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AN IMPLEMENTATION ANALYSIS OF THE U. S. DEPARTMENT OF ENERGY'S
AMERICAN INDIAN POLICY AS PART OF ITS ENVIRONMENTAL
RESTORATION AND WASTE MANAGEMENT MISSION

by

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ABSTRACT

THE U. S. DEPARTMENT OF ENERGY'S AMERICAN INDIAN POLICY AS PART OF ITS ENVIRONMENTAL RESTORATION AND WASTE MANAGEMENT MISSION

This thesis examines the implementation of a working relationship between the Nez Perce Tribe and the U.S. Department of Energy's Office of Environmental Restoration and Waste Management at the Hanford reservation. It examines the relationship using a qualitative methodology and three generations of policy analysis literature to gain a clear understanding of the the potential for successful implementation.

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Chapter 1

Introduction to the Department of Energy's Environmental Restoration and Waste Management Mission

Introduction

The U.S. Department of Energy's (DOE) environmental cleanup mission is probably the most complex and ambitious of such efforts in the history of the United States. After decades of nuclear weapons production, the DOE is coming to terms with the environmental legacy of the Cold War. The Department's defense productions mission required that it operate under a bureaucratic culture of secrecy for national security reasons. It is quite understandable, then, that federal and contract employees, trained to operate in this mode of secrecy find it difficult to change their mode of operations to embrace public involvement in DOE activities. This chapter will examine the defense productions legacy, i.e the scope of DOE cleanup operations, specifically the task of implementing culture change within the Department at former weapons production operations offices like the Hanford reservation. Included in the explanation of the physical scope work required to remediate, restore, manage hazardous and nuclear wastes, and transition facilities into other uses of I will examine the significance of culture change DOE is attempting to implement. In particular, the following chapters will focus on the

DOE American Indian Policy as part of that larger mission of democratizing the environmental restoration and waste management effort at DOE's federal facilities.

Throughout the thesis it will be important to keep in mind the specific questions I am trying to answer, namely: how can we better inform policy makers about involving Indian Nations in environmental cleanup? Can examining the implementation of the U.S. Department of Energy's American Indian Policy under the conceptual frameworks offered by policy analysis literature provide us lessons about democratization of necessarily technical and managerially complex programs? What are these lessons? Did the decisionmakers who developed the DOE American Indian Policy adequately take implementation realities into account? Can implementing an Indian policy provide any unique problems or solutions to environmental cleanup programs?

However, before moving on to these questions, it is necessary to introduce the scope of environmental restoration and waste management work required to address the legacy left by the Cold War and DOE's nuclear weapons complex. This introductory chapter will examine the difficulty of managing the DOE federal cleanup program to reduce human and environmental health risks in a timely and efficient manner. It will be necessary, however, to limit this examination to an introduction of the thesis work in Tribal involvement.

DOE's Nuclear Weapons Complex

The weapons complex nuclear and hazardous waste cleanup is managed by the Office of Environmental Restoration and Waste Management (EM). The weapons complex refers to all DOE installations involved in "nuclear energy or weapons research and production" (EM, 1994). This activity "resulted in radioactive, hazardous and mixed waste contamination" (EM, 1994). The current U.S. stockpile of weapons-grade plutonium is estimated at 14,000 tons (Dennis DeFord, 1993).

Nuclear materials were created by mining uranium 238 (U238) in the Southwest and West. This U238 was then chemically separated at other locations (at gaseous diffusion plants), making it U235. U235 is capable of reaching critical mass and sustaining a controllable nuclear chain reaction (the fundamental process in a nuclear reactor). The U235 was then shipped to other parts of the country to be used in federal government nuclear reactors whose sole purpose was to create weapons-grade plutonium. Hanford had nine nuclear reactors operating at the same time. Hanford, WA and Savannah River, SC were the primary sites creating weapons-grade plutonium. Other plants, such as Mound, OH were creating high-explosives to be used as triggers for the warheads. The weapons-grade plutonium and high-explosives were combined into warheads at Rocky Flats, CO. The warhead assemblies were sent to Pantex, TX where they were fitted onto Department of Defense delivery systems, i.e. rockets (Richard Aiken, 1992). The weapons complex was managed by the Office of Defense Production (DP). As the Cold War fizzled and

the environmental degradation created at this massive complex was uncovered, a large portion of DP facilities were transferred to EM for environmental restoration and waste management.

The weapons complex cleanup effort also includes the dismantling of nuclear warheads. The Department of Defense removes the warheads from its missiles, and delivers the warheads to the facility at Pantex, TX. The triggers and fissionable material is separated and transferred back to its originating facility (Richard Aiken, 1992).

Currently EM "is responsible for identifying and reducing risks and managing waste at 137 sites in 34 States and territories" (EM, 1994). "Portions of more than 3,300 square miles of land managed by the Department contain contaminated surface or groundwater, soil, and structures. The number of sites continues to grow as facilities are transferred to be cleaned up and closed down" (EM, 1994). Hanford is by far the largest physical piece of the EM mission. The Hanford reservation covers approximately 560 square miles. Three hundred square miles of that has groundwater nuclear and hazardous materials contamination (Kevin Clarke, 1992). Hanford also has 176 one million-gallon, single-shell tanks whose contents are unknown. The combination of known releases and storage places EM in the position of trying to integrate the RCRA and CERCLA processes. The U.S. EPA and the Washington State Department of Ecology regulate the DOE cleanup at Hanford.

DOE's Cleanup Mission

The United States Federal Government believed, since the creation of nuclear weapons, with their vast destructive capacity that the weapons grade plutonium and uranium should be under the jurisdiction of an agency other than the Department of Defense. The DOE is a civilian, Cabinet-level Department, however their mission, was largely one of secrecy and top-level security. As the DOE mission changed, its performance had to be measured by a new standard. The standards for policy legitimacy in nuclear weapons production are different from those in environmental cleanup. Consequently, more interests must be taken into account. What started as a trickle of stakeholder input, under the NWPA, is now a full fledged public involvement program. Managing this effort, controlling costs, while facilitating input and considering the public's policy directions is new ground for DOE.

Introduction to Cost-Effective Management

The management of the DOE Environmental Restoration and Waste Management program is ripe with opportunity for cost improvements and greater accountability (EM Two Day Standdown, 1994). The cost estimates for the cleanup effort at Hanford is estimated to be \$300 billion over lifetime of the 40 year Tri-Party Agreement. The Office of Environmental Restoration and Waste Management

oversees the operations contract currently held by the Westinghouse Hanford

Company, an annual \$300 million effort. EM is currently seeking ways to

improve its contract management practices, economic incentives for competition,

and improved transferability of technological innovations (EM Two Day

Standdown, 1994).

Contract management practices

Contractor incentives for cost effectiveness are targeted as a major area of

improvement. Suggestions for contract improvement include the assigning all

management and operations activities to one major contractor, who is then able to

subcontract the portions of the overall contract, but remains accountable for their

actions. Cost control is also an area targeted for improvement. Controlling cost can

be accomplished in large part by 1) imposing hiring freezes and reductions in

administrative support activities, and 2) making the main contractor pay for

schedule and cost overruns. If the Department is fined for missing a milestone due

to contractor non-compliance, past practices would have passed the cost on to the

taxpayer via the DOE budget, leaving little incentive for contractor compliance.

Today, the cost for missed milestones is carried by the contractor.

Economic incentives for competition

The addition of more companies vying for competitive bids in areas of technology development might lead to swifter and less costly solutions to contamination problems. This topic is gaining momentum as the pressure builds to find "better, faster, and cheaper" environmental remediation and restoration solutions. At Hanford the idea of creating incentives for greater competition, a streamlined regulatory framework, and simplified procurement procedures has most recently been the focus of the Hanford Summit II.

The first Hanford Summit was hosted by the State of Washington and the Department of Energy to discuss cleanup issues. At that Summit the Secretary of Energy made specific commitments to various interested parties. One of them was to return to report on the progress the Department made during the following six months. The Hanford Summit II Steering Committee is recommending the creation of a demonstration zone whose major focus is streamlined regulation and procurement procedures that act as incentives for business/technology demonstrations (Hanford Summit II Steering Committee, 1994).

Technology transfer

Technology transfer is closely linked to technology development. Companies developing technology to clean up Hanford are not looking solely at Hanford's problems. Those companies involved in technology development must also strive to make their innovations applicable to cleanup activities at other sites as well. Improving the transferability of technological developments increases the incentives for companies to enter the global market in environmental remediation, restoration, and waste management. While the benefits of this may not be felt immediately, it is commonly assumed that it will help lower the costs of cleanup activities and improve the U.S. economy in the long run.

Regulatory Costs

Critics of the high cost of cleanup at Hanford site duplicative and therefore unnecessarily burdensome regulation as part of the problem. The U.S. DOE, the U.S. EPA, and the Washington State Department of Ecology have negotiated the Federal Facilities Compliance and Consent Agreement (Tri-Party Agreement or TPA) to relieve some of this regulatory burden. The TPA covers costs, deadlines for deliverables, and respective roles of the three signatory, regulatory authorities. The costs to the State of Washington for overseeing and participating in this effort are 100% reimbursable by DOE. In an effort to integrate the regulatory requirements of RCRA and CERCLA, EM offers its RCRA/CERCLA Integration Workshop. This

workshop is one in a series aimed at finding areas where the processes can be performed to the satisfaction of both sets of regulations in one fell swoop. For example, when conducting the CERCLA remedial investigation/feasibility study portion of a site cleanup, it is important to keep the RCRA data needs in mind and plan to do these similar information gathering activities in the same project. The cost of setting up to perform one of these investigations and then removing equipment from the site, only to come back and set up again to satisfy another requirement and remove the equipment a second time is enormously expensive (RCRA/CERCLA Workshop, 1993).

EM is also in favor of reducing the role of the middleman. For example, the cost of performing a cultural resources assessment on Hanford was earmarked at \$500,000 (M. Fernandez, 1994). This money originally intended to go to Argonne National Laboratory, who would then gather and manage the expertise to perform the assessment. EM Assistant Secretary, Grumbly, stopped that transfer of funds because he felt that the cultural resource management assessment could be performed more cost effectively, if the activity was contracted directly to the affected Tribes. Instead of having Argonne contract experts who would survey the affected Tribes about their needs and past practices, and thus allow only peripheral Tribal involvement and financial benefit from the activity. The dollars are going directly to the affected Tribes, thus removing two layers of management from the picture while allowing Tribes to perform the task rather than have their role relegated to consultant.

The two cases of delegating and funding lead roles in certain tasks, as seen in the TPA and cultural resource management, to affected parties is a way of not only including stakeholder interests but also of increasing cost effectiveness. The affected governments are directly accountable to their constituencies and, therefore might have a greater incentive to perform actual cleanup, where past contract management removed contractors from paying costs of fines for missed milestones.

Stakeholder Involvement

Environmental restoration has been placed, properly I believe, in the realm of public decisionmaking. As a matter of environmental justice, it is important to balance the financial cost of remediation, risk of exposure, and public aspirations for present and future generations. Citizen groups affected by the environmental degradation, have organized to interject their interests in the technically difficult, and consequently costly, cleanup effort. The Department of Energy recognizes individual citizens, citizen groups, Tribal governments, State governments, local governments, labor interests, and professional organizations with affected constituencies as "stakeholders" (DOE Public Involvement Plan, 1993)

A substantial mass of policy analysis literature is devoted to the effectiveness of such groups, and their roles in the environmental restoration process. I therefore find it necessary to limit my use of such material. While I will continue to cite references where necessary, I will employ the "three generations" approach of policy analysis

offered by Nakamura, Church, and Cooper to examine the case of Tribal involvement at Hanford, in Chapter 2.

One such case was studied by Nakamura, Church, and Cooper, where the State of New York attempted to implement Alternative Dispute Resolution (ADR) in the cases of CERCLA, NPL sites (Nakamura, Church, and Cooper, 1991). The authors state that the New York State Attorney General's Office believed that ADR would produce results at a lower cost than litigation of Potential Responsible Parties (PRPs). Believing that by simply deciding to introduce ADR (which process was never clearly defined) would result in reduced costs and less effort the NY Attorney General's Office failed to apply the necessary effort to get the PRPs to the table. The PRPs were not satisfied that if they came forward, their costs would be reduced, and may be, in fact, increased because they were identified while others remained hidden. Nakamura, Church, and Cooper found that: 1) the incentive structure for PRPs and the State of New York to come to the ADR process was flawed, 2) the "fixers" identified to facilitate the ADR process were poorly chosen, 3) second generation approaches to the study of policy implementation or the "top-down approaches would have anticipated difficulties for ADR in New York", and 4) the "third generation" approach could have helped implementation by changing the relationships of the parties involved, allowing them to at least agree to develop the new systems of an appropriate ADR mechanism.

Similar to the case studied by Nakamura, Church, and Cooper where they examined the policy choice of Alternative Dispute Resolution (ADR) in New York State's attempt to cleanup of hazardous waste sites, the Department of Energy has attempted to include stakeholders in its cleanup mission. In this case however, it is not the regulator implementing the policy choice of ADR, its is the regulated. Bringing stakeholders to the table in this case was, intially, like calling the hogs for dinner. The main stumbling block to entering into some form of ADR with EM was its reluctance to be carved up and served for dinner. This lack of confidence in the stakeholders, in its own ability to manage costs, combined with EM's own bureacratic inertia kept it from taking a more proactive approach to stakeholder involvement. Indeed, the stakeholders, themselves were anxious to rush in and uncover hidden secrets of DOE's agenda and management practices. EM's strategy to open its planning and budgeting processes to stakeholder participation began with an old system of relationships, but has since matured somewhat. A period of getting to know and trust each other began and has continued to this day. The change in administrations has also served to open up the Department, and declare itself the responsible party. The responsible party, as such, is willing and able to redress its legacy, however, as everyone in this era of government belt-tightening knows, costs must be kept down and progress must be demonstrated. Stakeholders are aware of this, and both sides are striving to develop innovative ways to make the money go further. EM is clearly beginning to work with its stakeholders to develop a new system of relationships. As we will see in the introduction of DOE's stakeholder involvement effort, it would seem in the best interest of all parties to enter into this

form of ADR.

EM's Reasons for Entering into an ADR-type Management Style

Until as recently as 1989 the DOE weapons complex was considered exempt from all national environmental laws for national defense reasons. Stakeholder involvement in DOE activities was considered taboo. A major challenge of complying with environmental legislation was creating opportunities for stakeholder involvement in a bureaucracy instilled with a culture of secrecy and public exclusion and even suspicion of public motives. This old system of management was often cited as an obstacle to cleanup. EM is clearly aware of its own public image, and has experienced difficulty in getting the "old culture" to fade. The fact that EM was proposing a systems change and ADR-style process of involvement is both evidence of its recognition of its credibility problem and its chosen solution.

