

PROVING THE APPLICABILITY OF THE THEORY OF REGULATION AND THE
ECONOMIC THEORY OF REGULATORY CONSTRAINT TO AMERICAN INDIAN
STUDIES (AIS):

A CASE STUDY IN FEDERAL INDIAN LAW AND POLICY

By

Christina Weinzettle

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This thesis has been approved on the date shown below:

Eileen Luna-Firebaugh
Associate Professor of American Indian Studies

04/12/2010

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ABSTRACT

The Theory of Regulation and the Economic Theory of Regulatory Constraint have not yet been adapted by American Indian Studies scholars to explain and analyze the federal regulations connected with Federal Indian Law and Policy. It is the intention of this thesis to prove the applicability of these theories to the law and policy concentration of American Indian Studies. The adaptation of these two theories could impact how federal regulations affecting Indian Country are viewed and interpreted. An examination of Federal Indian policy, specifically the regulations (43 CFR 10) promulgated for the Native American Graves Protection and Repatriation Act (NAGPRA) and the National Historic Preservation Act (NHPA) Section 106 tribal consultation processes (36 CFR PART 800) can provide a case study for understanding the applicability of the Theory of Regulation and the Economic Theory of Regulatory Constraint to a common regulatory process in Federal Indian Law.

INTRODUCTION

All disciplines must define their scope of study, major units of analysis, and the issues that drive theory and research. For American Indian studies, the disciplinary focus cannot center on a critique of the colonial experience but rather must focus on the individual and community choices American Indians make to realize their culture, values, and political and economic interests within the constraints and opportunities presented by changing colonial contexts and, increasingly, contemporary global political, economic, and cultural contexts.

- Duane Champagne, "In Search of Theory and Method in American Indian Studies"

The scholarly field of American Indian Studies (AIS) has always been interdisciplinary in nature, drawing its scholars from specialties within the social sciences, humanities, the law, anthropology, and several other disciplines. Scholars drawn from different academic disciplines tend to bring their original field of study's theoretical training and approaches to their scholarly work. This phenomenon has become a common occurrence among American Indian Studies scholars, setting a precedent on how theory is used and acquired by the discipline of AIS. The theoretical foundation for AIS has become these adapted theories and modules. As the field of AIS grows and expands new theories are adapted and incorporated into the scholarship in order to fulfill the academic discipline's areas of research. The intention of this thesis is to show how the Theory of Regulation and the Economic Theory of Regulatory Constraint, developed for the fields of political science and economics, respectively, can be adapted and applied to AIS scholarship. Regulatory theory and the Economic Theory of Regulatory Constraint and its conceptual modules can be adapted to AIS in the same manner that other theories have been applied to AIS scholarship.

Federal, state, and tribal regulations have a significant role in how laws, policies, and resolutions are carried out and enforced. An understanding of regulatory theory and regulatory politics will help to explain the process, motivations, and forces driving the writing of regulations, while also demonstrating the variation present in federal regulations for Indian Country. Certain factors contribute to the control of regulatory processes. These factors can be controlled by external¹ or internal forces² that guide each project through pertinent federal regulations associated with the compliance to a regulatory process.

The idea that forces are guided governs how theorists view the regulatory process. Several different theories have been founded on the nature of the regulatory process—who controls it, how does it work, and the factors that govern it. Regulatory theory is entering a new stage with political and economic theorists currently developing new theoretical frameworks for regulatory processes previously ignored. These theoretical frameworks address the regulatory politics, control, and enforcement styles that administer the regulatory process (Gormley, Jr. 1986: Gormley, Jr. 1998: Gilliland and Manning 2002: Willer 2003).

¹ External force-pressure put upon compliance to a regulatory process by parties not directly involved and outside the actual compliance process i.e. political and social pressure. (Gormley Jr. 1998, 363)

² Internal force-pressure put upon a regulatory process by participants charged with the carrying out of the regulatory compliance process i.e. federal agency employee's, federal agency managers, and compliance managers (Gormley Jr. 1998, 364)

Commonly, the theoretical basis for governmental regulatory oversight has been based upon the concept of regulatory politics. Regulatory politics is a political and economic theory that is based upon the idea that enforcement and implementation of regulatory policy varies over specific issue areas depending on the salience³ and complexity⁴ of the area. “To be still more precise, salience refers to public salience and complexity refers to technical complexity” (Gormley 1986: 598).

According to the theory of regulatory politics, salience and complexity are the two factors that govern how each party reacts to specific situations. Salience and complexity are not firmly fixed and under certain regulatory conditions can fluctuate. Salience is more susceptible to fluctuation, because it requires a large group of people to maintain interest in the issue over a long period of time. Complexity is more flexible, but only under a specific set of circumstances such as: advancement in technology, new competition entering the regulatory arena, or where an optimal task⁵ is no longer a required part of the regulatory process (Gormley, Jr. 1986: 599). Salience and complexity are important factors that can govern how the federal regulatory process works and helps to gauge how reactive the process is to specific situations.

