sup> In *Lyng v. Northwest Indian Cemetery Protective Association*, Native Americans unsuccessfully challenged the construction of a road and the harvesting of timber on religious grounds.<sup>62</sup> In *Apache Survival Coalition v. United States*, Native Americans unsuccessfully challenged the construction of several

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telescopes on Mount Graham in Arizona.<sup>63</sup> In *Native Americans for Enola v. United States Forest Service*, Native Americans unsuccessfully challenged an issue permit allowing the hauling of logs on certain U.S. Forest Service roads on the basis of the NHPA.<sup>64</sup> In *Havasupai Tribe v. United States*, Native Americans unsuccessfully challenged a plan of operations for a uranium mine located in the Kaibab National Forest, near the Grand Canyon National Park.<sup>65</sup>

The facts surrounding the SLT present a similar opportunity to burden Native American cultural and historical land. The SLT will affect Haskell Indians in countless ways. Plans for the SLT indicate it will be a four-lane divided highway that will slice through the middle of the wetlands.<sup>66</sup> During its construction, the SLT will require sixteen acres of wetlands to be filled.<sup>67</sup> One of Haskell's written responses explains the gravity of its impact: "[M]ost importantly, it will destroy our identity and what we represent because of the negative impact on our cultural and spiritual nature."<sup>68</sup>

The SLT will destroy Haskell's place of worship. Even if the proposed berm or noise wall will keep passing traffic from making a spectacle of private ceremonies, tremendous pollution and noise will compromise sacred purification, healing, and prayer ceremonies that must be conducted in solitude.<sup>69</sup> The SLT will forbid the daily prayer and mediation currently practiced on the land today.<sup>70</sup> One Haskell document explains:

Access to sites which are conducive to and appropriate for the practice of Native American cultural and spiritual practices are essential to the survival of Native American cultures. The inherent right of Native American people to protect and care for remnants of the earth which they have always existed upon, is equally critical for our survival.<sup>71</sup>

The SLT's impacts extend far beyond the physical presence of the road, the exhaust emissions, and the traffic noise. As the principal route for traffic to bypass Lawrence, the thoroughfare will open the door to residential and commercial development on Haskell's remaining land.<sup>72</sup> This progress will challenge Haskell's existence as a university.<sup>73</sup> Today, as one of the few universities with wetlands on its campus and the only multi-tribal university in the United States, Haskell serves as a model to tribes across America as an example of survival of Native American spirit, culture and education.<sup>74</sup> But the SLT will demolish the potential for campus growth by physically exploiting the land.<sup>75</sup> By destroying the wetlands, the SLT will threaten Haskell's livelihood by eliminating Haskell's primary sources of external funding for the University's limited budget.<sup>76</sup> Haskell has described the wetlands as "the most valuable instructional facility on our campus."<sup>77</sup> Furthermore, Haskell Indians believe tribal knowledge of plants and fungi is a "fundamental part" of Native American culture.<sup>78</sup> But the SLT will jeopardize Haskell's long-term ecological studies,

baccalaureate programs, and its nationally celebrated outdoor facilities that are used to pass on tribal knowledge of the sciences.<sup>79</sup>

The Native American minority has repeatedly endured these “burdens” of federal land planning, perhaps more than any other minority. American history evidences millions of acres of land ceded by the Native Americans and the continued imposition of federal projects on culturally and historically significant Native American lands today. The Haskell Indians are representative of more than one hundred tribes who have shouldered these burdens. Thus, the SLT illustrates fertile ground for another environmental injustice.

## **V. POTENTIAL SOURCES FOR PROTECTING ENVIRONMENTAL JUSTICE**

Although the Clinton Administration formally recognized environmental justice as a policy goal of the federal government with its 1994 Executive Order, the Order is not judicially enforceable.<sup>80</sup> Section 6-609 of the Order states:

This order is intended only for internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or persons. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.<sup>81</sup>

Because the order is not judicially enforceable, environmental justice claimants have employed other legal tools, such as environmental laws, civil rights laws, property, and constitutional challenges to enforce environmental justice principles.<sup>82</sup> This section will consider two potential sources for protecting environmental justice—the NEPA (National Environmental Policy Act) and the NHPA (National Historic Preservation Act). This section will detail the scope of both sources in regard to culturally and historically significant lands by evaluating their substantive and procedural requirements and their enforceability, and it will then apply such evaluations to the facts of the SLT.

### **A. The National Environmental Policy Act (NEPA)**

In 1969, Congress enacted NEPA to address immense and diverse environmental concerns.<sup>83</sup> In Sections 101 and 102, NEPA purports to provide expansive, substantive goals to address an array of issues, including economic, demographic, ecological, aesthetic, ethical, and other topics in regard to the

environment.<sup>84</sup> Its policy is couched in sweeping language, such as the federal government's objective to "use all practicable means and measures . . . in a manner calculated to . . . create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic and other requirements of present and future generations of Americans . . ." <sup>85</sup> Section 101(b) states that federal agencies should "preserve important historic, cultural, and natural aspects of our national heritage."<sup>86</sup> NEPA directs agencies to maintain "an environment which supports diversity and variety of individual choice."<sup>87</sup> Despite its purported substantive objectives, courts have consistently refused to give legal force to such language and have interpreted NEPA and its implementing regulations as procedural only.<sup>88</sup>

The procedural framework of NEPA is rooted in its two primary goals: requiring federal agencies to take a "hard look" at environmental impacts of government actions, and informing the public of such considerations during the decision-making process.<sup>89</sup> To achieve these goals, NEPA requires federal agencies to formally fulfill this procedural consideration by completing an Environmental Impact Statement (EIS) for any federally funded project "significantly affecting the quality of the human environment . . ." <sup>90</sup>