Mending its Credibility Problems

In examining the implementation of the DOE American Indian Policy, we must understand this phase of stakeholder involvement in a wider implementation environment. The Department of Energy is attempting to cleanup its federal facilities and mend its credibility problem in doing so. Not to mend its damaged credibility is seen as a serious impediment to meeting cleanup time schedules and budget projections. The likelihood of these set-backs can be seen in past DOE

failures to site nuclear waste repositories at West Valley, NY; Lyons, KS (Seley, 1983). Numerous scholars have conducted research about the motives and technical competence of local citizens opposed to waste sites in their "backyards" (Brion, 1991; Kraft, 1992; Kraft and Clary, 1991; Kunreuther, Easterling, Desvousges, and Slovic, 1990; Seley, 1983). A major criticism of DOE's credibility is in regard to its management and long-term commitment to maintaining the waste facilities. In Seley's review of the politics of public facility planning he outlined the argument dialogue about DOE's credibility. Some of the major issues include:

The OTA (Office of Technology Assessment) underlines this impression: "Justified or not, there is the perception by States and others that the Federal Government cannot be counted on to keep its word on waste management matters, that it may not even mean what it says, and that, in general, it cannot be trusted."

They do agree with Abrams and Primack, however, that "it is the failure to address these kinds of issues, not just the strictly technical ones that has undermined much of the credibility of the waste management program." More directly to the Abrams and Primack proposal (to develop a critical-review-and-public-assessment model to incorporate more viewpoints into the waste repository siting process), the OTA points out that "history suggests that the normal Federal budget process may not assure the adequate and stable long-term funding needed to enable timely development of final isolation facilities (Seley, 1983).

These are concerns shared by Indian Nations who are involved in the Monitored Retrievable Storage program. For instance, if a high-level waste repository is not opened, will the host Indian Nation be left holding the nuclear waste bag? DOE's past record of maintaining its relationships with Indian Tribes is does not encourage

many Tribal leaders (Holden, 1994). Complicating DOE's efforts is Congressional action. For example, Congress recently voted to stop funding for Tribal participation in the final stage of feasibility studies to host an MRS. This is an example of DOE misjudging the willingness of Congress (and the New Mexico delegation) to accept a Tribally hosted MRS.

Another example of this faltering relationship exists at Hanford. The Nez Perce Tribe had just finished negotiating its Consultation and Cooperation Agreement with DOE in June of 1987, when funding for the Basalt Waste Isolation Project (BWIP) was withdrawn. DOE left the Nez Perce Tribe unfunded and out of the picture until 1992, when, in fulfillment of the Defense Authorization Act, EM funded the Tribe's participation in development of the Five-Year Plan. The Five-Year Plan no longer exists, in the Defense Authorization language, or within EM, however the new administration's management is continuing funding Tribal participation. As I will explain later, the Nez Perce Tribe is just about to enter into another set of negotiations. This time DOE and The Nez Perce Tribe are negotiating a cooperative agreement, that will address, among other things, cooperation and consultation. This history is frustrating and sometimes painful for Tribal officials who interact with DOE (Powuakee, 1994). Tribal program managers who continually approach DOE in a spirit of cooperation and consultation and are continually neglected in this way begin to lose credibility among their constituencies (Tano, 1992). It appears to many Tribal leaders that DOE does not understand the difficulty of keeping good faith relations with a federal government that behaves in

this way. It also appears that many DOE officials do not care how it appears or how their actions will affected relationships with Tribes. Implementing the DOE American Indian Policy is one facet of educating EM employees to the necessity of stakeholder involvement in mending its credibility problem and DOE's larger cleanup mission. EM relations with Tribal governments, in the sense that they are a project in stakeholder involvement, can also be used as a guage of DOE's commitment to the larger issue of including democratic values in its decisionmaking, and more specifically the success of EM's proposed systems change.

Any serious commitment to long-term Tribal involvement will involve a period in the initial stages of implementation to scoping. Scoping refers to defining the budgetary, legal, and other commitments required to fully implement the policy directive. Not to adequately scope the resources required to establish relations with all stakeholders will only serve to further damage DOE's credibility, when it can not live up to its promises. The case of Tribal involvement is particularly troublesome for EM because Tribes must be dealt with individually, on a government-to-government basis. DOE has been criticized for turning to intertribal organizations, to do "one stop shopping" to fulfill its Tribal consultation commitment. There are over five hundred federally-recognized Indian Tribes in the United States. The potentially massive and duplicative effort to consult individually with each of the potentially affected Tribes (out of the over five hundred) has been identified as a possibly contentious situation. A pragmatic (as oppposed to strictly legal or ethical) argument for individual consultation with Tribes is the many roles Tribes are

capable of playing. All Tribes display numerous legal, political, moral roles.

Adequate Scoping of the EM Mission: Tribal Involvement

The success of the systems change envisioned by the stakeholder involvement process, has special meaning for Tribal governments, because any Tribes see themselves as under seige from environmental degradation. The prospect of participating in the cleanup nuclear waste that is directly related to Tribal natural resources damage and human health concerns provides Tribal governments with a particularly vexing problem. The difficulty of dealing with nuclear waste issues stems from the emotionally charged public perception of radioactive wastes and the technical difficulty of managing them safely. Just as the Department of Energy is struggling to cope with Tribal involvement, Tribal governments are still coping with the relatively new problem of how to address the issues of nuclear waste. The incentives and institutional structures for the success of the EM Tribal participation program will be discussed in greater detail in the following Chapter.

Before moving on to examine the incentives, institutional structures, and systems changes in Chapter Two, it is important to introduce the roles of Tribal governments. Tribal governments function in many roles, as defined by treaties, executive orders, national legislation, court decisions, and pragmatic concerns. The underlying fundamental concept of understanding Tribal governments is the often confusing concept of Tribal sovereignty.

Tribal Sovereignty

The United States Constitution delegates treaty making authority to the President for entering into agreements with Indian Nations. Congress has the power to "regulate commerce with foreign nations, and among the several states, and with Indian tribes" (U.S. Constitution, Article 1, Section 8, Clause 3). Tribal governments are, therefore, recognized as governments existing prior to European encroachment and the treaties which the United States made with Indian Tribes before 1871 have full force of treaties as defined by the U.S. Constitution.

This Constitution, and laws of the United States which shall be made in pursuance thereof; and all treaties made, or shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding (U.S. Constitution, Article 6, Clause 2).

In its formative stages the United States considered Indian Tribes as foreign nations, but as the U.S. increased its land holdings, through treaty and warfare, tribal status required redefinition. In a landmark decision, of *Cherokee v. Georgia Nation*, Justice Marshall delivered the opinion of the U.S. Supreme Court in which he coined the term "domestic dependent nations" to describe the sovereign status of Indian Nations.

Though the Indians are acknowledged to have unquestionable, and heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be

doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian (*Cherokee Nation v. Georgia*, 1831).

This definition does not provide a very clear picture of how Tribes fit into the governmental structure of the United States. Later U.S. Supreme Court decisions and federal policy have built upon these foundations in an attempted to define the role of Indian Nations.

In summary, in earlier times, Indian tribes possessed inherent sovereign powers to the same extent and the same type possessed by other sovereign nations. These powers existed because of the tribe's ability to act as a sovereign and the recognition of that ability by foreign sovereigns. "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights as the undisputed possessors of the soil from time immemorial..."
Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832).

A detailed examination of tribal governments today would soon reveal that while they still exercise inherent governmental powers, the number of such powers has been significantly reduced and some, while they still exist, have been decreased (*Nez Perce Treaty Workshop*, 1993).

The relationship of ward and guardian has persisted with the treaties as supreme law of the land and the unique governmental status of Indian Nations. A federal trust responsibility derives from the ward and guardian relationship, described by Justice Marshall.

responsibility and for Tribes to protect environments under their jurisdictions, the two policy areas must be integrated.

The DOE official responsible for drafting the Department's Indian Policy had experience working in the Bureau of Indian Affairs, and from that experience, had other contacts with intertribal organizations and the U.S. Environmental Protection Agency. Her task in properly drafting a broad, departmental Indian policy required consultation with others in the Indian policy community, and consultation with others who would become part of that expanding community. To complete such a task requires time and money, both of which she had little of. The Department was "ramping up" quickly to address the credibility problem that accompanied environmental cleanup of DOE-controlled facilities. Political pressure was on for quick results in areas of credibility and cleanup of federal lands.

The major Indian policy advocate in CP had a mixture of incentives for her actions. First she had personal interests. It was her job. She had an interest in good job performance and its usual accompanying personal benefits. She also had friends in the world of Indian affairs and the Democratic Party, having come to Energy from the Bureau of Indian Affairs under the Carter Administration. She had been pushing for an Indian policy for quite a while, and had consequently developed a sense of personal satisfaction in getting such a policy developed. She was the "Indian desk" in DOE. As such she was under funded under Reagan and Bush weapons production days. In the latter portion of the Bush Administration, and

under the leadership of Admiral Watkins, she saw the opportunity to develop an Indian policy. So, she had job related personal interests. She was also considered "Indian affairs" in DOE to her professional peers in other Departments and organizations. The job and her performance was her reputation. Secondly, she had values to promote. Her advocacy was established before her introduction to Indian affairs. In her early professional career, she was the southeast Asian desk officer for the Peace Corps and it would be fair to say that some of the tendency for idealism, from those days, has remained with her. And finally, her love of the spotlight can not be discounted. But her decisionmaking authority was constantly challenged by other Offices and affected Tribes.

Regardless of her love of the spotlight, she had deeper motives in developing the DOE American Indian Policy. She saw a window of opportunity to develop a policy she had envisioned for years, and she took it.

Consultation with Tribal governments consisted of a one-time massive mailing, with short notice, to all Tribal governments, asking for comments on the proposed DOE American Indian Policy. A small number of Tribal governments responded. CP then passed the proposed Indian Policy among the different, and often reluctant to accept Tribal participation, Offices in DOE and received comments from American Indian individuals working in DOE (Marie Monsen, CP-30).

Tribal governments continue to criticize the DOE American Indian Policy (Wilkinson, 1993). Today Tribes are focusing more on implementation as a way to solve the vaguaries of the policy. The EM Implementation Plan for the DOE American Indian Policy was met with similar disdain, Tribes have identified the following grievances:

- 1) The plan makes no reference to treaties.
- 2) Consultation did not include briefings, or allow for predecisional input.
- 3) EM, as in the case when CP developed the Indian policy, consulted with American Indian individuals in DOE, when the purpose of the policy was to establish official working relationships with elected Tribal governments (Wilkinson, 1992).

It is clear from these grievances that some Tribal players in the DOE Indian policy community do not consider themselves adequately described, and in some way slighted by the short-shrift they received in creating the document that would begin the institutionalization and normalization of their participation.

The next step to institutionalizing the DOE American Indian policy was implementation. CP drafted and oversees the compliance with DOE Order 1230.2 which calls for each Program Secretarial Office to implement the Indian policy. Draft implementation plans were due by December 15, 1992. Most Offices complied with the implementation order. EM responded by providing a draft implementation plan based on its draft charter for its Indian Issues Work Group.

energy resources. The benediction of her swearing-in at the Department was said by an esteemed member of the Native American Church. This was a first for any Cabinet level swearing-in, and it sent chills of excitement through the portion of the Indian policy community within DOE labeled "advocate." It is interesting to note that "advocates" of Tribal participation received less credibility than officials who towed a more DOE-centric view of stakeholder involvement. The fear of being labelled a Tribal or DOE-centric implementing official complicated the internal "turf wars" among the bureaucratic fiefdoms, mentioned by Kingdon.

The systems change

The shift in Administrations also saw a shift in management paradigms. This new paradigm would become more apparent as Secretary O'Leary took more control over the Department. The paradigm shift was from attempting to define DOE as a potentially responsible party (PRP) to a responsible party. It is the Secretary's position that DOE employees are there to manage the program for the affected parties. It is the parties who are affected by DOE operations that will provide the policy direction for the Department. The Department will assist in implementing these directives in the most expeditious and efficient manner possible. This management style displays the concept of the third generation of policy analysis which focuses on the problems of implementing a systems change (Nakamura, Church, and Cooper, 1991). A more detailed discussion of the third generation of policy analysis literature can be found in the following sections.

This new relationship (systems change) was clearly iterated by EM Assistant Secretary, Thomas Grumbly (former President of Clean Sites, Inc.), in his speech to the National Symposium on Community Health Research Needs and Environmental Justice (held February 14-16, 1994). Assistant Secretary Grumbly began his speech by asking permission to speak, and then continued on by stating (wryly) that he was in a fortunate position compared to other Federal agencies, because DOE knows it has no moral authority. He went on to explain that he was there to listen and receive direction from the Symposium participants.

The State and Tribal Government Working Group

The State and Tribal Government Working Group (STGWWG) is an example of an ADR mechanism developed by the Office of Environmental Restoration and Waste Management to provide input to its Five-Year Plan (an EM-14 product mandated by the Defense Authorization Act). STGWWG members include seventeen States and seven Tribes, and two State professional organizations (see Appendix for membership). The members were not required to reach a consensus, and were asked for input as individuals of their respective organizations. These rules were implemented to avoid running afoul of the Federal Advisory Committee Act (FACA). The major reason of avoiding falling under FACA was to level the playing field and develop a closer, more trusting, and open working relationship between EM and the other interested governmental parties. In the short term, incentives to

comply with this relationship were negative, i.e. the potential exists of being labelled collaborators with EM, of selling (or cutting) out their constituencies for the sake of expediency, and failing to comply with state laws requiring open meetings. In the mid-to-long term, incentives are compelling to nurture the new relationship before attempting to implement it complex-wide. The STGWG empowers the regulatory government stakeholder policy community to comment on cleanup planning and budget commitments. This group works to support stakeholder involvement, and strives to balance the financial cost of that involvement against cleanup results. The group has defined itself in a charter (see Appendix). The group operates almost autonomously, however, it is funded by EM. The working arrangement from an EM perspective is that for the group to function credibly and smoothly, DOE must take a hands-off approach. EM does not dictate membership nor the agenda. The level of trust developed, among this divergent and once-contentious group of interests is, I believe a sign of real success for EM's credibility problem. In the area of Indian policy, it is also unusual to see States and Tribes supporting each other's initiatives consistently and with almost no contrary points of view voiced.

An example of Kingdon's policy community, and the degree to which Tribes are accepted as normal and legitimate members is the work the STGWG sub-group on funding is performing. This sub-group is chaired by the Manager of the Nez Perce Department of Environmental Restoration and Waste Management, Ms. Donna Powaukee. The sub-group was tasked to develop a concept paper on State and Tribal funding issues. One recommendation of that draft paper was development of a

Three Generations of Policy Analysis at Hanford

The stakeholder involvement process is very similar to an ADR process studied by Nakamura, Church, and Cooper's and therefore, their implementation analysis of systems changes might apply in this case. Accordingly, the next step in applying their mosaic approach is to examine the "larger organizational and political factors" influencing the implementation. I will do this by applying Mazmanian and Sabatier's conceptual framework for implementation.

Instead of explaining how the case studies apply, here, I will examine each criteria listed as the "six conditions of effective implementation" on its own merit. This examination will clear the way for application to the case studies involving implementation of the DOE American Indian Policy by EM. Following, the examination of these criteria, I will examine the application of Nakamura, Church, and Coopers's first and third generation mosaic implementation analysis.

Condition

1. The statute contains clear and consistent directives.

Assessment

It does seem fundamentally important that any enabling statute, or in this case a Departmental Policy, contain clear and consistent directives. How can any policy or statute be implemented without clear directives? In fact it would seem that some

agencies must be identified in order to correctly address or successfully implement a statute or policy. In this case it is also conceivable that a lead agency be identified and given special jurisdiction to direct the other agencies. Such a case exists in the Department of Energy's cleanup effort at Hanford, where the USEPA Administrator can trump a DOE Secretarial decision regarding RCRA approval of cleanup technologies.