### **1. Enforceability**

By requiring agencies to formally investigate and consider the environmental effects of their projects, Congress intended to not only influence agencies' substantive decisions, but to inform the public and encourage public participation as a way of effecting substantive change.<sup>91</sup> However, regardless of the environmental considerations a federal agency makes in compliance with NEPA, the agency may give whatever weight it wishes in balancing the costs against the environmental impact, and the agency is free to make any decision, no matter what the consequences might be for the environment.<sup>92</sup>

As the United States Supreme Court succinctly stated, once a federal agency fulfills the EIS requirement, "NEPA requires no more."<sup>93</sup> NEPA does not require the agency to document any plans to mitigate environmental harm, nor does NEPA require mitigating actions be taken at all.<sup>94</sup> The Court stated, "NEPA exists to ensure a process, not a result."<sup>95</sup> Therefore, regardless of the detail the Haskell Indians provide regarding their culture and history, the National Highway Association has fulfilled its NEPA duties once it receives such information. However, NEPA does provide a legal cause of action to individuals to enforce federal agencies' compliance with NEPA's mandated procedure, although the final decision to proceed with the project, once the procedural prerequisites are met, still rests with the federal agency.

## **2. EIS Requirement for Federal Projects on Culturally and Historically Significant Lands**

The NEPA EIS process is implicated by federal projects “significantly affecting the quality of the human environment,” which seems to include federal projects like the SLT.<sup>96</sup> The Council on Environmental Quality (CEQ) has set forth regulations for the implementation and interpretation of NEPA. The CEQ regulations define effects and impacts to include “ecological . . . , aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.”<sup>97</sup> And NEPA’s use of the phrase “human environment” is defined “comprehensively to include the natural and physical environment and *the relationship of people with that environment.*”<sup>98</sup> Thus, a federal project’s consequences on a community’s culture and history would seem to implicate NEPA’s EIS process based on this language.

However, the CEQ expressly stipulates that economic or social effects alone do not mandate the preparation of an EIS.<sup>99</sup> Only when social effects are “interrelated” with the “physical environmental effects” must an EIS “discuss all of these [direct *and indirect*] effects on the human environment.”<sup>100</sup> Accordingly, courts have conditioned the relevancy of social impacts on how removed they are from the direct physical impacts: “To determine whether [NEPA] §102 requires consideration of a particular effect, we must look at the relationship between that effect and the change in the *physical* environment caused by the major federal action at issue . . . .”<sup>101</sup> NEPA’s conditional coverage, dependent on the presence of effects on the physical environment, clearly indicates a hesitancy to recognize the significance of environmental justice issues in their own right. By stipulating that a federal project that imposes negative consequences only on the social environment is not covered by NEPA, the federal government subordinates environmental justice issues to traditional impacts on the physical environment. On the facts of the SLT, the stipulation that social effects must be accompanied by physical effects on the environment in order to necessitate an EIS seems to translate into NEPA’s willingness to cover the federal SLT project by virtue of its physical filling of the wetlands, pollution, and other direct damages to the physical environment, rather than protection of minority cultural and historical interests.

A project “significantly” affects the quality of the human environment if it “may have an effect on” that environment.<sup>102</sup> More specifically, in order to determine if an effect is “significant” under NEPA, the federal agency must consider “both context and intensity.”<sup>103</sup> To evaluate the context, CEQ regulations instruct that:

[T]he significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific

action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.<sup>104</sup>

This detailed acknowledgment that an effect may be significant particularly at a local level tends to affirm environmental justice awareness of diverse cultures and historical areas. Cultural and historical minorities are often defined by their local significance—they are minorities because of the ways their particular cultures and histories can be distinguished from the majority. Thus, the CEQ regulations purport to acknowledge nuances in local culture and history that would not be protected by one uniform, national standard of “significance.”

### **3. The EIS Disclosure Requirements**

Federal projects that significantly affect the human environment necessitate the preparation of an EIS. An EIS mandates various disclosures before the project may proceed. In order to comply with NEPA, the EIS must detail: (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed actions should they be implemented.<sup>105</sup>

Judicial interpretations of the scope of EIS disclosures indicate that an EIS must consider cultural and historical impacts in order to comply with NEPA’s procedural process.<sup>106</sup> In accordance with the NEPA’s broad definition of effects discussed earlier, courts have held that an adequate EIS must discuss both physical impacts on the environment and cultural and historical impacts.<sup>107</sup> Also, the EIS must acknowledge cumulative impacts, including “past, present, and reasonably foreseeable future actions,” and courts have held that this language includes acknowledgment of the possibility of further development of the subject land.<sup>108</sup> Consistent with these requirements, the final SEIS prepared for the SLT discussed various aspects of Haskell’s educational, religious, and historical perceptions of the land.<sup>109</sup>

While cases indicate that an adequate EIS must consider impacts on cultural and historical areas, it is worth noting that judicial review of the adequacy of an EIS often center upon its consideration of more quantifiable, *physical* consequences of a project, due to the more social and subjective nature of cultural and historical inquiries. For example, in *Okanogan Highlands Alliance v. Williams*, the Confederated Tribes of the Colville Reservation challenged an EIS by the United States Forest Service in connection with a proposed gold mine.<sup>110</sup> Pursuant to an 1891 agreement in which

the Colville tribes ceded 1.5 million acres to the government, the Colvilles reserved the exclusive right to hunt and fish.<sup>111</sup> In *Okanogan*, the Colvilles argued that the Forest Service's EIS "failed to give adequate consideration to Colville's reserved hunting and fishing rights . . . by failing to include in the EIS or [Record of Decision] a discussion of the effect of the Project on culture and subsistence, a feature of Colville's reserved rights . . . ." <sup>112</sup> The court concluded that the EIS discussion of Colville's reserved rights was sufficient, stating the EIS addressed Colville's hunting and fishing rights and tribal cultural properties as environmental issues.<sup>113</sup> The court quoted the Forest Service's Record of Decision:

Approximately 2000 acres of hunting and fishing territory will not be available to Tribal members over the life of the project. This is less than 1% of the total acreage of Federal lands available for Tribal hunting within the North Half. The small streams within the project area do not support fish populations. Project effects to the harvest of wildlife and fish by tribal members is not quantifiable; rather the effects to wildlife and fish habitat and stream flows had been disclosed in the FEIS [Final Environmental Impact Statement].<sup>114</sup>

This excerpt reflects the court's narrow perspective, focusing solely on that which is quantifiable and failing to acknowledge the consequences on Native Americans' lifestyle and culture.