Condition

3. The statute structures implementation to maximize the probability of compliance from implementing officials and target groups.

Assessment

The statute structuring "implementation to maximize the probability of compliance" is not self-evident. Many people would believe that a statute automatically compels compliance, however, without the proper mix of incentives and disincentives for compliance (contract bonuses or potential imprisonment are extreme examples) bureaucrats, who are busy implementing existing programs, will give the "new statute on the block" little notice. This is true if the new statute or policy requires a long learning curve. If people are not ready to accept something new, it will take longer for them to recognize the importance of making the effort to implement successfully or comply at all. From personal experience, top-down implementation of policies or statutes with small/marginal policy communities is nearly impossible. More people must be enticed to join the community and must be

motivated through team development.

Condition

4. Top implementing officials are strongly committed to attainment of statutory objectives and have the skills necessary to ensure achievement of the goals.

Assessment

Again, this condition seems obviously important, however, what constitutes a "top implementing official." In some cases the policy or statute receives tacit support. Everyone might acknowledge the importance of the statute, in theory, but when budget prioritization comes into play, the entrenched communities with financial incentives for compliance and budgets in a finite overall budget picture, actually might see compliance with a new statute with a less compelling incentive for compliance as an annoyance. With such a scenario, even the most personally persuasive implementing officials' pleas will fall on deaf ears. The skillful implementing official must then reach beyond the internal implementing policy community for support from the wider community and constituency groups, without being seen as violating the norms of behavior of the internal policy community. As I have seen before, some advocates of Tribal involvement have lost credibility by being perceived as too closely associated with external policy communities. Those advocates lose credibility among their internal policy community peers, and then lose credibility among the external community because of their lack of effectiveness. The skill of implementation then becomes a question

of finding some incentive mechanism considered acceptable to the internal policy community, and having that mechanism developed in an appropriate manner to the situation. In other words, an inappropriate means of developing incentives for compliance would be if an implementing official is known to have suggested, to an external constituent, filing a lawsuit against the implementing agency in order to involve the courts in developing an incentive for compliance, that official would lose the role as implementing official (and probably go to jail). A more appropriate, and cost-effective, means of developing incentives would be to enter into negotiations to develop those incentives, involving both the internal and external policy community and constituents. Moving into this mode of incentive development is fraught with possibilities for derailment because it can take a long time for the negotiations to reach fruition if at all. However, the potentially lengthy process of negotiations can be used by a skillful implementing official to build support for the process and guide/prepare the internal policy community for the coming probable results of the negotiated implementation incentives.

Condition

5. The program is actively supported by organized constituency groups and few key sovereigns (legislative and executive) throughout the implementation process.

Assessment

In my experience, supportive and active constituency groups are very important to successful implementation. However, it is not those characteristics alone that make

this condition important. The important aspect of this condition is, to a certain degree, the working relationship between the active, supportive constituency groups and the implementing officials. As I pointed out above, the implementing official may need to reach out to those constituency groups for their support. If the constituency group is active and supportive of the statute or policy, but has an historically adversarial relationship with the implementing agency, a sudden change in this relationship could be viewed with suspicion by the internal policy communities of both the formerly adversarial constituency groups and the non-advocate policy community of the implementing agency. For the results of the hypothetical negotiations to be considered legitimate and able to withstand the inevitable challenges of implementation, the level of trust in the working relationship must be, at least, believable. They must be believable to the interested public and the interested, and potentially supportive, sovereigns.

Condition

6. Changing socioeconomic conditions over time do not serve to weaken the statute's causal theory or political support nor the priority of statutory objectives.

Assessment

This sixth and final condition in the conceptual framework, developed by Mazmanian and Sabatier, is like the others in the sense that it appears completely logical. It is clear that if an issue requiring political attention rises through the public policy development stages becomes moot, that implementation of the policy

will fail. However, there are examples of policies that have lost their initial drivers, but having acquired a policy constituency, develop their own inertia. The implementing agency might continue to develop additional reasons for the necessity of the policy, or at least change the mission of the agency to address issues associated or uncovered by the implementation of the original policy. In other cases the policy might have been designed to implement an ongoing process or establish a working relationship between the government and parties interested in the work of the agency, such as public participation in environmental restoration at Federal facilities. In this case, it would not be the weakening of the policy's original intent, but perhaps the changing mission of the agency's work that causes waning interest in the working relationship. Likewise the interested public, incorporated into the working relationship of the agency because the agency lacked public trust, through the implementation of the working relationship itself, might begin to trust the agency and thus weaken the causal theory behind the public participation policy. Also if the public participation policy becomes too financially expensive while the agency has established a greater degree of public trust the policy might be scaled back. In this case it would be a combination of successful implementation of a working relationship combined with changing socioeconomic conditions that would weaken the political, and therefore budgetary, priority of the policy. So in some cases it is conceivable that a combination of factors can help "tip" the statute's or policy's priority in changing socioeconomic conditions. Underestimating the scope of work surrounding the issue(s) can also serve as a "changing" condition. As the first estimates of the scope of the problem continue to grow, through investigation and

actual implementation, the support for the initial project may weaken.

Second generation examination of Indian policy implementation at Hanford

In this section, I will examine the case study under the full conceptual framework developed by Mazmanian and Sabatier which includes the general categories: the tractability of the problem, the ability of the statute to structure implementation, and the nonstatutory variables affecting implementation.

Tractability of the problem

Mazmanian and Sabatier begin their framework for implementation by addressing the tractability of the problem at hand. They structure their examination in four categories, 1) Technical difficulties, 2) Diversity of target group behavior, 3) Target group as percentage of the population, and 4) Extent of behavioral change required.

The DOE American Indian, at first glance, seems to have taken these categories into account. There are no technical difficulties, and if there are and technical regulatory difficulties, the implementation Order requires that they be changed, removed, or addressed to the extent possible of the implementing office. The diversity of the target group's behavior is minimal, they are all DOE employees or contractors in a highly centralized bureaucracy. The target group is initially small (provide actual

numbers here), requiring one point of contact address Indian issues for each office having established contacts with Tribal governments. The extent of behavior was originally perceived as minor. The POC's would have to "get smart" on the Tribes they dealt with, and understand a few basics of Federal Indian Law, but nothing major.

However, as DOE has seen, there is truth in an Indian belief: "When you touch something, it touches you back" (Goldtooth, 1994). DOE had not really touched the subject of Tribal involvement yet and did not understand the extent of change required to enter into the government-to-government relationships it espoused.

As I will explain, fulfillment of the statutory requirements and, later, the paradigm shift has expanded the scope of the issue, but has not necessarily changed the tractability of the problem. The reasons for this are that fulfillment of the statutory requirements are being judged, in large part by the Tribes themselves. And as the relationship develops the percentage of the target group involved remains about the same, as some are converted while new offices are targeted.

1) Technical difficulties

As mentioned above, the technical difficulties are mainly to involve modification of the process to include Tribes in the predecisional phase of program implementation. This can be in the scoping phase of remedial investigations and

feasibility studies or design of environmental and human health risk assessment models. It also includes consulting with affected Tribal governments about future land use and the perennial question, "how clean is clean?" and the accompanying "clean for what use?" These process modifications are behavior modifications, however, they add another task for EM and consequently greater budgetary requests and expenditures. Additionally, release of budget information before the President's budget goes to the U.S. Congress in order to insure Tribal and State wishes are included in the EM budget is an example of overcoming a regulatory technical difficulty.

An example of overcoming the regulatory technical difficulties was the Federal effort in implementing its commitments to the working relationship found in the STGWG. The example is a controversy over the release of budget information to the State and Tribes before the President's budget went to the U.S. Congress. The States and Tribes maintained that to have proper meaningful involvement in EM's budgeting process, they would need to see that EM was budgeting adequately to comply with State and Tribal wishes. EM is restricted from releasing this information to the public before the President's budget goes to the Hill. The President's Office of Management and Budget (OMB) would not allow this release for fear that Departments would begin lobbying Congress by leaking budget information, thus preempting the President's budget proposal. Departmental lobbying of Congress is prohibited, so EM had to create a way to fulfill its obligation to honor State and Tribal government requests while complying with the law. The

working relationship finally developed where this information could be released, when the States and Tribes saw the wisdom of agreeing to keep that information confidential.

2) Diversity of target group behavior

The diversity of the target group behavior in implementing the DOE American Indian Policy is low. The DOE American Indian Policy mainly calls for consultation, resources for meaningful participation, and minor institutional reorganization if the implementing offices find it is required.

3) Target group as percentage of the population

The target group is initially small (provide actual numbers here), requiring one point of contact address Indian issues for each office having established contacts with Tribal governments.

The point of contact system of Indian issues integration, however, requires maintenance. The appointed head of the the DOE American Indian Policy not only needs to require field and program elements to appoint POCs, but must institutionalize their coordination. The coordination effort requires resources.

Within EM, the points of contact remain in touch mainly because of day to day work activities requiring coordination. It is, in EM's case, the Tribes themselves who

require the coordination and force the issue of coordination. At Hanford, the EM point of contact system has been elevated to maintain daily access with the Operations Office Manager. This elevation is required by CP, by direct order of the Secretary of Energy. The Hanford affected Tribes have seen greater coordination and increased access to not only the Operations Office Manager, but to the Secretary and the EM Assistant Secretary. This elevated level of interaction has resulted in a commitment to increase Tribal participation resources. However, the level of commitment to required resources necessary for interdepartmental coordination is lagging. This situation is predicted to change with the requirement of entering into Cooperative Agreements with Indian Nations. Cooperative Agreements will require greater interaction with Tribes, and consequently greater internal resource commitments.

4) Extent of behavioral change required

It is clear to EM and the affected Tribes that the work DOE-RL is performing requires a great deal of attention from the interested parties and fulfillment of all obligations can be difficult. For Tribal governments, their inclusion does not appear to be of great difficulty. However, DOE-RL and the U.S. EPA failed to recognize their responsibility to include the Tribes, the Nez Perce Tribe in particular, in the renegotiation of the Tri-Party Agreement in an appropriate way.

The Tri-Party Agreement is a legally binding document governing the cleanup of Hanford. The three signatories to the Agreement are the DOE, the U.S. EPA, and the Washington State Department of Ecology. Fulfilling the often confusing and duplicative (and therefore unnecessarily expensive) requirements of the NEPA, RCRA, and CERCLA drove the three signatory authorities to negotiate this agreement. The TPA sets "milestones," or dates for and specifications of environmental restoration and waste management deliverables. The Federal Facilities Compliance Agreement forced the DOE to come into compliance with all applicable environmental laws. It soon became apparent that this would be more difficult and expensive than first thought. The TPA is an attempt to comply with all applicable environmental laws, to the satisfaction of the regulatory authorities in Washington State. The TPA attempts to integrate the RCRA and CERCLA processes.

Under the Department's trust responsibility and American Indian Policy, the Richland Operations Office is supposed to consult with the affected Indian Tribes prior to making any decisions that will affect the Tribes, and represent Tribal interests as Federal interests when Tribes are unable. In the case of the TPA, it is clear that the Tribes are not regulatory authorities. Therefore, the DOE and EPA should have been consulting with the affected Tribes, briefing them on the proposed amendments and asking what changes they would like to see in the renegotiation of the TPA. The Richland Operations Office had included the Tribes in the Tank Waste Task Force (an effort to "define key values and principles that would guide

negotiators in their deliberations"). The Tribes were not included in the open and full renegotiation as government entities with aspirations and specific and potentially, legally-binding milestones to include. The Nez Perce Tribal Executive Committee Chairman wrote to the Secretary explaining how the Department had failed the Nez Perce Tribe by not including them properly; expressing anger at being allowed to comment on the tentative renegotiations during the public comment period. The letter expressed these points in angry tones. The three signatory authorities responded by coming to the Nez Perce reservation and briefing the NPERWM on the comments they had submitted during the public comment period and assuring them that the tentative renegotiation was not the final word on the agreement. Even after its signing, the agreement could be modified.

The lesson learned by DOE-RL is that they should ask if the Tribes would like predecisional briefings on the upcoming processes. By inquiring of the Tribes their wishes, view of the issues, and capability to address the issues, on a case by case basis, DOE-RL is implementing the DOE American Indian Policy (Kevin Clarke, DOE-RL).

Ability of Statute to Structure Implementation

Mazmanian and Sabatier explain that the original statute has the possibility to favorably structure the implementation of its policy direction. In the case of the DOE American Indian Policy, I will examine the Policy and the DOE Order 1230.2

which requires and directs the Field offices and program elements to implement the Policy.

Precision and clear ranking of legal objectives

The DOE Order 1230.2 is included in the Appendix, and I will only offer a summary of its points. First, Mazamanian and Sabatier state that clearly ranked legal objectives can serve as an indispensable aid in program evaluation. In the case of the Indian Policy, the DOE Order only serves as an organizational tool, and falls short of being able to provide any useful tool in evaluation of the policy implementation.

Second, Mazmanian and Sabatier state that implementing the new policy must receive a clear priority when introduced to an existing agency, or it will receive low priority and delay in implementation. The DOE Order 1230.2 fails to give the Indian Policy a priority relative to existing implementation priorities. As predicted by Mazmanian and Sabatier, the DOE Indian Policy implementation has languished. However, it will become clear that failure of the Order to prioritize the policy direction is not the sole cause of its delay.

Validity of the causal theory

Mazmanian and Sabatier state that for a valid causal theory to exist it must demonstrate two factors:

- 1) that the principal causal linkages between government intervention and the attainment of program objectives be understood.
- 2) that the officials responsible for implementing the program have jurisdiction over a sufficient number of the critical linkages to actually attain the objectives.

In the case of EM the causal theory behind the DOE Indian Policy is well established by the U.. Constitution, previous Federal agency policies, supported in numerous court cases, and proclaimed by numerous Administrations and both houses of Congress (Nez Perce Treaty Workshop, 1993). The causal linkage between government intervention and attainment of the Policy objectives is the Federal trust responsibility stemming from treaties and executive orders establishing relations with Indian Nations in exchange for land.

The criterion that officials having adequate jurisdiction over critical linkages is, in the case of EM, is met and in the process of being attained. EM-5 , in the EM Assistant Secretary's Office has the decisionmaking authority to compel the EM programs and Operations Offices to comply with the Assistant Secretary's policy directives. EM-5, however, has no budget, but is in the process of acquiring a budget to support Tribal planning participation. Other Tribal participation activities in EM will be funded through the Cooperative Agreements and various program and

Operations Office budgets.

Initial allocation of financial resources

The initial allocation of financial resources for Tribal participation in EM was inadequate by estimation of Tribal needs. It was, however, sufficient for EM's initial understanding of its role with regard to Indian Nations. Tribal participation was viewed as a small price to pay for fulfillment of legally binding milestones. The token grants for Tribal participation were not viewed favorably by the participating Tribes, and they travelled to the then Assistant Secretary, Leo Duffy, to request greater financial commitment. The financial commitments were raised, however, EM is not in complete control of its budget. The Office of Management and Budget (OMB) consistently passes back Tribal participation funding in roughly half of the Tribal request.