## **B. National Historic Protection Act**

The NHPA expressly recognizes its application to cultural and historical properties. The NHPA was enacted "to encourage the preservation and protection of America's historic and cultural resources."<sup>115</sup> The NHPA acknowledges that "the historical and cultural foundations of the nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people."<sup>116</sup> It admits that "in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation . . . ." <sup>117</sup> Not only are nationally significant properties protected by the NHPA, but the NHPA also protects "historical, architectural, or cultural significance at the community, state, or regional level . . . ." <sup>118</sup>

## **1. Enforceability**

Similar to the NEPA, the NHPA is merely procedural.<sup>119</sup> “There is no obligation . . . to actually preserve or mitigate damage to any historic property arising from the statute or regulations.”<sup>120</sup> If a federal agency fails to comply with the NHPA’s procedural mandates, individuals may seek judicial enforcement. But resort to litigation can only yield procedural consideration and delay, while the ultimate decision still rests in the hands of the federal agency.<sup>121</sup> Furthermore, even if an agency intentionally causes significant adverse effects to a historic property, the agency will not definitely be barred from receiving financial assistance, the permit, or whatever aid it was seeking if the agency “determines that circumstances justify granting such assistance despite the adverse effect created or permitted . . . .”<sup>122</sup>

## **2. The NHPA Consultation Process**

As set forth in Section 106, the NHPA consultation process is necessitated by any “federal or federally assisted undertaking” affecting “any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.”<sup>123</sup> The Advisory Council on Historic Preservation (Council) has set forth regulations detailing five steps with which a federal agency planning a “federal undertaking” must comply: (a) identification of consulting parties, (b) identification of historic properties eligible for listing on the National Register, (c) assessing adverse effects, (d) resolving adverse effects, and (e) procedures in the event adverse effects are not resolved.<sup>124</sup> This section of the paper will discuss all five steps of the NHPA’s process, but will primarily focus on the second step, identification of historic properties eligible for listing on the National Register, in the context of culturally and historically significant properties.

### **a. Identification of Consulting Parties**

After determining that a federal agency is embarking on a “federal undertaking,” the NHPA requires that the federal agency determine which parties will be consulted throughout the NHPA process, such as the State Historic Preservation Officer (SHPO), the Advisory Council on Historic Preservation, and Tribal Historic Preservation Officers and governments.<sup>125</sup> Tribal governments and Tribal Historic Preservation Officers may substitute for the role of the SHPO when the subject land is on a reservation.<sup>126</sup> For reservation property, the NHPA requires the agency to “make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organization[s] that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties.”<sup>127</sup>

In accord with environmental justice concerns, the NHPA requires that tribal representatives be consulted even when an undertaking may affect non-reservation property of “religious and cultural significance.”<sup>128</sup> By requiring consultation with tribal figures, the NHPA advances environmental justice goals of increasing public participation of minorities in the federal government’s environmental decisionmaking.

**b. Identification of Historic Properties Eligible for Listing on the National Register**

The NHPA requires consultation with various officials in order to identify potential historic properties. The NHPA mandates that federal agencies consult SHPOs and make a “reasonable and good faith effort to identify historic properties that may be affected by the undertaking and gather sufficient information to evaluate the eligibility of these properties for the National Register.”<sup>129</sup> Relevant to environmental justice, the NHPA’s description of the necessary consultation process uses language to include culturally and historically significant properties within its scope. In addition to consulting with the SHPO, federal agencies must also consult other organizations “likely to have knowledge of or concerns with historic properties in the area,” and must seek information from consulting parties regarding land that may hold religious or cultural significance, which would seem to include Haskell students with interests in the wetlands threatened by the SLT.<sup>130</sup>

As set forth in Section 106, the NHPA covers any “federal or federally assisted undertaking” affecting “any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.”<sup>131</sup> Applying this definition, a federal project on culturally or historically significant land potentially qualifies. The Secretary of the Interior determines eligibility for the National Register using the following criteria:

- 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.<sup>132</sup>

In 1990, the National Park Service's *Bulletin 38* expressly recognized that "Traditional Cultural Properties" (TCPs) are "eligible for inclusion in the National Register because of [their] 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."<sup>133</sup> *Bulletin 38* defines "culture" 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 the nation as a whole."<sup>134</sup> In order to identify historic properties and TCPs, the NHPA requires federal agencies to make a reasonable and good faith effort to identify eligible properties through various means, such as "background research, consultation[s], oral history interviews, sample field investigation[s], and field survey[s]."<sup>135</sup> The NHPA also requires agencies to consult tribes regarding their confidentiality concerns and notify the Council of the tribe's views.<sup>136</sup>

The criteria for eligibility as a TCP clearly supports the tenets of environmental justice. Eligibility as a TCP has given many Native American minorities a legal basis on which they can argue for compliance with the NHPA consultation process, as will be discussed later in this section. For example, the Helkau Historic District in the Six Rivers National Forest of Northern California was eligible "because of its association with significant cultural practices of the Tolowa, Yurok, Karuk, and Hoopa Indian tribes of the area, who have used the district for generations to make medicine and communicate with spirits."<sup>137</sup>

Another example of a TCP is the top 150,000 acres of Mount Shasta in California, which was determined eligible for the National Register as a TCP due to its historical and cultural significance to northern California Indian tribes in 1994.<sup>138</sup> However, Mount Shasta's status as a TCP was subsequently threatened; in response to an avalanche in 1978 on Mount Shasta, local community members mounted pressure on the National Park Service to rebuild skiing facilities on the TCP area, arguing it was a safer part of the mountain.<sup>139</sup> This provoked Representative Wally Herger to sponsor a bill in Congress "purporting to provide that Mount Shasta is not eligible for the National Register and, more generally, that no property can be determined eligible for the National Register unless it contains artifacts or other evidence of human activity."<sup>140</sup> This bill, often called the "Herger Bill," contradicts core concerns of environmental justice by conditioning eligibility on the ability of a minority to proffer physical proof of its culture or history within the land itself. In effect, the Herger Bill would invalidate Native American cultures and histories passed down by oral tradition and evidenced in continued cultural practices today.<sup>141</sup>

It is worth mentioning that application of the TCP criteria often overlaps with the Clinton Administration's 1996 Executive Order 13007 regarding Indian Sacred Sites. TCPs may include sacred sites, defined by the Order as:

Any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of such a site.<sup>142</sup>

While the Executive Order on Indian Sacred Sites is not judicially enforceable, the Order's directive to the executive branch regarding the treatment of sacred sites is reminiscent of environmental justice. In regard to federal lands, the Order requires the executive branch to "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites."<sup>143</sup>

Although this Order seems to qualify properties to which Native Americans attach cultural and historical significance as TCPs, qualification as a sacred site does not automatically guarantee qualification as a TCP. Furthermore, the NHPA "does not offer protection to places because of their sacredness, but rather, because they have enough historic significance to be eligible for the National Register."<sup>144</sup>

The NHPA's coverage of TCPs has caused considerable controversy because of the potential geographic scope such lands might encompass and because of difficulty in identifying the location and eligibility of such properties.<sup>145</sup> As *Bulletin 38* recognizes, "[t]here may be nothing observable to the outsider about a place regarded as sacred by a Native American group."<sup>146</sup> This acknowledgment goes to the heart of environmental justice; to protect a Native American minority from bearing yet another environmental burden on land that is critical to their culture and history, federal agencies must extend protection to lands with human connections that are not easily identified by physical proof, but by the nature of human reverence, celebration, and respect for the land. Because a nonobservable significance is often part of diverse cultures, distinctive from mainstream American culture, *Bulletin 38* clearly comports with environmental justice's protection of minorities. Applied to the facts of the SLT, in order for the Haskell wetlands to qualify as a TCP, a federal agency must look beyond tangible signals of the land's significance. Physically, portions of the Haskell wetlands would appear to be no different than other wetlands areas, with no visual indication of its historic role as a symbol of hope for hundreds of Native Americans who were buried there or its use as a sacred ceremonial ground today.

One of the most cited cases regarding the evaluation of TCP status in the NHPA consultation process is *Pueblo of Sandia v. United States*, which held that “a mere request for information is not necessarily sufficient to constitute the ‘reasonable effort’ section 106 requires.”<sup>147</sup> In the late 1980s and early 1990s, the National Forest Service planned to construct new roads and sanitary facilities, realign existing roads, and expand picnic areas in the Cibola National Forest of New Mexico.<sup>148</sup> The Tenth Circuit reviewed the Forest Service’s NHPA evaluation of whether the Las Huertas Canyon in the Cibola National Forest constituted a TCP due to its religious and cultural significance to the Sandia Pueblo tribe.<sup>149</sup> Originally, the SHPO (State Historic Preservation Officer) concurred with the Service’s finding that no TCPs existed in the Cibola National Forest, but the SHPO later revoked his concurrence upon receiving information that the Forest Service had withheld from the SHPO that suggested TCPs might indeed exist in the forest.<sup>150</sup> Finding the Forest Service’s efforts to evaluate whether the Las Huertas Canyon in the Cibola National Forest qualified as a historic property were “neither reasonable nor in good faith,” the Tenth Circuit held that the Forest Service failed to comply with the NHPA process.<sup>151</sup> The Tenth Circuit reasoned, “[d]etermining what constitutes a reasonable effort to identify traditional cultural properties depends in part on the likelihood that such properties may be present.”<sup>152</sup> Thus, while the Indians did not respond to the Forest Service’s requests with the type of information requested, the Tenth Circuit found that “the information the tribes did communicate to the agency was sufficient to require the Forest Service to engage in further investigations, especially in light of regulations warning that tribes might be hesitant to divulge the type of information sought.”<sup>153</sup>

If a federal agency finds that no historic properties exist on the subject land or that eligible properties will not be affected, the agency must notify the SHPO and other consulting parties; the notified parties then have thirty days to object.<sup>154</sup> If no one objects, the NHPA process is fulfilled.<sup>155</sup> If the agency finds an eligible historic property will be affected, or if one party objects to a finding of no historic properties, the agency must consult the SHPO and other consulting parties to assess the effects of the undertaking and determine the adversity of such effects.<sup>156</sup>

### **c. Assessing Adverse Effects**

To determine whether the undertaking will have an “effect,” an agency must ascertain whether it will alter “characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.”<sup>157</sup> The issue of whether a TCP is affected became relevant in *Morongo Band of Mission Indians v. Federal Aviation Administration*, where the Morongo Band of Mission Indians sought judicial review of the Federal Aviation Administration’s decision to reroute air traffic over its

reservation.<sup>158</sup> Citing *Pueblo of Sandia*, the Morongo Indians argued that the FAA merely requested information and failed to investigate letters from the Morongo tribe, suggesting that religious and cultural sites existed on the reservation.<sup>159</sup> The Ninth Circuit distinguished *Pueblo of Sandia*, reasoning: “[T]he FAA’s conclusion was not based on a finding of no cultural properties in the area, but on the fact that the noise and other studies showed that there would be no impact on any type of property in the project area.”<sup>160</sup> Thus, the failure to identify specific religious or cultural sites or properties was irrelevant.<sup>161</sup>