Funding for programs to support the commitments made in the Indian Policy are under tight scrutiny, as are all program activities in EM. The overall funding is relatively small, and barely adequate to support basic Policy directives.

Hierarchical integration within and among implementing institutions

Hierarchical integration of implementing officials within DOE is expressly mentioned in the DOE Order 1230.2. The effort, as Mazmanian and Sabatier point

out requires sufficient incentives for cooperation. As mentioned earlier, the EM Indian Issues Work Group was an attempt to develop a coordinated working relationship interior to EM. This effort was driven by the perceived need to integrate implementation activities. The need was perceived by the Office required to develop the implementation plan. The other offices and programs did not necessarily perceive this need, at least with the same priority. Consequently, without specifically directed product, the group was unable, or unwilling, to reach consensus on process issues. Each program and office of the Work Group was already involved with Tribal participation with their own processes to facilitate that involvement. Consequently there was discussion over what each element was doing, however, little willingness to abandon their turf or progress.

CP is responsible for coordinating and overseeing compliance with the DOE Order and American Indian Policy. The responsible official within CP, designated directly by the Secretary, was able to elevate POCs in the Field to report directly to the Operations Office Managers. How EM integrates its activities with those Operations Offices is the responsibility of EM-5, the Office of Public Accountability.

At Hanford, the Indian Programs Manager has noticed increased access to the Manager and is coordinating its activities with EM-5. The improved direct access to decisionmakers by both the Tribes and the Indian Programs Manager has decreased the potential veto points. It has decreased the veto points by reducing the degree of hierarchical integration necessary. As stated earlier the improved Tribal access to

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decisionmakers, namely the Operations Office Manager, the EM Assistant Secretary, and the Secretary has also served to increase the priority of implementing the Indian Policy. Consequently, the implementation of the DOE American Indian Policy at Hanford is being shaped by Tribal needs, and not necessarily on the full potential scope of Tribal involvement. As long as the Tribes are dictating the implementation of the Indian Policy and serving as the measure of EM compliance with the Indian Policy, the implementation can be said to be progressing at a satisfactory rate. This rate of progress is determined by a combination of Tribal ability to involve themselves in EM activities at Hanford and the ability of EM officials to meet expressed Tribal needs.

Decision rules of implementing agencies

As mentioned earlier, the rules for including Tribes in EM activities at Hanford was prescribed by the 1982 Nuclear Waste Policy Act. The level of Tribal participation, however, has not enjoyed the same formal decision rules. Tribal participation grants were funded by a combination of unsolicited Tribal proposals, EM budgeting priorities and OMB passback figures.

Recognizing the unsatisfactory nature of *ad hoc* funding decisions, and the potential for breach of trust lawsuits, EM has published a notice of intent in the Public Register. DOE is open to a breach of trust lawsuit if it is found to be making decisions in an "arbitrary and capricious" manner. In fact EM, is aware of its

precarious position as are the Tribes. It has been EM's efforts to fund Tribes as close to their proposals as possible that has kept Tribes from filing for breach of trust. The notice of intent is option offered by the Administrative Procedures Act (APA) before entering into an "informal rulemaking process." The notice of intent is EM's opening remarks concerning funding eligibility and criteria standards. The rulemaking process is underway, with comments on the notice of intent due by June 1, 1994. EM has found a set of formal decision rules to operate under while developing their own decision rules.

To date the notice of intent has been greeted, by Tribes, by mixed reactions. Some informal, verbal comments are that EM did not consult properly on the decision to enter into the rulemaking process. Other comments are that the rulemaking is designed to develop rules to exclude Tribal participation. Still other Tribes welcome the process, as long as they will meet all the criteria.

The Nez Perce ERWM has expressed the opinion that it recognizes that EM has a trust responsibility to the taxpayers as well to the Tribes and does not have any major problems with the rulemaking intent. In fact, its is their belief that by agreeing to greater financial accountability, EM's willingness to spend more money on their participation program will increase. The Nez Perce ERWM is confident that it will be able to provide EM "greater bang for the buck" than any other Tribal program and especially EM's own programs and contractors, thus opening the door to capture EM contracts.

Officials' commitment to statutory objectives

The EM commitment to statutory objectives is the responsibility of EM-5. EM-5 is responsible for overseeing and coordinating program efforts to implement the DOE American Indian Policy and other stakeholder involvement efforts. It is their responsibility to inform the Assistant Secretary of compliance issues. The Assistant Secretary is responsible for implementing the Secretary's commitments to Indian Nations and is directly accountable to her as well. A call, or even the threat of a call, from the EM Assistant Secretary about non-compliance and failure to honor commitments to a Operations Office implementing official is treated seriously. Even with the Secretary's commitment to decentralize decisionmaking authority apparently has not diminished direct lines of accountability. The Secretary's operating style is to go directly to where the problem lies. Her appointed cadre of implementing officials, and their federal employee staffs, will intervene directly when necessary to fulfill the Secretary's commitment to implementing the Indian Policy.

Formal access by outsiders

Consultation with Tribes has become the norm for evaluating EM compliance with DOE American Indian Policy implementation efforts. The process is being formalized in cooperative agreements, such as the one being developed by the Nez Perce Tribe.

Nonstatutory variables affecting implementation

Mazamanian and Sabatier explain that while the statutes establish the legal framework for implementation there are also inherent dynamic forces at work that must also be taken into account (M&S, p 30). They are:

- 1) the need for any program which seeks to change behavior to receive constant or periodic infusions of political support if it is to overcome the delay involved in seeking cooperation among large numbers of people, many of whom perceive their interests to be adversely affected by successful implementation of statutory objectives.
- 2) the effect changes in socioeconomic and technological conditions on the support for those objectives among the general public, interest groups, and sovereigns. In addition to these changes over time, there is usually variation in antecedent factors identified by Hofferbert--e.g., historical events, socioeconomic conditions, public opinion--among the governmental jurisdictions in which a statute is being implemented (M&S, p.30).

In the case of the Department of Energy's Indian policy there are few technological variables directly affecting the implementation of this policy, however, public support and changing socioeconomic conditions have a large role to play. Tribal governments have witnessed the general public's support of Indian sovereignty and accompanying issues wax and wane. From genocide, broken treaties, and religious persecution to paternalism, abandonment, and idealism Tribes have seen about every aspect of the general public's personality except respect and understanding. However, these conditions are, in a large part, in the midst of a positive change.

Signs of this positive change are the Indian Policies developed by the U.S. EPA and the U.S. DOE. It is primarily the implementation of the U.S. DOE's American Indian Policy that I am examining, but it must be understood in the context of Tribal as well as Federal perceptions. In fact, understanding the Tribal perspective of the environmental issues at the DOE facilities is part of successful implementation of the DOE Policy. How can Tribes become partners in the cleanup if they are perceived as misunderstood, cultural outsiders wanting to implant some pie in the sky mysticism about the Earth on Federal environmental restoration activities at former nuclear weapons facilities?

Tribal Involvement with the United States

The Indian people defined by the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, and the Yakima Indian Nation have lived in and around the Mid-Columbia River Basin area are indigenous to that region. They, therefore, have lived in the area since the beginning their identities, since time immemorial. Their contact with Euro-American encroachment began with the Corps of Discovery, or more commonly called the Lewis and Clark Expedition.

The Lewis and Clark Expedition was charged with exploring the Louisiana Purchase and finding a water way from the Mississippi River to the Pacific Ocean. In meeting with the Nez Perce Nation, they were very close to finding that passage. The Columbia River basin is created by the flow of the Yakima, Snake, Salmon,

Clearwater, and Columbia rivers. The headwaters of the Columbia reach into present day Canada. The confluence of the Snake and Clearwater Rivers is one of the furthest inland seaports in the United States, found at Lewiston, ID. When the Clearwater meets the Snake, it is called the Snake River. The headwaters of the Snake River, proper, are found near Pocatello, ID.

The location of the Department of Energy's Hanford reservation is located near the confluence of the Yakima, Columbia, and Snake Rivers. This site was chosen for its remote location and abundance of water. The large and consistent flow of the Columbia River were necessary for cooling the nuclear reactor(s) built at Hanford.

The arid, shrub-steppe desert area (receiving six inches annual rainfall) was also a traditional Winter gathering spot for the indigenous Indian Nations. The Hanford reservation consequently has numerous cultural/religious sites located within its boundaries.

Socioeconomic conditions

The Yakima Indian Nation (YIN) is comprised of many Indian Tribes, as is the Confederated Tribes of the Umatilla Indian Reservation (CTUIR). The Nez Perce Tribe is solely Nez Perce, however, some Nez Perce people live on the Colville Indian Reservation. But for the purposes of the Federal working relationship with the elected Tribal governments the three Nations have distinct sovereign status.

culturally, however, they are all related to some degree by culture and intermarriage. The current working relationship between the Federal government and the three Tribes stems from the Treaty of 1855. The 1855 Treaties affected all three Indian Nations. It spells out their reservation boundaries, and most importantly, for this case, their reserved off-reservation rights and privileges. The common off-reservation rights include the right to pasture livestock, hunt, gather roots and berries on open and unclaimed land, to take fish at all usual and accustomed places (See Appendix). The protection of these and other rights and privileges is one of the most important duties of the Tribal governments. Protection of the resources and protection of the right to access to undamaged resources is, in fact, protecting religious freedom and cultural self-determination for these three affected Tribes. Nothing, beyond immediate risks and essential services, is taken more seriously than protection of these resources. It has been argued that they can not be separated from one another (interview with D. Powaukee). It is therefore that the Treaties of 1855 are constantly in the minds of Tribal leaders. Included with these legal documents are all the memories of agreements before and after the Treaties were signed and how relations have changed and remained the same over history. It is safe to say that Tribal leaders and many Tribal members have a greater historical perspective than many of their non-Indian counterparts. That is why when new Administrations come to Tribes and say, "things will be different," and "the old ways of doing business are gone," Tribal leaders say to themselves, "nothing has changed."

The notorious, myopic view of political and bureaucratic minds is in stark contrast to that of many Tribal leaders. It is therefore that socioeconomic factors, which might also include attitudes about American Indian cultures is a part of the implementation of the DOE American Indian Policy.

In 1943, the United States removed a large portion of land from open and public domain status along with this the Federal government took through eminent domain private land holdings to form the Federal Hanford reservation. Three small towns and the Wanapum Indian Nation were removed from the site to begin the national security mission of Hanford. The site was intentionally created to be larger than was absolutely necessary, most of the land being used as a buffer zone from prying eyes, for accident containment, and as a strategically spread target to thwart hostile bombing.

Technology

The technology required to implement the DOE Indian Policy at Hanford is limited to telephones, faxes, and computers with communication capabilities. Besides these technologies, which EM has provided funding for, it is important for the affected Tribes to understand the technologies and technology development efforts necessary to perform the actual cleanup.

The three affected Tribes are actively involved in the Hanford technology development processes and in their use in evaluating documents such as: Environmental Assessments, Environmental Impact Statements, Expedited Response Actions, and human health and environmental risk assessment models. These technologies and their use are driven by a complex matrix of regulatory drivers as well as the actual physical contamination of the site.

The scope of this problem is truly enormous. Hanford's B-reactor was the first-ever fully operational nuclear reactor. Its purpose was the production of enriched uranium for atomic weapons production. At one time, during the height of the Cold War, the Hanford reservation hosted nine fully operational and functioning nuclear reactors. In 1968, President Johnson ordered B-reactor shut down because it was near the end of its production life and the nuclear weapons stockpile was reaching truly, enormous proportions.

In 1988, President Bush ordered Hanford deactivated. The nuclear weapons stockpile was extremely large, the Cold War at its end, and it was apparent that the pollution from the Hanford site was a major problem. Hanford had air release and surface water release problems. It would become apparent that the groundwater releases are one of the most troubling environmental problems. The strategically spread facilities on the Hanford reservation are miles apart. Almost every facility used the common disposal practice of dumping contaminated hazardous and or radioactive liquid into open and unlimited trenches. It was believed that the

contamination would not extend past the vadose zone, and that groundwater movement was slow enough to prevent it from reaching the Columbia River. The government was wrong in both cases. It is estimated that of the approximately 560 square miles of the Hanford reservation roughly 300 square miles of groundwater is polluted with hazardous and or radioactive waste.

The surface and air releases affected Tribal treaty rights, and the movement of groundwater toward the Columbia River has the potential to affect those same treaty rights for a number of years to come. Other operations at Hanford also have the potential to affect those treaty rights, an example is the restoration and handling of waste found in any of the 176 million-gallon tanks in Hanford's Tank Farms. Some of those tanks are "burping" others are "leakers," and other still are "suspected leakers." The majority of these huge tanks are single shell construction design, buried about eight feet below the surface of their farm pits. They were filled with almost anything in any combination. The DOE does not have good records documenting exactly what was put in the tanks. Complicating the problem are the chemical processes occurring within those tanks. The chemicals are producing heat, some substances settle out, forming a hard bottom-sludge, other substances form salt like crusts on top of churning liquid. "Burping" refers to the pressure build-up in some of these tanks. The gas must be captured from the tank to prevent any possible explosion. The most serious gas, of course is highly-combustible, hydrogen (the gas used to float the Graf Zeppelin Hindenburg). "Leakers" are known by decreased tank volume and contamination found in monitoring wells. "Suspected

leakers" are tanks which were bulging, ready to be "burped," but then mysteriously stop swelling without detection of a leak, from monitoring well data. The operation of emptying these tanks into double shell tanks, while managing the tanks waiting for pumping, and or stabilization, is an enormous task, made more onerous by the task of removing the remaining hard sludge at the bottom of many of these tanks. The highly toxic, tank wastes must be handled remotely. In many cases, the necessary robotics have not been developed. For example, cleaning the bottom sludge requires a remote unit, capable of entering a million-gallon tank through its 36 inch-wide cap, and scraping the sludge from the interior of highly-corroded single shell tank without damaging the tank any further. The remote unit must then be able to transport this scraped sludge to the surface for further handling and temporary storage.

Public Support

Public support of the environmental cleanup mission at Hanford has replaced public support for nuclear weapons production. The Hanford mission means jobs and education and other resources. Tribal participation is viewed ambiguously. The greatest obstacle to overcoming public disapproval of Tribal participation is racism. Numerous articles have been written in local newspapers questioning the legal standing and technical competence of the affected Tribes.

State governments, on the other hand, have been uncharacteristically supportive of Tribal participation. The working relationship developed in the State and Tribal Government Working Group is evidence of this new page of State and Tribal relations. Additionally, relations of the Hanford Advisory Board have been cordial and to a large degree supportive. The status of Tribal governments rides a rollercoaster of public opinion. It is effected by the popular media (the release of "Dances with Wolves" is often cited as the most recent turning point in public perception of Indian Nations) and local media coverage. There have been no formal public opinion polls about the public's perception of Tribal involvement at Hanford.