If an agency finds the undertaking will have an effect on eligible historic properties, it must review the adversity of such an effect.<sup>162</sup> An “adverse effect” is one which “may diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.”<sup>163</sup> The inclusion of diminishment of associations with property as an adverse effect seems to provide some ground for arguments against adverse effects on the cultural and historical aspects of threatened property. This broad definition of “adverse effects” is further expanded by its inclusion of the “introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting.”<sup>164</sup> If the agency finds no adverse effects, it must either obtain the SHPO’s concurrence or submit the finding to the Advisory Council on Historic Preservation for review.<sup>165</sup> If the Council does not respond, the agency may assume it concurs, but after the Council makes a determination, the agency must proceed accordingly.<sup>166</sup>

#### **d. Resolving Adverse Effects**

If the agency finds an undertaking will have an adverse effect, the agency must work with the Council and the SHPO and solicit public comment to try to avoid or mitigate such effects.<sup>167</sup> The agency must then either enter into an agreement (such as a Memorandum of Agreement) with the SHPO regarding “how the effects will be taken into account,” which is submitted to the Council for approval.<sup>168</sup>

#### **e. Procedures upon Failure to Resolve Adverse Effects**

If no agreement with the SHPO can be reached, the agency, SHPO, Tribal Historic Preservation Officer (THPO), or Advisory Council on Historic Preservation may terminate the consultation process. The agency must seek further comment from the Council in order to proceed, after which the agency may decide whatever it likes, so long as any adverse decision is made by the head of the agency and the decision is documented.<sup>169</sup> If the THPO, agency, or Council terminate, the Council will comment, but if the SHPO terminates, the agency and Council may enter into a Memorandum of Agreement.<sup>170</sup> Ultimately, the decision must be made by the head of the agency, who

must prepare a summary of his or her rationale and provide it to consulting parties, although the NHPA imposes no legal obligations as to his or her decision.<sup>171</sup>

## **VI. ENVIRONMENTAL JUSTICE CURRENTLY RECEIVES INADEQUATE PROTECTION**

Under the penumbra of environmental justice, the SLT invokes a complex web of controversial and overlapping issues, including the ecology of the wetlands, the religious beliefs of multiple Native American tribes, an unrecognized history of the wetlands and of Haskell Indian Nations University, and political debates among multiple community groups with clashing viewpoints. This article does not suggest that all of these complex issues can be fully resolved by mere application of the tenets of environmental justice, but argues that the federal government has failed to give its lofty policy objectives pronounced by the Executive Order on environmental justice any legal teeth with which Native American minorities may protect themselves. Although NEPA and the NHPA both pronounce expansive concerns for safeguarding cultural and historical sites, they do not adequately protect environmental justice because both lack substantive force and, therefore, fail to account for inherent barriers of cultural differences that cannot be adequately addressed by NEPA's required disclosures or the NHPA's required consultations.

### **A. The Absence of Substantive Protection**

NEPA and the NHPA both lack substantive legal power. Because both acts leave the final decision with the federal agency proposing the project, neither the NEPA nor the NHPA imposes any legal obligation to actually mitigate adverse effects on the environment. NEPA and the NHPA provide an opportunity for legal opposition only when a federal agency fails to follow prescribed procedures, and even then, opponents achieve delay, at best, as an indirect means of rallying political support for their cause. Thus, until a federal agency missteps, a cultural minority's participation is relegated to educating that federal agency, which has no obligation beyond making the necessary requests and gathering the requisite information, irrespective of the culture or history such information describes.

Procedural laws cannot meet environmental justice goals of equal concern and respect. As one author writes of NEPA, "[F]inal decisions are based on administrative maneuvering and procedural accuracy."<sup>172</sup> In the same way a Civil Rights Act with mere procedural mandates would fail to protect human interests, ties to culturally and historically important lands threatened by federal projects are legally defenseless with mandated procedural inquiries.

Applied to the facts of the Haskell Wetlands and SLT, NEPA and the NHPA's lack of substantive force is poignant. The two most comprehensive laws designed to protect the environment—NEPA and the NHPA—offered no substantive forum for Haskell opponents to the SLT. Opponents had no choice but to wait—and hope—for a procedural error, upon which they later based their claim. Despite the Tenth Circuit's ruling that the SLT could not circumvent compliance with NEPA's Environmental Impact Statement process by defederalizing, the final Supplemental Environmental Impact Statement was completed in 2000, and discussions of completing the SLT continue.

**B. The Inadequacy of Disclosures and Consultation to Overcome Cultural Differences**

When a federal agency plans a project that will burden a land culturally or historically significant to a minority such as the Haskell Indians, procedural disclosures and procedural consultations fail to address complex issues of racial, religious, and cultural diversity. Similar to the notions of environmental racism within the environmental justice movement, a cultural minority is most often viewed through the lens of the cultural majority, inevitably raising issues of cultural bias, or favoritism, as the federal decisionmaker is most often immersed in mainstream American culture. As one environmental justice scholar writes, there is an “often unacknowledged role of whiteness in environmental law and policy.”<sup>173</sup> This is not to say federal decisionmakers intentionally discriminate against cultural minorities whenever a federal agency locates a project on a minority's culturally or historically significant land. But the procedural forum in which NEPA and the NHPA currently protects environmental justice provides no safeguard against differing cultural values between the decisionmaker and the minority bearing the burden. NEPA and the NHPA may effectively prevent decisionmakers from failing to acknowledge cultural and historical impacts, but they fail to empower interested minorities with any legal, substantive leverage against competing considerations, such as economic and financial justifications.