The environmental restoration and waste management mission at Hanford now removes it from the regulatory regime of the NWPA. However, the waste problems are still present and the Tribes are still affected by the DOE operations at Hanford. The Department in its effort to build public confidence and achieve regulatory compliance issued its Federal Facility Compliance Agreement. This agreement committed the Department to complying with all environmental regulations including those of the State of Washington. As part of this public confidence building and regulatory compliance measure, the U.S. Department of Energy also agreed that Tribal participation should continue. Decisionmakers within the Department saw fulfilling their trust responsibility as more of a goodwill gesture that would eventually lead to quicker compliance, by avoiding lengthy court cases, with their larger mission. Tribes are known to litigate over status issues, which

many in the Watkins Department saw as problematic. The answer was to include Tribes, thus eliminating the potential for Tribal litigation over their right to inclusion in Department activities.

Tribal governments, however, see their participation in a different light. Tribal governments, besides wanting to protect their treaty rights and privileges, are compelled to do so in the absence of adequate Federal protection. Even if the Federal government is capable of protecting Tribal interests, Tribes are sovereign governments with the sole responsibility of representing their interests, through any means necessary. It so happens that the most expeditious means to protection of Tribal rights is for Tribes to develop their own capabilities to represent their interests in the appropriate forums. Development of this capability is termed "meaningful participation."

Attitudes and resources of constituency groups

Meaningful participation is an ambiguous term. For the Nez Perce Tribe meaningful participation means investing in development of scientific and technical capability of its human resource potential for the long-term cleanup of Hanford (currently estimated in the Tri-Party Agreement as 40 years). The short-term it means participating in DOE budgeting and planning to ensure that adequate resources are available for the Tribe's participation program. This program is embodied in the Nez Perce Department of Environmental Restoration and Waste

Management (NPERWM). The NPERWM is currently funded through a Five-Year Plan participation grant, a mechanism found in the Defense Authorization Act.

Funding for the Five-Year Plan participation grants (which fund the three affected Tribes and the State of Oregon) did not receive high funding priority by EM, in general, nor the OMB. The funding history of these grants, in the Tribal cases, was consistently to cut the grant proposals by roughly half to \$200,000. For example, this past year, the second year of Nez Perce funded participation in EM operations at Hanford, the NPERWM submitted a grant proposal for 1.152 million, and received an OMB passback figure of \$421,000. The CTUIR submitted a proposal for more than the Nez Perce but received \$646,000. The YIN submitted an even higher proposal and received \$969,000. The OMB passback figures from the previous year were similar, but after travelling to DOE Headquarters to complain about the funding levels, the Nez Perce ended up with \$700,000, the CTUIR \$800,000, and the YIN \$969,000. The way EM augmented the OMB passback figures was by scrambling for other discretionary funds in various EM program budgets. It was clear to all concerned that this was not a satisfactory way of providing funding for Tribal participation. It seriously undermined the Tribal ability to plan and diverted too much attention from the environmental restoration and waste management work.

The Five-Year Plan was absent in the most recent amendments to the Defense Authorization Act. This development coupled with the unpredictable and unsatisfactory funding level of the participation grants has driven the Office of

Public Accountability and the NPERWM to search for a more satisfactory funding mechanism.

The NPERWM is, in consultation with the DOE, developing a Cooperative Agreement that will build greater consistency in funding levels, a more compelling funding priority. EM funding priorities are to fund projects that address immediate health and safety concerns first. The second EM funding priority is to fund projects required by law and or legally binding agreements. Third funding priority is everything else that EM is capable of without violating the Anti-Deficiency Act. More immediately relevant to the DOE American Indian Policy, a goal of this agreement is building a meaningful, appropriate, and sustainable long-term relationship between DOE and the Nez Perce Tribe.

The DOE is operating, like all Federal agencies, in an increasingly restrictive budgetary environment. EM initially experienced a very rapid and steep funding "ramp up" period between 1989 and 1992. In the current fiscal crisis, Congress is demanding more results for the money spent. EM, after many studies and news articles revealing financial waste and mismanagement, is stressing greater "bang for the buck" and accountable management practices. Consequently funding grant proposals, which require little or no accountability, is not held in high regard within EM. In fact, the practice of funding Tribal participation through grants is being changed. The Assistant Secretary for EM has recently issued a directive authorizing Operations Office to sign cooperative agreements with Tribal governments. Once a

cooperative agreement is signed, Headquarters personnel are instructed to fund the agreement. This is one example of the Secretary's effort to decentralize the decisionmaking authority. She has repeatedly defined the new culture of DOE as one where the affected/interested parties will give the Department its direction, and the Federal employee will manage the program.

The Nez Perce ERWM is unique in its approach to dealing with DOE. The goals of the Nez Perce ERWM are:

- 1) to protect Nez Perce Treaty rights,
- 2) to protect those treaty rights by helping cleanup Hanford as quickly and safely as possible,
- 3) assist the DOE in fulfilling its trust responsibility,
- 4) offering possible solutions and conferring on common problems,
- 5) all while keeping vigilant to violations of that trust responsibility in a positive working relationship (Powaukee, 1994).

Raking the DOE over the coals is periodically necessary, and the bitter medicine seems to work, when applied judiciously. The NPERWM has seen positive response to its criticisms. The thinking of the NPERWM is to make the best of missed opportunities and overlooked trust obligations.

The renegotiation of the Tri-Party Agreement (TPA) is recent example of this operating style. In trying to make the best out of this situation, the Nez Perce Chairman directed the NPERWM to develop a workshop for the DOE and EPA on the meaning of Federal trust responsibility. The workshop is tentatively scheduled to be tele-conferenced from the Richland Operations Office to all ten EM Operations Offices and Headquarters. It will be an EEO training opportunity for Federal employees, adding an incentive for attendance. EM is using this opportunity to launch their training efforts on Tribal participation.

The positive developments, from this exchange are that EM is launching its training on Tribal participation, Federal employees will learn what Federal trust responsibility means at Hanford, the Secretary's new culture is taking a step forward by taking a lesson from the affected Tribes, and the NPERWM is assisting the DOE in fulfilling its responsibilities as a Federal agent. It is hoped that the impact of this effort will be protection of Nez Perce treaty rights, and smoother operation of Hanford cleanup activities, thus saving tax dollars while protecting human health and the environment.

The relationships of the CTUIR and the YIN with DOE are not quite so positive. They seem to be having trouble making the paradigm shift envisioned by the Secretary. The CTUIR and the YIN are more prone to lecture DOE officials in public meetings. They are also more prone to focus on short-term results, investing less in human resource development for Tribal members and educational opportunities

for Tribal youth than the Nez Perce. The Nez Perce strictly enforce Indian preference hiring and view their program as developing a long-term relationship with the Federal government (realizing that DOE is only a part of the whole picture) on their own terms. The CTUIR and YIN programs focus more on technical results and detailed operation of the cleanup at Hanford. The NPERWM realizes that by focusing primarily on the day-to-day operations of the cleanup they could easily be overwhelmed by the Federal resources. Trying to match the EM operations would require subordinating Tribal priorities to keeping up with EM. The likelihood of the NPERWM matching the \$1.6 billion effort at Hanford is obviously a losing battle (Harris, 1993).

The NPERWM, however, does possess the professional, technical staff to monitor EM operations, and is one of the first (if not the first) Tribal Department to present a paper at the Waste Management '94 Conference in Tucson, AZ, in a subject other than public participation. The paper addresses the inadequacies of risk assessment models when Tribal interests are involved. The NPERWM is also scheduled to begin providing technical training to other Tribes (and other local, historically, disenfranchised communities) on risk assessment, after developing its Washington State University-accredited course (for 1.6 CEUs) entitled "Introduction to Radionuclide Transport in Groundwater and Surface Water."

Mazmanian and Sabatier's final criteria in the section of Nonstatutory Variables: "Support from sovereigns" and "Commitment and leadership of implementing officials" have been covered throughout the sections above and will be addressed in the following section examining the role of the "fixer."

"First generation" approach to implementation analysis

Although the role of the "fixer" has been mentioned in an incidental fashion above, it is worthwhile examining this role more explicitly here. The Secretary's main management objective could be described as "fixer" heavy. The DOE has problems. The Secretary continuing to build more affected voices into the development of its policy directions. It is the duty, under the Secretary's management style, for the Federal employees to find ways to fulfill those publicly developed policy directions.

In the case of implementing the DOE American Indian Policy, the main "fixer" is the Secretarially designated CP-20. This "fixer" is a Native American woman who has direct personal and organizational access to the Secretary. Consequently, she is viewed as having the decisionmaking authority in the Department over implementing offices and programs. Her job is also to develop a cadre of "fixers" in the field. She has elevated Indian Policy POCs to have direct access to the Operations Office Managers. The effect of this has yet to be felt in all Operations Offices, however, at Hanford the effect has been to increase the policy level and

frequency of Tribal/EM interaction and resource allocation.

At other Operations Offices and within the Headquarters programs it is hoped that the effect will be to increase decisionmaker attention to Indian issues. The past practice of appointing Indian Policy POCs has been to delegate the responsibility to a minority individual who is not necessarily qualified to interact with Tribal governments or capable of handling the pressure of forcing Tribal initiatives through the system. The increasing attention to Indian issues might serve as an incentive for decisionmakers to re-delegate the responsibility to some one closer to the decisionmaker with more authority and skill in implementing policy directives.

Within EM, the "fixer" Programmatic responsibility for Indian Policy issues has been given to the Office of Public Accountability. This Office is part of the Assistant Secretary's staff. EM defines "the public" as any government, organization, or individual affected or interested in EM activities. Hitching Tribal participation to the larger public involvement issues only serves to increase the authority of the Office of Public Accountability. However, and despite the promises of the Secretary and the Assistant Secretary, the staff of EM-5 seems to be having some difficulty in fulfilling the ambitious policy commitments with the expediency the Tribes had hoped for (Sanchez, 1994). The increased responsibility and heightened expectations serve as incentives for EM's lead Indian issues point of contact, the Office of Public Accountability, to seek its own budget to fund Tribal planning participation cooperative agreements (Volk, 1994). The difficulty of attracting the budget

authority will require great skill and certainly qualifies as a fixer-like initiative.

Examining EM's implementation efforts at Hanford under the auspices of Nakamura, Church, and Cooper's "third generation" of implementation analysis may produce some interesting findings not highlighted by the first and second generation approaches used so far.

The "Third Generation" Approach

Where the first generation of policy analysis literature focuses on the role of the "fixer" and their incentives for compliance with policy directives, and where the second generation of policy analysis literature focuses on the structural or institutional capacity to address the multi-faceted aspects of policy implementation, the third generation focuses its analysis on generic properties of policy implementation such as "systems changes" (Nakamura, Church, and Cooper, 1991).

Nakamura, Church, and Cooper explain what this "systems change" approach to implementation entails:

Systems changing approaches are based on an analysis of the policy problem, which holds that the fault lies with the existing system of relationships, and which uses the authority of the State to reallocate responsibilities and obligations. It assumes furthermore, that those with the reallocated responsibilities to act have or will develop both the motivation and capacity to deliver the expected public goods (Nakamura, Church, and Cooper, 1991).

How well does this analysis fit the case at Hanford? Today, it is commonly accepted that failure to clean up more of Hanford is the fault of the existing system of relationships. This assumption is supported by such major negotiated and legally binding, regulatory agreements such as the Tri-Party Agreement.

EM has issued its Federal Facilities Compliance Agreement and fallen under the Federal Facilities Compliance Act, which means that EM will comply with all federal and state environmental regulations. The best example of this type of compliance with State and Federal regulation, and the enforceable Federal budget obligations community, is at Hanford. The Hanford Federal Facility Consent and Compliance Agreement (commonly referred to as the Tri-Party Agreement) is an agreement between the State of Washington's Department of Ecology, the U.S. EPA and U.S. DOE covering negotiated environmental restoration and waste management activity prioritization, time schedules, budget information, fees for operation, and fines for non-compliance.

Placing the blame on the existing relationships at Hanford for slow clean up progress is also the impetus for the Natural Resource Trustee Council, which works as a group to address the Natural Resource Damage Assessment portion of CERCLA (Natural Resource Trustees Council, 1994). The natural resource trustees and the responsible party (DOE) make up the core of the council. Other interested parties are allowed to attend meetings of the council, except when the council is discussing facts directly related to legal action seeking compensation or restoration of damaged

natural resources. The parties investing in the new relationship envisioned by the Natural Resource Trustees Council have demonstrated their motivation to enter the relationship in order to deliver the public good, in this case restored natural resources. The State and Federal agencies on the Trustees council have the capacity to deliver, however, Tribal governments are somewhat less able to deliver without increased resources to dedicate someone the task of overseeing the CERCLA Natural Resource Damage Assessment process in such a forum. As it stands now, the Nez Perce Tribe ERWM is acting as teams, dedicating part of each staff person's time to almost every task (Powaukee, 1994). The same holds true for the other two affected Tribes' staff, to varying degrees (Wilkinson, 1994).

The two Hanford Summits (in September 1993 and April 1994) are also examples of action driven by the perceived need to reshape the existing system of relationships at Hanford. In fact, the recommendation of the Hanford Summit II Steering Committee is to create a demonstration zone where streamlined procurement procedures and integrated regulatory issues serve to put new or existing remedial technologies to work faster (Hanford Summit II, 1994). These actions, along with the other national groups like STGWG and the Environmental Management Advisory Group created to provide input to the EM Programmatic Environmental Impact Statement (EM PEIS), are made up of interested parties with a relatively long history of dealing with EM (EMPEIS Implementation Plan, 1994). Other groups, like the Hanford Advisory Board (HAB) are finding it more difficult to find consensus, however, the HAB was formed in 1994, and consists of a more diverse group of

interests than the other groups (Powaukee, 1994). Consequently, one might expect the HAB to take longer to identify its role and begin changing the members' relationships, motivation, and capacity with EM to deliver the public good of a "clean" Hanford. The fact still remains that EM is trying to change these relationships through numerous working groups, councils, and advisory boards, thus revealing the commonly held perception that systems changes are required to improve cleanup results. Most of these efforts are too recent to predict their results. One may speculate, however, that if the main problem in DOE environmental restoration and waste management efforts is adequate public involvement to define "clean," establish priorities in cleanup, and determine siting considerations for nuclear waste isolation, then we can expect to see (with adequate federal support for facilitation and technical training) some positive change in the relationships and consequent improved prospects for eventual significant risk reduction.

Systems Changing Approach to Tribal Involvement

How then does the systems changing approach apply to the Nez Perce Tribe's relationship with EM and the Richland Operations Office? If we take the same approach to this question as we did in the previous paragraphs, that actions help reveal the commonly accepted analysis of the problem, we can examine the past and present relationships of Indian Tribes with EM to uncover their possible motivation to apply a systems changing approach in this case.

What was the past relationship of the Nez Perce Tribe with Hanford? Previously in Chapter Two, and in Chapter One, I have described some of the relationship the Nez Perce Tribe has had with Hanford. It should be noted, however, that EM assumed responsibility for Hanford in 1989 and is now responsible for implementing the DOE American Indian Policy. I will therefore confine the brief summary of the past relationship to one between the Nez Perce Tribe with EM since 1989.