Procedural disclosures and consultations are also insufficient means of promoting the “equal concern and respect” that environmental justice seeks. Cultural and historical inquiries require cultural minorities to put the significance of their spirituality or history into words. While it is not unreasonable to require minorities to defend their position, such a textual representation of a minority culture or history inevitably faces disadvantages due to its profound nature and issues of confidentiality. These barriers in communicating the meaning of a minority's culture or history are crucial when disclosures and consultation are a minority group's only means of protecting itself.

The facts of the SLT are illustrative. In response to the Federal Highway Administration's request for data to complete the EIS, Haskell compiled a booklet of more than one hundred pages detailing the history of the Haskell campus and its spiritual ties to the land.<sup>174</sup> However, halfway through the booklet, the text confronts the inherent obstacles of privacy and transcultural misunderstanding: "We will not and cannot share with others the details of our sacred ceremonial lives as the First Americans. Not only has the last 502 years of history taught us to be wary of sharing, but in our very diverse spiritual traditions, there is no practice of religious evangelizing and proselytizing."<sup>175</sup> It continues, attempting to "explain why we as the First Americans approach the issue of trafficways from a fundamentally different world view than persons shaped by the traditions of Western Civilization . . . ."<sup>176</sup> One Haskell student was quoted in the local newspaper, saying, "Haskell is a place of great tragedy for the Indian people . . . . It's a place where rape and genocide of the culture were institutionalized and made manifest . . . . And it's a place that's rich and ripe with the flavors of our heritage and of our past. You can't mitigate that, and unless you are willing to immerse yourself within the culture, you can't understand it either."<sup>177</sup>

Procedural requirements do not generate concern and respect for minority cultures such as the Haskell Indians, but instead, they only protect environmental justice to the degree federal decisionmakers *already have* such a concern and respect for the minority culture. In regard to the SLT, differing cultural values between federal authorities and Native American minorities were not remedied by disclosures and consultations, although the conflict between such values became increasingly clear. In reference to the South Lawrence Trafficway, a local newspaper paraphrased what a Kansas Department of Transportation official told Haskell's Board of Regents: "any burial remains discovered during the trafficway's construction would be relocated with the utmost care and concern."<sup>178</sup>

## VII. CONCLUSION

Based on NEPA and the NHPA's professed policies and procedures, which require federal agencies to give pause for cultural and historical considerations, it would seem NEPA and the NHPA would provide a legal tool of protection for environmental justice concerns of cultural and historical minorities, such as the Haskell Indians. However, the lack of substantive legal power offered by NEPA and the NHPA inadequately protects environmental justice by leaving cultural and historical minorities legally powerless as federal agencies make final decisions about land planning. Furthermore, the procedural requirements of NEPA and the NHPA do not address the cultural differences that necessarily pervade decisions frequently made by members of the mainstream culture. The federal government must empower its

environmental justice objectives with substantive laws in order to protect minority cultures, such as Haskell's, from becoming extinct.

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**Notes**

1. John Borrows, *Living Between Water and Rocks: First Nations, Environmental Planning and Democracy*, 47 U. TORONTO L.J. 417, 457 (1997) (referring to the environmental principles of the indigenous Anishinabe First Nation).
2. Dr. Charles Haines, For the Benefit of the Service—Indian Child Labor Schools 1 (Feb. 19, 2000) (unpublished manuscript, on file with author). See also HASKELL INDIAN NATIONS UNIVERSITY, RESPONSE TO THE 31<sup>ST</sup> STREET ALIGNMENT, SOUTH LAWRENCE TRAFFICWAY, LAWRENCE, KANSAS 25 (1994) [hereinafter HASKELL].
3. HASKELL, *supra* note 2, at 27.
4. *Id.* at 28.
5. *Id.* at 31; Haines, *supra* note 2, at 16.
6. HASKELL, *supra* note 2, at 40.
7. *Id.* at 40-41.
8. *Id.* at 40.
9. Haskell and the South Lawrence Trafficway Facts 2 (unpublished manuscript, on file with the Lawrence Public Library in Lawrence, Kansas) [hereinafter Haskell and the SLT Facts].
10. HASKELL, *supra* note 2, at 26-27; Haines, *supra* note 2, at 1-2.
11. Haines, *supra* note 2, at 3.
12. HASKELL, *supra* note 2, at 20-22.
13. Haines, *supra* note 2, at 4.
14. *Id.* at 4.
15. *Id.* at 5.
16. Haskell and the SLT Facts, *supra* note 9, at 1.
17. HASKELL, *supra* note 2, at 62.
18. *Id.* at 10.
19. *Id.* at 56.
20. *Id.* at 41.
21. *Id.* at 7.
22. *Ross v. Fed. Highway. Admin.*, 972 F. Supp. 552, 555 (D. Kan. 1997); *Ross v. Fed. Highway Admin.*, 162 F.3d 1046, 1049 (10th Cir. 1998); Haskell and the SLT Facts, *supra* note 9, at 5.
23. *Ross*, 162 F.3d at 1048.
24. *Id.*
25. *Ross*, 972 F. Supp. at 556.
26. *Ross*, 162 F.3d at 1049; Haskell and the SLT Facts, *supra* note 9, at 6.
27. *Ross*, 162 F.3d at 1049-50. The Haskell Board of Regents passed a resolution opposing the SLT, provoking the county and KDOT to suspend construction. *Id.* at 1049.
28. *Id.* at 1050. The Final SEIS was completed in February of 2000. See UNITED STATES DEPARTMENT OF TRANSPORTATION FEDERAL HIGHWAY ADMINISTRATION, ET AL., SOUTH