The basis for the Nez Perce Tribe's involvement at Hanford was established in 1983, with the Nuclear waste Policy Act, of 1982. Since the withdrawal of funding for Nez Perce participation in Hanford activities, all be they limited to BWIP, in 1987, the Nez Perce Tribe sought for was to stay involved with Hanford activities because they affected Nez Perce Treaty rights on the Columbia River (White, 1993). In 1989, with the formation of EM and the transfer of Hanford activities to EM management, the Nez Perce Tribe saw an avenue for participation open under the Defense Authorization Act's requirement of an EM Five-Year Plan, and funding for Tribal participation in that planning process (Powaukee, 1993). *FIND OUT HOW THE REQUIREMENT FOR TRIBAL PARTICIPATION OCCURED IN THE DAA.* In 1992, after the Yakama Indian Nation applied in 1990, and the CTUIR applied in 1991, the Nez Perce Tribe applied for funding to participate in the Five-Year Plan process. The Nez Perce Tribe received Five-Year Plan participation funding in 1992, but due a delay in adjusting its funding level, did not begin staffing its ERWM Department until January 1993. The adequate funding question has plagued the Nez Perce Tribe's relationship with EM since its inception (Powaukee, 1994). The funding for

Tribal participation came from discretionary funds available to programs for funding activities without legally required funding levels. This fact made "adequate" funding the primary topic of Tribal participation (Waldrop, 1993). Just as meaningful public participation was vague, so was adequate funding. The Bush administration staff considered adequate funding limited in size, and it was allocated for Tribes on a first-come first-serve basis (Waldrop, 1992). In other words, the first and largest proposal received the lions-share of the funding. Proposals arriving a year later received less, as EM attempted to maintain the level of funding for the first funded proposal. Likewise, Nez Perce proposal, arriving two years after the first proposal received funding based on what was left over as EM attempted to maintain the funding levels of the previous two Tribal participation proposals (Clarke, 1994). EM recognized that the funding systems was inadequate to withstand close external scrutiny, and in an effort to buy time, back-filled proposals by adjusting funding levels after receiving the OMB passback figures (Petrasek, 1993). Adjusting funding levels for Tribal participation required scrambling for additional funds from other programs to add to the Tribal participation pot (Petrasek, 1993). EM and the Nez Perce Tribe recognized the need to re-evaluate this situation in early 1993 (Powaukee, 1994).

The Nez Perce Tribe had consistently sought reform of EM management regarding Tribal participation (Powaukee, 1994). The Nez Perce Tribe joined, as a member, the National Congress of American Indians (April, 1993), the Council of Energy Resource Tribes (March, 1993), in presenting its views on Tribal participation to the

Secretary of Energy. At various times throughout 1993 the Nez Perce Tribe's ERWM and some of the Tribe's elected leadership visited EM Headquarters to discuss the equity of the funding situation. In 1994, EM Assistant Secretary Grumbly authorized Operations Offices to enter into cooperative agreements with affected Tribes (Grumbly, 1994). This move came during the overall EM effort to reel-in costs and redesign its operating practices. EM has included Tribal governments in this effort to their credit (Powaukee, 1994). Tribes are now able, through their negotiated cooperative agreements to, in effect, contract portions of the EM program at Hanford. The change in relationship, from "affected participant" to "partner in cleanup" still must materialize in cleanup results to be considered effective, however, the shift in relationship nuance is important to note. This change in relationship may produce measurable results in EM's "front-end loading costs" (EM Two Day Stand Down, 1993). Front-end loading costs are the cost associated with implementing a program or cleaning up an Operable Unit. The Nez Perce Tribe and EM have committed, in their new relationship based on the cooperative agreement, to work together to identify where Tribal participation can help reduce these and other costs and speed tangible cleanup results (Powaukee, 1994).

From this brief historical description of the Nez Perce/EM relationship it seems clear that planning participation funding has resulted in some mutually agreeable improvement to the situation. This "improvement" will be judged on future refinements of the relationship and tangible cleanup results with improved cost effectiveness (Powaukee, 1994; Waldrop, 1994).

Summary

The DOE American Indian Policy began by to define DOE's commitment to government-to-government relationships with federally-recognized Indian Tribes. The brush strokes of this policy commitment were admittedly wide and require careful study to apply them appropriately to Tribes affected by DOE's nuclear and hazardous waste cleanup and isolation activities across the nation. I have described the development of the DOE American Indian Policy and examined EM's institutional capacity to implement this policy using three generations of policy analysis. I have examined the roles of the "fixer," and incentives for compliance with the policy direction. I have also examined the institutional capacity of EM's efforts using the conceptual framework developed by Mazmanian and Sabatier to determine if EM is capable of fulfilling its policy commitment and identifying where it may fall short. Finally, using the third generation of policy analysis of Nakamura, Church, and Cooper, I have examined an alternative way of thinking about the policy commitment which may lead to some useful alternatives to implementation. From these examinations we can begin to recommend wher the policy might be rethought or implementation designed to meet the needs of both its targets and clientele. I will present these findings in Chapter Four.

Chapter 3

Methodology for Examining the U.S. Department of Energy's American Indian Policy as Implementation of a Public Policy

Introduction

In conducting the research for this Thesis I have employed the qualitative approach, the case study, and a mixture of analytical models. Before describing the measures I used to ensure validity of my results it should be noted that:

Of course, the ideal of the active-reactive-adaptive evaluator being methodologically flexible, sophisticated, and able to use a variety of methods to study any particular evaluation question runs headlong into the realities of the evaluation world. These realities include limited resources, political considerations, and the narrowness of disciplinary training available to most evaluators. These constraints mean that the imagery of being active-reactive-adaptive includes the evaluator as a negotiator who strives to obtain the best possible design and the most useful answers within the real world of politics, people, and methodological prejudice (Patton, 1980).

This caveat is not a disclaimer, rather, it points out the need for additional research in the area of U.S. Department of Energy effort to involve Tribal governments in its stakeholder involvement effort. As in other areas of Tribal government/Federal government relations the literature of Tribal involvement in federal facilities

environmental restoration and waste management is sparse to non-existent. The reality in this area of program evaluation may be that Tribal involvement is considered marginal, politically uninteresting, with too few qualified people to do the research. This effort, then is one of the first steps toward better evaluation of Tribal involvement in environmental cleanup activities at federal facilities. Hopefully the work presented here will inspire additional studies to test my analysis and conclusions.

Qualitative Analysis

In Michael Patton's 1980 text, Qualitative Evaluation Methods, Patton introduces the validity of qualitative evaluation methods:

The hypothetico-deductive, natural science paradigm aims at prediction of social phenomena; the holistic-inductive, anthropological paradigm aims at understanding of social phenomena. From a utilization-focused perspective on evaluation research, neither of these paradigms is intrinsically better than the other (Patton, 1980).

Patton argues that choosing one paradigm over the other should be the choice of the evaluator. The evaluator, operating under the research constraints of reality, must then employ the best options available for the resources and clientele needs (Patton, 1980). I therefore have chosen the options I am able to employ.

In later sections Patton addresses the usefulness of qualitative evaluation methods in implementation analysis:

It is important to study and evaluate program implementation in order to understand how and why programs deviate from initial plans and expectations. *Such deviations are quite common and natural, as demonstrated in the findings of Rand's "Change Agent Study" of 293 federal programs supporting educational change. That study found that national programs are implemented incrementally by adapting to local conditions, organizational dynamics, and programmatic uncertainties.*

If program implementation is characterized by a process of adaptation to local conditions, needs, and interests, then the methods used to study implementation must be open-ended, discovery oriented, and capable of describing developmental processes and program change. Qualitative methods are ideally suited to the task of describing program implementation (Patton, 1980).

Qualitative methodologies seem ideally suited for this implementation analysis.

While not comparing sites in different locations of the country, this implementation case has experienced change since its inception and does demonstrate adaptation to local conditions; moreover the DOE Indian policy itself requires consideration of individual Tribal governments' needs and interests.

The qualitative methodology relies on documentation research, personal interviews, observation, and personal introspection (Patton, 1980). My documentation research can be understood by looking at the reference section, and my personal introspection should be evident throughout the thesis, so I will address the two remaining aspects of qualitative research methodology next.

Observational Method

The research was conducted, due to lack of financial resources, while employed at the U.S. Department of Energy and at the Nez Perce Tribe as a participant-as-observer, as initially, partially covert and later overt. I say "initially, partially, covert" because I am an Osage Indian provided by an intertribal organization. This fact alone, I suspect, gave EM implementing officials some reason to suspect that I may be reporting some information to CERT, which was, by the way, not the case. The reasons for the initially, partially, covert participation as an observer was dictated by a mid-course change in my thesis topic. After working in DOE for eight months I decided to study the current thesis question, rather than my previous implementation analysis of the Tallgrass Prairie Preserve, in Osage County Oklahoma. Consequently, field notes for a good portion of the thesis are from recall and confirmed by the sources cited throughout the thesis. This field research was conducted through informal, conversational interviews and personal observation.

The Field

I worked for a year in the Department of Energy's Office of Environmental Restoration and Waste Management (EM) as a Council of Energy Resource Tribes (CERT) year-long intern. While in DOE Headquarters, I was placed in EM's Office of Planning (EM-14) for roughly six months and then in the Office of Policy and

Program Information (EM-4) for the rest of my time there. The EM-4 has since been renamed during the new Administration's reorganization of the Department. EM-4 is now called "the Office of Public Accountability" and redesignated as EM-5.

The work I performed while in EM-14 and EM-4 was primarily the implementation of the Department's American Indian Policy for EM which allowed me daily access to decisionmakers and implementing officials. The reason for the shift of my office assignment was the shift in responsibility for implementation of the Indian Policy for EM. I was allowed to follow the issue to "the front office." EM-4 is organizationally, part of the EM Assistant Secretary's staff. EM-14 is under the direct supervision of the Deputy Assistant Secretary for Management and Finance (EM-10). This organizational change allowed me to observe the inter-organizational imperatives from two different Headquarters perspectives.

More specifically, my duties in implementing the Indian Policy, while in EM-14 included responding to Tribal correspondence and coordinating Headquarters and Field efforts to develop an implementation plan, through the EM Indian Issues Work Group. The EM Indian Issues Work Group was conceived to develop one voice for EM in dealing with Tribal governments. The benefit of responding to Tribal correspondence (which included all correspondence regarding Indian issues, including letters from Congressmen) was that I was forced, very quickly, to understand and reiterate the "EM line" on Indian issues, contributing to a deeper understanding of the internal sensitivities associated with Tribal involvement.

My assignments in EM-4 continued along the same vein, however, they began to include more consultation with Tribal governments and intertribal organizations. This experience provided me the opportunity to participate in and observe how EM implementing officials felt interacting with their Tribal constituents.

My research has continued with my current employment. I worked in the DOE as a Council of Energy Resource Tribes (CERT) intern. I am currently a CERT employee provided to the Nez Perce Tribe, under a subcontract, to work in their Department of Environmental Restoration and Waste Management (ERWM).

I am now afforded the new perspective of working on the DOE's cleanup effort at the DOE Hanford reservation from Tribal side. The duties I have at the Nez Perce ERWM are departmental planning, assisting in securing funding from the DOE, writing correspondence (which again is the official line of the Nez Perce Tribal Executive Committee), and commenting on DOE planning processes and technical reports required by environmental/cultural protection legislation. These duties have given me insight into the Nez Perce perspective. In assisting to secure funds from the Department of Energy I have also drafted the Cooperative Agreement between the Nez Perce Tribe and the DOE, which will serve as the official and binding document defining the two parties' working relationship. This experience has allowed me to participate and observe the Tribal/Federal relationship from a Tribal management perspective.

This cooperative agreement might also serve as the *de facto* Richland Operations Office implementation plan for the DOE Indian Policy. The Richland Operations Office must develop its implementation plan, and within EM, Richland is receiving more autonomy under the new Administration (as are all Operations Offices and National Laboratories) and is taking the lead on implementing the DOE Indian Policy. Within DOE, EM is taking the lead on implementing the Indian Policy, with other Offices waiting and watching how EM proceeds. Richland will probably develop its implementation plan by simply entering into cooperative agreements with all the affected Tribes in its area. This perceived emphasis for productive Tribal/Federal cooperative relationships adds a unique perspective of being on the forefront of developing Tribal/Federal-Federal/Tribal intergovernmental relations around environmental clean up activities.

Framework for Analysis

In examining the results of the observational data, I structured the implementation analysis using a mixture of implementation analysis approaches. These three approaches are described as three generations of implementation analysis literature (Nakamura, Church, and Cooper, 1991). The first generation focuses on individual incentives for compliance and the importance of the "fixer." The second generation focuses on the institutional setting and capabilities, such as the framework offered by Mazmanian and Sabatier. The "third generation" approach offered by Nakamura, Church, and Cooper, focuses on "systems changing" approaches, such as

developing new relationships to improve implementation of CERCLA cleanup actions. I have chosen to follow Nakamura, Church, and Cooper's lead because it provides a level of analytical triangulation that may increase the validity of my findings. It is my hope that potential inaccuracies due to my data collection may either be uncovered (making them easier to address) or alleviated because of this analysis approach.

Summary

This thesis employs a qualitative methodological approach both because it is less resource intensive and because qualitative methods appear well-suited for implementation studies. While qualitative methods require rigor in data collection, my thesis relies heavily on data from recall. The potential for inaccuracies, due to this data collection deficiency, have driven me to measures to ensure greater validity. The principle validity-increasing measure is subject reactions to the analysis. The implementation analysis provides three policy implementation analysis perspectives of the DOE American Indian policy. It is hoped this "analysis triangulation" will not only increase the usefulness of the analysis, but help identify its strengths and weaknesses.

Chapter 4

Analysis Findings and Questions for Future Study

Introduction

This chapter will draw the thesis to a close by presenting what I believe are the lessons learned. These lessons learned will be presented within the limitations of the methodology. These highlighted limitations and conditioned findings will provide the fruit of the need for further inquiry into the subjects of democratization of environmental cleanup efforts at federal facilities and the Department of Energy's attempts to include Tribal governments in that effort. The case of including Tribal governments presents unique obstacles for the Department of Energy because of their legal and cultural status, but including Tribal governments also presents opportunities for the advancement of democracy in planning and implementing programs design to provide greater environmental accountability and sustainable patterns of land use. These opportunities can only be fully realized by including the Tribes themselves.

Before gleening the lessons learned from the prevoius chapters, it would be helpful to remind the reader of the questions I posed at the beginning of this thesis:

- 1) Can examining the implementation of the U.S. Department of Energy's American Indian Policy under the conceptual frameworks offered by policy analysis literature provide us lessons about democratization of necessarily technical and managerially complex programs? What are these lessons?
- 2) Did the decisionmakers who developed the DOE American Indian Policy adequately take implementation realities into account?
- 3) Can implementing an Indian policy provide any unique problems or solutions to environmental cleanup programs?
- 4) How can we better inform policy makers about involving Indian Nations in environmental cleanup?

I will answer these questions in turn, explicitly stating where additional research might help more fully answer these and additional questions.

Question One:

Can examining the implementation of the U.S. Department of Energy's American Indian Policy under the conceptual frameworks offered by policy analysis literature provide us lessons about democratization of necessarily technical and managerially complex programs? What are these lessons?

The literature

The answer to the first part of this question is obviously the easiest. Yes. But what have we learned from applying the three generations of implementation analysis in this case? I must answer this question in two parts because it asks two questions.

The first question relates to the utility of the literature, so I will address the usefulness of applying three generations of policy implementation analysis in this case. The second question relates to the case itself. What in particular have we learned in this case from the literature?

Focusing on the role of the "fixer" and incentives for compliance with the DOE American Indian Policy reveals aspects about the existing relationships within the U.S. Department of Energy. One must understand the current motivations in order to understand the application of an incentive structure. What this thesis has revealed is nothing startling. Entrenched bureaucrats operating under resource constraints and an old culture of secrecy find it difficult to accept the presence of stakeholders, in part, because they do not understand, or accept as valid, stakeholder reasons for being involved. The new stakeholder involvement policy can not simply be integrated with the existing structure. Organizational restructuring, is necessary to insure compliance. New offices within the organization have been created to oversee the stakeholder involvement effort. Within EM this is the Office of Public Accountability, however, simply adding a new office does not appear to be enough to insure compliance with the stakeholder involvement effort. Skillfull

implementing officials must also be employed to direct these offices. These officials must have the authority to raise the stature of advocates for change who are currently working within the old organization, and evaluate their effectiveness and institutional support. Raising the stature of advocates for change will not create any new incentives for compliance if their effectiveness or professional reputations are tarnished by past advocacy activities. In short, the raised stature of the fixer offices and applied resources must be perceived by the targets of change to be within certain past standards of acceptability. This incremental approach to implementation is supported by policy literature theory and numerous case studies. The constituencies of stakeholder groups must also learn to accept the interaction of their representatives with a changed Department mission. The fixer offices must be visible to these constituencies, because in large part a department as large and complex as DOE is often seen as monolithic. Increasing the visibility of fixers can be accomplished by public affiliation with popular, politically appointed government officials. However, personal affiliation with politically-appointed, public officials is clearly not sufficient to institute compliance with career bureaucrats. Career officials are aware of the relatively short-terms of political appointees.

Mazmanian and Sabatier's "second generation" conceptual framework for implementation analysis, when complementing the examination of the fixer role, provides a closer, more systematic, examination of the institutional capacity to implement change. Policy analysts who employ Mazmanian and Sabatier's conceptual framework can develop a fair approximation of the likelihood of

successful implementation. The information gathered from applying their conceptual framework can also suggest specific measures for improved chances for successful implementation which is useful to implementing officials and active, informed constituents. At some level, however, the detail loses its appeal and usefulness to the stakeholder constituencies who operate in a world of scientific, technical aspects of hazardous/radioactive cleanup and general organizational relationships.

The appeal of applying Nakamura, Church, and Cooper's "third generation" of implementation analysis is that, in part, it can begin to illuminate the relationships between the constituents and the implementing officials by focusing on the systems changes required by the situation. An examination of policy implementation focusing on system changes not only provides information about where relationships are working or not, but it can lead the evaluator (or constituency) to ask other questions which can be answered by employing the first two generations of policy analysis. For example in asking whether the parties involved have the motivation or capacity to implement a new relationship (a question in the systems changing examination) the evaluator or constituency can then ask, how can we examine these questions? The answer I have found in this thesis is: examine these questions using the first and second generation approaches.

The case

What in particular have we learned in this case from the literature? From examining the case of Nez Perce Tribal involvement in the Hanford cleanup mission the fixer-focused analysis leads me to conclude that incentives for compliance are complex sets of relationships between implementing officials and their perceptions of the institution in which they work. This might not be a startling revelation, but it does highlight the massive psychological and managerial task of changing perceptions, standards of acceptable behavior, and scope of information required to make decisions. How then does society deal with changing psychological conceptions? The answer is through education. How should EM address its task of culture change with regard to Tribal involvement? Through a combination of attrition and education. Integrating a Tribally-focused component of the EM employee training program should be viewed as the preferred avenue because it emphasizes a commonly-accepted moral value of employees and it forces change, speeding the incrementalism inherent to such change. Normal attrition takes care of itself. EM has identified the task of employee education as part of its new mission and is developing Tribal training components of its working orientation and other training programs. In fulfilling a DOE Indian policy commitment, EM is developing this training with Tribes, using Tribal expertise and personnel.

Is education enough? Is convincing employees of the ethical, democratic, and managerial imperatives enough to implement the Indian policy? Are there other measures EM can take to implement the Indian policy? The specific answers are illuminated by picking apart the departmental capacity to institute the required change. I will use a tabular format to present the findings revealed by employing Mazmanian and Sabatier's conceptual framework.

Condition

1. The statute contains clear and consistent directives.

Assessment

The DOE American Indian Policy contains vague directives such as committing to consult with Tribal governments, and not interfering unnecessarily with Tribal cultural practices, and include the Indian policy in its longterm planning. Terms like "consult" and "unnecessarily" and "include" leave a lot of room for interpretation. Consequently, the Nez Perce Tribe has made it a major goal to define these terms. In its effort to develop a relationship that works, the Nez Perce Tribe and EM have agreed to enter into a cooperative agreement to clear up vague terms like those mentioned above. EM has also begun to include Tribes in as trainers in their new employee and employee training programs. The intention is to hear from Tribes what these terms mean to them.

DOE Order 1230.2, although very specific in some respects, does not help to clear up

the vague and potentially inconsistent terminology in the Indian policy. Vague terms have the potential for becoming inconsistent when they are interpreted loosely by various disconnected offices within the department. It may be assumed that the Office of Congressional and Intergovernmental Affairs will assure consistent interpretation and application of terms, however, as we have seen in Chapter Two, without adequate resources available to implementing officials, this task becomes nearly impossible.

Condition

2. The statute incorporates a sound theory identifying the factors affecting program goals and gives implementing officials sufficient jurisdiction to attain those objectives.

Assessment

The statute incorporates a sound theory for its trust responsibility, however, it does not mention what constitutes a breach of trust, i.e. standards defined by the U.S. Supreme Court to fulfill this trust responsibility. Order 1230.2 defines programmatic jurisdiction for developing implementation plans and coordination within the department. As we have seen in Chapter Two, jurisdiction may not be adequate to insure compliance with the policy or its order. Sufficient incentives for compliance must accompany the allocation jurisdiction. The jurisdiction is not a simple question of where one program begins and where another ends. The critical aspect of jurisdiction is the interrelationship between jurisdictions. This gray area can be

described as programmatic perceptions of others' ability to punish or reward decisions made or actions taken. The policy and order do not address these critical gray areas, and reliance on existing incentive structures designed for compliance with different types of requirements may not be adequate. As noted in the section in Chapter Two devoted to fixers and incentives reorganization, it is clear that the old incentive structures were not adequate. New organizations were required to develop these incentives and monitor their deployment. These new organizations, however, were developed in large part by the need to implement the culture change of increased democratization of departmental decisionmaking. It is too soon to determine whether these public involvement implementation strategies will be adequate for the Indian policy, but indications are that they can satisfy.

Condition

3. The statute structures implementation to maximize the probability of compliance from implementing officials and target groups.

Assessment

The Indian policy, as noted above does little to amend any existing structure for implementation, other than to direct implementing programs to identify and remove impediments to implementation. Removing impediments to implementation requires having a clear idea of what to implement and how to implement it. This condition clearly opens the door for an incremental approach to implementation in this case. The implementing program must feel its way along,

identifying impediments as it attempts implementation. In this sense the policy does take into account that areas of difficulty may arise, and it can do no more than issue a blanket direction for the implementing officials to seek to identify and remove them. Flexibility or vagueness in this instance may lend to maximizing implementation.

Condition

4. Top implementing officials are strongly committed to attainment of statutory objectives and have the skills necessary to ensure achievement of the goals.

Assessment

Strong is a relative term. Judging from the difference in the Bush and Clinton administrations it would be fair to say that under Secretary O'Leary is strongly committed to implementing the Indian policy, and taking direction from the Tribes as to what shape implementation will take. The Secretary's commitment is translated through layers of department staff. Top implementing officials under the Secretary include the EM Assistant Secretary and his staff and the Assistant Secretary for Congressional and Intergovernmental Affairs and his staff. EM Assistant Secretary Grumbly has made major (another relative term) commitments to Tribes to address their planning participation funding concerns, and has taken a step further to include Tribal programs as options for reducing management costs. Where it makes sense to use Tribal strengths EM is actively pursuing incorporating their participation. Including Tribal program strengths in training and cultural

resource management is being done in addition to the required Tribal participation in EM program planning.

Condition

5. The program is actively supported by organized constituency groups and few key sovereigns (legislative and executive) throughout the implementation process.

Assessment

Indian policy supporters are limited, however, Tribal participation constituency groups include the Tribes, intertribal organizations, State STGWG members, and in a more general sense the President and a handful of Senators. Nez Perce Tribal participation has been supported by the normally hostile or indifferent Idaho Congressional delegation. Their support, however, has been gained not by their conversion to Indian causes, but by the potential funding that Idaho may lose if the Nez Perce are not funded to similar levels as the Tribes in Oregon and Washington. The support has been consistent to date, but the Nez Perce Tribe feels it must act quickly to institutionalize its presence, because support for Tribal issues is notorious for taking 180 degree turns almost overnight.

Condition

6. Changing socioeconomic conditions over time do not serve to weaken the statute's causal theory or political support nor the priority of statutory objectives.

Assessment

Changing socioeconomic conditions currently top the list of Tribal concerns. The DOE Office of Environmental Restoration and Waste Management has issued a notice of intent to enter the rulemaking process to develop funding eligibility and funding level criteria. This is evidence of a tightening budgetary environment and the potential for explosive growth in Tribal participation. The move toward restricting funding can be couched in terms of greater fiscal accountability, however, Tribes without funding perceive this move as fudging on a commitment to include Tribes in planning and other activities. This condition may well be viewed as the most crucial to Tribes without the existing involvement mechanisms of active and skillful Indian program liaisons. The Nez Perce Tribe's ERWM department sees this move as a way to insure adequate funding for protection of Nez Perce treaty rights. If the zero-sum funding scenario, that both EM and the Nez Perce are operating under, is accurate, the changing socioeconomic conditions affecting the federal budget may undermine the political support for the Indian policy. However, since the causal theory is largely moral and legal, changing socioeconomic conditions will not affect it, unless those changes cause change in the law and/or morality.

Examining these institutional variables provides the interested observer some important answers to whether the implementation will be successful, but can we look at the case differently to find some additional confidence about the prospects for implementation? I have used the Nakamura, Church, and Cooper's third

generation, systems changing approach to answer this question. From Nakamura, Church, and Cooper's implementation study of ADR mechanisms in New York State to cleanup superfund sites the authors focus on the dynamics of relationships. There is an analysis of systems changes, where existing relationships are blamed for failure to implement cleanup and where those relationships are targeted for change as a solution. The similarities between that study and the case at Hanford were too tempting to not attempt a brief comparison. EM's identified problems are largely, in the case of democratizing their technical and complex managerial decisions, are blamed on existing relationships. In the case of EM's relationship with the Nez Perce Tribe, a stakeholder with unique and special roles and relationships with the United States, there is evidence of redefining the relationship. This relationship is recognized and guided by the DOE American Indian policy. Despite the circumstances surrounding the development of the Indian policy, the Nez Perce Tribe and EM are attempting to implement this relationship with a cooperative agreement. Institutionalizing the relationship between the Nez Perce and EM is however, not as simple as signing an agreement. As Nakamura, Church, and Cooper mention, both parties must demonstrate motivation and capacity to implement the new relationship. As the Nez Perce/DOE BWIP cooperation and consultation agreement of 1987 demonstrated, DOE must have clear and consistent incentives for maintaining the relationship. DOE's history of involvement, its federal trust responsibility, and the Nez Perce implied threat of legal action are all incentives for entering into the relationship.

EM does have a demonstrated financial capacity to enter into the relationship, but they do not view their relationship with the Nez Perce as a single event in time. EM sees potentially hundreds of other Tribes in need of similar relationships, and has consequently begun to scope the potential financial commitment that accompanies the relationship suggested by the Indian policy and the Secretary's personal commitments. Part of this work requires describing the relationships required. They will all be somewhat different, because they are defined as government-to-government relationships. EM's answer to defining these relationships is to open the question of defining categories of relationships to the public, through a notice of intent to enter the rulemaking process. The Nez Perce relationship with EM will be used to some extent as a partial definition of the category of a high degree of involvement. That the Nez Perce are being considered in this light is evidence that the Nez Perce Tribe's relationship with EM is becoming institutionalized, in the minds, plans, and budgets of EM.

The systems change in the case of the relationship between EM and the Nez Perce Tribe is an example of incremental success. The relationship is slowly developing in more than the minds of the implementing officials, however, those minds in particular must be considered at least partially critical to greater institutionalization. Incremental institutionalization of a long-term, working relationship can be viewed in this case as a normal process, but one that requires careful tending as different phases of that relationship come and go. The final analysis is one of cautionary optimism.

As for the other questions at the beginning of this chapter I can answer:

- 2) Did the decisionmakers who developed the DOE American Indian Policy adequately take implementation realities into account?

No, the decisionmakers developing the policy did not adequately scope the potential work or financial commitments required to implement this policy. The policy's broad scope may have doomed it to failure, but it also passed the blame for this failure on to the implementing offices. It is the duty of those offices to define, in close consultation with Tribes affected or interested in its programs, to develop an adequate implementation plan. The road EM has taken with its Tribal partners may not be the best one for every implementing office. If, however, that implementing office has similar historical, mission objective-related, and task defined relationships with Indian Nations, the case of Nez Perce involvement at Hanford is a rough approximation of successfully implementing the DOE American Indian Policy. I contend that it is a rough approximation because the relationship is by no means fully developed nor are outside influences assured to be friendly to the relationship.

- 3) Can implementing an Indian policy provide any unique problems or solutions to environmental cleanup programs?

From a Tribal perspective the answer is most definitely, "yes." The unique

ve been adequately outlined in the previous chapters. I would like to
 unique solutions to environmental cleanup problems offered by
 ement. The first is focused attention on the moral aspects of
 al degradation. Indian Nations are victims of disregard for the
 , as are we all, but their history and cultural values can serve as a
 ncreased care to the multi-faceted and multi-disciplinary aspects of
 al issues. Indian Nations represent distinct, separate, and sovereign
 ; and sets of cultural values. Including these values and governmental
 in environmental cleanup operations has the potential, in some cases,
 every discipline imagined in the academic world. Nez Perce
 at Hanford requires the Nez Perce to interact with EM as a potential
 natural resource trustee, an economically disenfranchised community, a
 ulation, an education project, a catalyst for blending technology
 t and environmental consciousness, a moral imperative, and a
 here undoubtedly other aspects to this relationship, but it is clear in my
 udying Tribal involvement provides ample room for innovative policy
 a dearth of unanswered questions. I firmly believe that study of these
 ; and their implementation can only help increase the prospects for
 r collective future and our environment.

- 4) How can we better inform policy makers about involving Indian Nations in environmental cleanup?

We can continue to study the various aspects of implementing complex working relationships like the one found in the case of Nez Perce involvement at Hanford. Building on the scant literature in the field of implementation of Indian involvement in federal facility environmental cleanup activities can serve as a broad base of this developing knowledge base, because federal involvement with Indian Tribes undoubtedly offers the most complex mix of regulatory, moral, and pragmatic considerations, which accompanies the fundamental definition of contemporary Tribal legal status.