- LAWRENCE TRAFFICWAY, PROJECT 10-23K-3359-13, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (2000) [hereinafter FINAL SEIS].
29. *Ross*, 162 F.3d at 1050.
  30. *Id.* at 1055.
  31. Mark Fagan, *Trafficway Arguments Aired*, LAWRENCE JOURNAL-WORLD, Sept. 13, 2002, at <http://www.ljworld.com/section/slt/storypr/105841>.
  32. *Id.*
  33. Mark Fagan, *KDOT Eyes Land Purchases for SLT*, LAWRENCE JOURNAL-WORLD, Sept. 13, 2002, at <http://www.ljworld.com/section/slt/storypr/105408>.
  34. Bob Martin, *Environment, Culture Argue Against Bypass*, LAWRENCE JOURNAL-WORLD, Feb. 27, 1994.
  35. WEBSTER'S NEW COLLEGIATE DICTIONARY 378 (1979).
  36. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).
  37. Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221, 227-28 (1997).
  38. *Id.* at 226-27.
  39. *Id.* at 231-32.
  40. *Id.* at 229-30.
  41. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).
  42. Kaswan, *supra* note 37, at 230-34.
  43. Stacy J. Silveira, *The American Environmental Movement: Surviving Through Diversity*, 28 B.C. ENVTL. AFF. L. REV. 497, 515 (2001).
  44. *Id.* PCB, or polychlorinated biphenyl, is an environmental pollutant harmful to animals. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4<sup>th</sup> ed.), at <http://dictionary.reference.com>.
  45. *Id.*
  46. Samantha P. Fairchild, *Environmental Justice: An Overview*, 18 TEMP. ENVTL. L. & TECH. J. 111, 115 (2000).
  47. *Id.*
  48. *Id.* at 113.
  49. The First National People of Color Environmental Leadership Summit, Principles of Environmental Justice Preamble, at <http://www.summit2.org>.
  50. *Id.*
  51. *Id.*
  52. U.S. Environmental Protection Agency, Office of Enforcement and Compliance Assurance, *Environmental Justice*, available at <http://www.epa.gov/compliance/environmentaljustice/index.html>.
  53. Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 289-90 (1995) (quoting Robert D. Bullard, *Environmental Equity: Examining the Evidence of Environmental Racism*, LAND USE F. at 6 (Winter 1993)).
  54. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).
  55. HASKELL, *supra* note 2, at 68.
  56. Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. at 7629.
  57. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941).
  58. *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980).
  59. *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980).

60. Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983).
61. Crow v. Gullet, 541 F. Supp. 785 (D. S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.1983).
62. Lyng v. Northwest Indian Cemetary Protective Ass'n, 485 U.S. 439 (1988).
63. Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994).
64. Native Am. for Enola v. United States Forest Serv., 832 F. Supp. 297 (D. Or. 1993).
65. The Havasupai Tribe v. United States, 752 F. Supp. 1471 (D. Ariz. 1990).
66. FINAL SEIS, *supra* note 28, at S-1.
67. FINAL SEIS, *supra* note 28, at 4-9.
68. HASKELL, *supra* note 2, at 70.
69. *Id.* at 41, 51.
70. *Id.*
71. *Id.* at 51.
72. *Id.* at 70. Specifically, Haskell foresees the need for sewage treatment plants and other accommodations as Lawrence grows southward. *Id.*
73. *Id.* at 62.
74. *Id.* at 56, 63.
75. *Id.* at 63.
76. *Id.*
77. *Id.* at 60.
78. *Id.* at 56.
79. *Id.* at 63.
80. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).
81. Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. at 7632.
82. Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?* 27 B.C. ENVTL. AFF. L. REV. 631, 632 (2000).
83. Lynton K. Caldwell, *Beyond NEPA: Future Significance of the Nat'l Env'tl. Policy Act*, 22 HARV. ENVTL. L. REV. 203, 203 (1998).
84. Lawrence Gerschwer, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996, 1000 (1993).
85. 42 U.S.C. § 4331(a) (1994).
86. 42 U.S.C. § 4331(b)(4) (1994).
87. *Id.*
88. Oliver A. Houck, Book Note, *Is That All? A Review of the National Environmental Policy Act, An Agenda for the Future*, By Lynton Keith Caldwell, 11 DUKE ENVTL. L. & POL'Y F. 173, 180, 184. *See, e.g.*, Stryker's Bay Neighborhood Council v. Karlan, 444 U.S. 223 (1980).
89. Baltimore Gas & Elec. v. N.R.D.S., 462 U.S. 87 (1983); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). For cases discussing the "hard look" requirement, *see, e.g.*, Louisiana v. Lee, 635 F. Supp. 1107, 1116 (E.D. La. 1986); Fritiofson v. Alexander, 772 F.2d 1225, 1248 (5th Cir. 1985); Env'tl. Def. Fund v. Marsh, 651 F.2d 983, 993-95 (5th Cir. 1981).
90. 42 U.S.C. § 4332(2)(C) (1994).
91. Gerschwer, *supra* note 84, at 1005.
92. Matthew Lindstrom, Ph.D., *Procedures without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. LAND RESOURCES & ENVTL. L. 245, 259 (2000). *But see* Harvey Bartlett, *Is NEPA Substantive Review Extinct, or Merely Hibernating?* 13 TUL. ENVTL. L.J. 411, 432 (Summer 2000).
93. Stryker's Bay Neighborhood Council v. Karlan, 444 U.S. 223, 228 (1980).