Conclusion

The realities of qualitative implementation analysis have limited the rigor of this thesis study of implementing the DOE American Indian Policy at Hanford, however, I feel the methodology provides sufficient rigor to provide an excellent starting point for additional study. If I had it to do over again, I would have paid more attention to maintaining field notes and made my interviews more explicitly overt. If I had to write another thesis or a dissertation, I would seriously consider building on the work I have done here because it provides as many questions as answers. This implementation analysis is a snapshot of the Nez Perce case at Hanford. It is a snapshot of the beginning of a new relationship. I am curious if my predictions of a fruitful and satisfying relationship will prove true. We may never have to opportunity to find out, but at least we have a clear glimpse of how it began.

References

APPENDIX I

U.S. Department of Energy American Indian Policy

Purpose

This policy outlines the principles to be followed by the Department of Energy (DOE) in its interactions with federally-recognized American Indian Tribes. It is based on Federal policy, treaties, Federal law and DOE's responsibilities as a Federal agency to ensure that tribal rights and interests are identified and considered in pertinent decision-making. The policy provides general guidance to DOE personnel for management actions affecting American Indians and emphasizes implementation of such activities in a knowledgeable and sensitive manner. This policy does not affect DOE interactions with State-recognized Tribes with respect to matters provided for by statute or regulation.

Definition

INDIAN COUNTRY means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether

within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. (18 USCS 1151)

Background

American Indian Tribal governments have a special and unique legal and political relationship with the Government of the United States, defined by history, treaties, statutes, court decisions, and the U.S. Constitution. The United States has entered into more than 600 treaties and agreements with American Indian Tribes. These treaties and agreements create a variety of legal responsibilities by the United States toward American Indian Tribes and provide the basis for a government-to-government relationship. Other responsibilities toward American Indians are created by Congress through statutory enactments. Although the Department of Interior, through the Bureau of Indian Affairs, has the principle responsibility for upholding obligations of the Federal Government to American Indians, this responsibility extends to all Federal agencies.

Policy

1. **The Department of Energy recognizes and commits to a government-to-government relationship with American Indian Tribal Governments.**

DOE recognizes Tribal governments as sovereign entities with, in most cases, primary authority and responsibility for Indian Country. In keeping with the principle of American Indian self-government, the Department will view Tribal governments as the appropriate non-Federal parties for making decisions affecting Indian Country, its energy resources and environments, the health and welfare of its populace. The Department will recognize the right of each Tribe to set its own priorities and goals in developing and managing its energy resources. The Department recognizes that some tribes have treaty-protected interests in resources outside reservation boundaries.

2. DOE recognizes that trust relationship derives from the historical relationship between the Federal Government and American Indian Tribes as expressed in certain treaties and Federal law.

In keeping with the trust relationship, the DOE will consult with tribal governments regarding the impact of DOE activities on energy, environmental and natural resources of American Indian tribes when carrying out its responsibilities.

3. The Department will consult with Tribal Governments to assure that Tribal rights and concerns are considered prior to DOE taking actions, making decisions or implementing programs that may affect Tribes.

The DOE will take a proactive approach to solicit input from tribal

governments on departmental policies and issues. The Department will encourage Tribal Governments and their members to participate fully in the national and regional dialogues concerning departmental programs and issues.

4. Consistent with Federal cultural resource laws and the American Indian Religious Freedom Act (P.L. 95-341), each Field Office or DOE installation with areas of cultural or religious concern to American Indians will consult with them about the potential impacts of proposed DOE actions on those resources and will avoid unnecessary interference with traditional religious practices.

DOE will comply with all cultural resource legislation and implementing regulations in the management and operation of its programs and facilities. Consultation with appropriate American Indian Tribal Governments is part of the compliance process involving Federal cultural resource laws and the American Indian Religious Freedom Act. Consultation may include, but is not limited to 1) the exchange of information concerning the location and management of cultural resources, 2) repatriation or other disposition of objects and human remains, 3) access to sacred areas and traditional resources located on DOE lands in accordance with safety, health and national security considerations, and 4) assessment of potential community impacts.

5) The Department will identify and seek to remove impediments to working directly and effectively with Tribal Governments on DOE programs.

DOE recognizes that there may be regulatory, statutory and/or procedural impediments which limit or restrict our ability to work effectively and consistently with Tribes. In keeping with this policy, we will seek to remove any such impediments. Additionally, we will, to the maximum extent permitted by law, apply existing statutory, regulatory and procedural requirements in a manner that furthers these goals of this policy.

6) The Department will work with other Federal and State agencies that have related responsibilities to clarify the roles, responsibilities and relationships of our respective organizations as they relate to Tribal matters.

DOE will seek and promote cooperation with other agencies that have related responsibilities. In many areas of concern to DOE, cooperation and mutual consideration among neighboring governments (Federal, State, Tribal and local) is essential. Accordingly, DOE will encourage early communication and cooperation among all governmental parties. This recognizes that the principle of comity among equals and neighbors often serves the best interests of all parties.

7) The Department will incorporate this policy into its ongoing and long-term planning and management processes.

It is key in this effort to ensure that the principles of this policy are effectively

institutionalized by incorporating them into the Department's ongoing and long-term planning and management processes. Department managers will include specific programmatic actions designed to facilitate Tribal participation in Departmental program planning and activities.

(signed)

James D. Watkins

Admiral, U.S. Navy (Retired)

APPENDIX II

Membership in the State and Tribal Government Working Group

(as of January 19, 1994)

Nez Perce Nation (Hanford)

Yakima Indian Nation (Hanford)

Confederated Tribes of the Umatilla Indian Reservation (Hanford)

Shoshone-Bannock Tribes of the Fort Hall Indian Reservation (INEL)

San Ildefonso Pueblo (Los Alamos National Laboratory)

Navajo Nation (UMTRA)

Seneca Nation (West Valley Demonstration Project)

State of Nevada (Nevada Test Site/Yucca Mountain)

State of California (numerous National Labs and waste storage sites)

State of Ohio (Fernald and Mound)

State of Florida (Pinellas)

State of New York (West Valley)

State of Colorado (Rocky Flats)

State of New Mexico (National Lab and WIPP)

State of Washington (Hanford)

State of Oregon (Hanford)

State of Illinois (Argonne National Laboratory)

State of Tennessee (Oakridge National Laboratory)

State of Kentucky (Paducah Gaseous Diffusion Plant)

State of South Carolina (Savannah River)

State of Georgia (Savannah River)

State of Idaho (Idaho National Exploratory Laboratory)

National Conference of State Legislatures (acronym NCSL)

National Association of Attorneys General (acronym NAAG)

APPENDIX III

State and Tribal Government Working Group Charter

MISSION

The mission of the State and Tribal Government Working Group ("STGWG") is to help ensure that Department of Energy ("DOE") facilities are operated and cleaned up in compliance with all applicable environmental laws and Tribal treaty rights, and that the cleanup is performed expeditiously and efficiently, in a manner that

protects human health and the environment. To perform this mission, the STGWWG provides enhanced communication at all levels among States and Tribes affected by DOE facilities and activities, and provides policy-level advice to DOE and other interested stakeholders.

The scope of issues that the STGWWG addresses includes environmental compliance, waste management and environmental restoration necessitated by DOE operations; reconfiguration of the DOE-weapons complex, technology development and transfer related to environmental restoration and compliance; treatment, storage, disposal and transportation of wastes from DOE facilities; management of materials from dismantlement of nuclear warheads; waste minimization and pollution prevention at DOE facilities; and public involvement and education related to the above issues.

MEMBERSHIP

STGWWG membership is open to States that host DOE facilities or that are impacted by contamination from a DOE facility in a neighboring State, and to Indian Tribes that are impacted by the contamination from DOE facilities or that host such facilities.

COMPOSITION

STGWWG is composed of policy-level representatives of member States and Tribes.

STGWG State representatives are appointed by and represent the Governors or Attorneys General of the member States. STGWG Tribal representatives are appointed by the governing bodies of their respective Tribes. STGWG also includes liaisons from various national associations of government officials. These representatives are appointed in accordance with the procedures of their respective organizations.

OPERATION

STGWG generally meets as a whole three or four times per year. Subcommittees meet from time to time as needed. STGWG meetings are divided between executive sessions for the State and Tribal members of STGWG, and open sessions, which also include high-level DOE representatives from the Office of Environmental Restoration and Waste Management, as well as other DOE Offices. STGWG typically focuses on issues of common concern to its members, and frequently reaches consensus on such issues. However, there is no voting, and no requirement that consensus be reached. Each member is free to express his or her own opinions.

STGWG presently has one half-time staff person, who is a State/association representative on STGWG, to assist the group in setting its agenda, enhancing communication among STGWG members, researching issues, drafting comments on DOE's Five-Year Plan and other documents, and developing policy

4. REFERENCES.

a. DOE 1220.1, Congressional and Intergovernmental Affairs, of 9-30-91, which establishes policies, responsibilities, and procedures for: (1) the management and coordination of congressional and intergovernmental affairs activities within a centralized system of the Department of Energy; and (2) carrying out the non-legal functions and processes involving the development, preparation, coordination, and clearance of all proposals contained in the DOE legislative program.

b. Title 25, United States Code (U.S.C.) 1301, (1982), which defines Indian Tribes.

5. EXCEPTION.

a. This policy does not affect Departmental interactions with State-recognized Tribes with respect to matters provided for by statute or regulation.

b. The Naval Nuclear Reactor Program is exempt from the provisions of this Order.

6. DEFINITION. American Indian Tribe is any Indian Tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native entity, which is recognized as eligible for the special programs and services provided by the United States because of their status as Indians.

7. RESPONSIBILITIES.

a. Assistant Secretary for Congressional and Intergovernmental Affairs (CP-1) shall provide policy guidance to all Departmental Elements concerning the Department's relationships with American Indian governments and related public interest groups.

b. Deputy Assistant Secretary for Intergovernmental and Public Liaison (CP-30) (now CP-20) shall:

- (1) Serve as the central point of contact for American Indian governments and public interest groups on energy matters relating to intergovernmental activities.
- (2) Identify and maintain a point-of-contact system and internal communications mechanisms among Departmental personnel whose responsibilities include interacting with tribal government representatives.
- (3) Identify and monitor progress toward eliminating regulatory, statutory, and/or procedural impediments to the Department's working directly with tribes.
- (4) Monitor Headquarters and field element implementation of procedures for consultation with tribal governments to assure that tribal rights and concerns are considered prior to the department taking actions that may affect them.
- (5) identify and maintain key reference resources needed to support Indian policy implementation activities and distribute these resources or reference lists to Headquarters and field elements.

(6) Assist the Office of Professional and Technical Training and Development (AD-70) in developing and monitoring the administration of appropriate training to increase the awareness of Indian rights and concerns among DOE contractor personnel.

(7) Monitor Headquarters and field element creation and implementation of appropriate procedures for consulting with tribal leaders to comply with cultural resource management and American Indian religious freedom protection laws.

(8) Promote cooperation with Federal and State agencies that have related responsibilities.

c. General Counsel (GC-1) shall provide advice and other counseling to appropriate DOE components pertaining to proposed policy, regulations, and activities of the department involving Indian Tribes.

d. Assistant Secretary for Environment, Safety, and Health (EH-1) shall develop DOE-wide guidance and coordinate activities implementing DOE's cultural resource management program, including those activities affecting Indian tribal cultural resource sites and items.

e. Secretarial Officers shall:

- (1) Identify a point of contact whose responsibilities include interacting with tribal government representatives.
- (2) Develop internal guidelines to implement the DOE Indian Policy in areas

under their cognizance. The guidelines should include, but are not limited to, procedures for identifying regulatory, statutory, and/or procedural impediments to working directly with tribes and procedures for consultation with tribal governments prior to the department taking actions that may affect them.

(3) Secretarial Officers shall, with the assistance of the Deputy Assistant Secretary for Intergovernmental and Public Liaison and the General Counsel, determine which programs, policies, and regulations impact significantly upon American Indian tribes to assure their participation in the development and promulgation of these Departmental actions. To the extent possible, the tribes should be involved in the process.

(4) Inform the Deputy Assistant Secretary for Intergovernmental and Public Liaison regarding all contacts with American Indian tribal officials or intertribal organizations about meetings, briefings, or similar levels of interaction.

(5) Coordinate all meetings/briefings with American Indian tribal officials or intertribal organizations with the Deputy Assistant Secretary for Intergovernmental and Public Liaison.

(6) Coordinate with the Assistant Secretary for Congressional and Intergovernmental Affairs to ensure necessary notification of proposed meetings/briefings and to obtain guidance whether a representative from the Office of Congressional and Intergovernmental Affairs should accompany staff when meeting with representatives of Indian intergovernmental groups.

(7) Include in a procurement request package, for each procurement requiring the application of this Order, the following:

- (a) Identification of the Order
- (b) Identification of the specific requirements with which a contractor or other awardee is to comply, or, if this is not practicable, identification of the specific paragraphs or other portions of this Order with which a contractor or other awardee is to comply; and
- (c) Requirements of the flowdown of provisions of this Order to any subcontract or subaward. For application to awarded management and operating contracts, Heads of Headquarters Elements may set forth this information in a written communication to the contracting officer rather than in a procurement request package.

f. Heads of Field Elements

- (1) In conjunction with the responsible Program Secretarial Officer, identify a point of contact whose responsibilities include dealing with American Indian issues related to the office's mission.
- (2) In conjunction with the responsible Program Secretarial Officer, develop internal guidelines to implement the DOE Indian Policy at sites under their cognizance. The guidelines should include, but are not limited to, procedures for identifying regulatory, statutory, and/or procedural impediments to working directly with tribes and procedures for consultation with tribal

governments prior to the Department taking actions that may affect them.

(3) Represent the department in American Indian intergovernmental activities related to their programmatic, operational, and administrative responsibilities, keeping the Deputy Assistant Secretary for Intergovernmental and Public Liaison and appropriate Program Secretarial Officer, informed of routine developments and interactions on a timely basis.

(4) Coordinate with the Deputy Assistant Secretary for Intergovernmental and Public Liaison, with concurrent notification to the responsible Program Secretarial Officer, when organizing conferences, workshops, seminars, and public hearings for American Indian government officials.

(5) Maintain direct communications on a regular basis with the Assistant Secretary for Congressional and Intergovernmental Affairs, with concurrent notification to the responsible Program Secretarial Officer, to keep the Department informed of any significant interactions and unusual events which may have an impact on intergovernmental activities relating to their field elements.

(6) Coordinate with the Assistant Secretary for Congressional and Intergovernmental Affairs, as well as the responsible Program Secretarial Officer, to ensure necessary notification of proposed meetings/briefings and to obtain guidance whether a representative from the Office of Congressional and Intergovernmental Affairs should accompany staff when meeting with representatives of American Indian intergovernmental groups.

(7) include in a procurement request package, for each procurement requiring

the application of this Order, the following:

- (a) Identification of the Order;
- (b) Identification of the specific requirements with which a contractor or other awardee is to comply, or, if this is not practicable, identification of the specific paragraphs or other portions of this Order with which a contractor or other awardee is to comply; and
- (c) Requirements of the flowdown of provisions of this Order to any subcontract or subaward. For application to awarded management and operating contracts, Heads of Headquarters Elements may set forth this information in a written communication to the contracting officer rather than in a procurement request package.

BY ORDER OF THE SECRETARY OF ENERGY:

(Departmental Seal)

John J. Nettles, Jr.

Director of Administration

and Human Resource Management