94. *See, e.g.*, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 353 (1989).
95. Morongo Band of Mission Indians v. Federal Aviation Admin., 161 F.3d 569, 575 (9th Cir. 1998).
96. 42 U.S.C. § 4332(2)(C) (1994).
97. 40 C.F.R. § 1508.8(b) (2001). “Effects” include direct effects, “which are caused by the action and occur at the same time and place” and also include indirect effects, “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* Accordingly, 40 C.F.R. 1508(b) lists the cultural and social effects, relevant to this article, as indirect effects. *Id.*
98. 40 C.F.R. § 1508.14 (2001) (emphasis added).
99. *Id.*
100. 40 C.F.R. § 1508.14 (2001).
101. *See, e.g.*, Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 773 (1983) (emphasis added).
102. 40 C.F.R. § 1508.3 (2001).
103. 40 C.F.R. § 1508.27 (2001).
104. *Id.* In application of the CEQ’s definition of “significantly affecting,” some courts have interpreted the meaning of “significantly” to include those effects that are “highly controversial,” but have indicated that mere opposition does not necessitate an EIS. *See Orangetown v. Gorsuch*, 718 F.2d 29, 39 (2d Cir. 1983).
105. 42 U.S.C. § 4332(2)(C) (1994).
106. *See, e.g.*, Havasupai Tribe v. United States, 752 F. Supp. 1471, 1493 (D. Ariz. 1990).
107. *Id.* *See, e.g.*, Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1430 n.3 (D.C. Cal. 1985) (upholding the plain language of the NEPA requiring consideration of cultural and historical impacts).
108. 40 C.F.R. § 1508.7 (2001); Colorado River Indian Tribes, 605 F. Supp. at 1433.
109. *See* FINAL SEIS, *supra* note 28.
110. Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 470 (2000).
111. *Id.* at 478.
112. *Id.* at 479.
113. *Id.*
114. *Id.*
115. Indiana Coal Council, Inc. v. Lujan, 774 F. Supp. 1385, 1387 (D. D.C. 1991).
116. 16 U.S.C. § 470(b) (1994).
117. 16 U.S.C. § 470(c) (1994).
118. WATCH v. Harris, 603 F.2d 310, 321 (2d Cir. 1979) (quoting H.R. Rep. No. 1916 (1966), reprinted in 1966 U.S.C.C.A.N. 3307, 3309).
119. *See, e.g.*, Walter E. Stern, *Effects of Historic and Cultural Resources and Indian Religious Freedom on Public Lands Development: A Practical Primer*, 35 NAT. RESOURCES J. 133, 138-39 (1995).
120. *Id.* at 153.
121. *Id.* at 139-40.
122. 16 U.S.C. § 470h-2(k) (1994).
123. 16 U.S.C. § 470f (1994).
124. 36 C.F.R. §§ 800.3 – 800.7 (2001). *See also* Sandra B. Zellmer, *Preservation of American Indian Cultural Resources on Public Land*, SF56 ALI-ABA CONTINUING LEGAL EDUCATION 151, 159-62 (2001).
125. 36 C.F.R. § 800.3 (2001).

126. *Id.* at § 800.2(c)(2) (2001).
127. *Id.* at § 800.3(f)(2) (2001).
128. *Id.* at § 470(a)(d)(6)(A) (1994).
129. *Id.* at § 800.4(b) (2001).
130. *Id.* at § 800.4(a)(4) (2001).
131. 16 U.S.C §470f (1994).
132. 36 C.F.R § 60.4 (2001).
133. PATRICIA L. PARKER & THOMAS F. KING, NATIONAL PARK SERVICE, NATIONAL REGISTER BULLETIN 38, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES, at 1 (1990) [hereinafter BULLETIN 38].
134. *Id.*
135. 36 C.F.R. § 800.4(b)(1) (2001). *See, e.g.*, Pueblo of Sandia v. United States, 50 F.3d 856, 860-62 (10th Cir. 1995); Hoonah Indian Ass'n v. Morrison, 170 F.3d 1223 (9th Cir. 1999).
136. 36 C.F.R. § 800.11(c) (2001).
137. BULLETIN 38, *supra* note 133, at 7.
138. Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 174 (1996).
139. *Id.*
140. *Id.* *See* 141 Cong. Rec. H325 (daily ed. Jan. 18, 1995) (statement of Rep. Herger sponsoring H.R. 563).
141. Suagee, *supra* note 138, at 174.
142. Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).
143. *Id.* at § 1(a).
144. Suagee, *supra* note 138, at 172.
145. Sandra B. Zellmer, *The Protection of Cultural Resources on Public Lands: Federal Statutes and Regulations*, 31 ENVTL. LAW REP. 10689, 4 (2001).
146. BULLETIN 38, *supra* note 133, at 11-12.
147. Pueblo of Sandia v. United States, 50 F.3d 856, 860 (10th Cir. 1995).
148. *Id.* at 857-58.
149. *Id.* at 858.
150. *Id.* at 858-59.
151. *Id.* at 857.
152. *Id.* at 861 (quoting BULLETIN 38, *supra* note 133).
153. *Id.* at 860.
154. 36 C.F.R § 800.4(d)(1) (1993).
155. *Id.*
156. *Id.* at § 800.4(d)(2) (2001).
157. *Id.* at § 800.16(i) (2001).
158. Morongo Band of Mission Indians v. Fed. Aviation Admin., 161 F.3d 569 (9th Cir. 1998).
159. *Id.* at 582.
160. *Id.*
161. *Id.*
162. 36 C.F.R. § 800.5(a) (2001).
163. *Id.* at § 800.5(a)(1) (2001).
164. *Id.* at § 800.5(a)(2)(v) (2001).
165. *Id.* at § 800.5(e)(2)(i) (2001).166.
166. 36 C.F.R. § 800.5(c)(3) (2001).

167. *Id.* at §§ 800.5(d)(2) – 800.6 (2001).
168. *Id.* at § 800.6 (2001).
169. *Id.* at § 800.7 (2001).
170. *Id.*
171. *Id.*
172. Roger Nober, *Federal Highways and Environmental Litigation: Toward a Theory of Public Choice and Administrative Reaction*, 27 HARV. J. LEGIS. 229, 276 (1990).
173. Eric K. Yamamoto, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 312 (2001).
174. HASKELL, *supra* note 2.
175. *Id.* at 37.
176. *Id.* at 37-38.
177. Dave Ranney, *SLT Pits Commerce Against Culture*, Lawrence Journal-World, Oct. 13, 1999, at A1.
178. *Id.*