The theory of regulatory politics not only considers federal regulatory response to salience and complexity issues, but it also considers the participants in the regulatory

³ Salience- Occurs when an issue significantly affects a large group of people and it is only superseded when the scope of conflict is large and intense (Gormley, Jr. 1986, 598)

⁴ Complexity- Is when an issue is concerned with a matter outside of pedestrian knowledge and requires the explanation of a specialists to convey its importance (Gormley, Jr. 1986, 598)

⁵ Optimal task- A task important to the regulatory process where its removal stop the regulatory compliance process (Gormley Jr., 1986, 599)

process. One of the basic criteria of regulatory processes is that agencies have to carry out the process stipulated in the federal regulations, and affected people have to conform to the regulatory constraint. Typically, there are two types of participants in the regulatory process—the regular and irregular participants. The regular participants are always involved in the regulatory compliance process (i.e. regulatory officials, agencies, and bureaucrats). Irregular participants only step into the process due to extenuating circumstances when public interest in the subject matter is high. Irregular participants are most often politicians, citizens, political advocacy groups, judges, media and professionals (Gormley 1986). The introduction of irregular participants is a highly situational occurrence. Salience and complexity control the when, where, and how of irregular participants' involvement in the regulatory process (Gormley 1986: 603).

In summary, regulatory theory and regulatory politics are concepts used to deconstruct the thought process and political motivations behind the U.S. government's development of Federal regulations. These theoretical concepts have been applied by political scientists and economists to analyze several different types of federal regulations, such as the Food and Drug Administration (FDA) and the Environmental Protection Act (EPA) regulations. Regulatory theory and regulatory politics have not yet been adapted by American Indian Studies scholars to explain and analyze the federal regulations connected with Federal Indian Law and Policy. It is the intention of this study to prove the applicability of this theory to the law and policy concentration of American Indian Studies. The adaptation of the theory and its conceptual modules could impact how federal regulations affecting Indian Country are viewed and interpreted. An

examination of the federal regulations from the Native American Graves Protection and Repatriation Act (43 CFR 10) and the National Historic Preservation Act Section 106 tribal consultation process (36 CFR PART 800) can provide a case study for the understanding of the applicability of regulatory theory and regulatory politics to a common regulatory process in Federal Indian Law.

This research will benefit tribal and organizational representatives by educating them about how the theories regulatory models can facilitate the understanding of the political motivations behind the creation of regulations. Understanding motivations and how regulations are made will help tribes writing their own regulations. This research will also prove that a theoretical connection exists between concepts used in political science and economics and those used in American Indian Studies. American Indian Studies scholars will be able to use these concepts and apply them to their own research concerning Federal Indian Law and Policy and federal regulations governing Indian country.

Research Questions & Chapter Outlines

During the research for this thesis several questions arose that needed to be addressed in order to successfully prove the applicability of regulatory theory to American Indian Studies.

- What is theory in American Indian Studies?
- How are new theories acquired and created in American Indian Studies?
- What are the current usages of regulatory theory?
- How can regulatory theory be adapted to American Indian Studies?
- How can regulatory theory be adapted to a specific regulatory process that occurs in Federal Indian Law & Policy?

Chapter One contains a study of the theory and theoretical approaches currently utilized by American Indian Studies scholars. During the course of the first chapter the research questions “What is theory in American Indian Studies?” and “How are new theories acquired and created in American Indian Studies?” are covered laying the foundation for how regulatory theory can be incorporated and applied to American Indian Studies scholarship.

Chapter Two discusses how regulatory theory is currently being used and developed by other academic disciplines, along with how it can be applied to regulatory processes associated with American Indian Studies law and policy concentration. This chapter will answer the research questions “What are the current usages of regulatory theory?” and “How can regulatory theory be adapted to American Indian Studies?”

Chapter Three begins with a discussion of how the theoretical models developed for regulatory politics by theorist William Gormley apply to Federal Indian policy. This is followed by a case study of NAGPRA's progression through the legislative process and the promulgation of its regulations. NAGPRA's progression is analyzed for its adherence to the principles of Gormley's theoretical models.

Chapter Four explores the applicability of economic analysis methods and the Economic Theory of Regulatory Constraint to American Indian Studies. NHPA Section 106 mandated tribal consultation process is the first case study example of how a regulatory process associated with Federal Indian policy can be analyzed. The Section 106 consultation process is briefly overviewed before being used as the example for cost-benefit analysis and Lea-Rachel D. Kosnik's economic regulatory equations. The National Association of Tribal Historic Preservation Officers (NATHPO) 2008 survey data has been incorporated into the cost-benefit analysis, as well as a specific historic preservation cases information obtained from the Advisory Council on Historic Preservation (ACHP) May 2008 *Case Digest* report (ACHP Summer 2008:13-14). This is followed by an analysis of the National NAGPRA grant program using a modified regulatory model from theorist Elizabeth Bailey's book *The Economic Theory of Regulatory Constraint*.

The Conclusion of the thesis draws together the answers to all of the research questions discussed throughout the thesis and reiterates why the theory of regulation is applicable to American Indian Studies.

Methodology

In order to understand regulatory theory, NAGPRA, and the NHPA's section 106 process, an extensive literature review was done to obtain all of the pertinent information. The main research technique utilized is archival and library research (including online research) review of journal articles, government documents, books, and federal agency publications. Secondary analysis was done on existing survey and research data available on the NHPA Section 106 consultation process and National NAGPRA grant program. Specifically, a national survey was conducted by the National Association of Tribal Historic Preservation Officers (NATHPO) in 2005 on "Best Practices in Historic Preservation" (Hutt and Lavallee 2005: http://www.nathpo.org/PDF/Tribal_Consultation.pdf) and NAGPRA grant data was acquired from the National NAGPRA programs yearly fiscal reports (National NAGPRA FY Report 2009-2000: <http://www.nps.gov/nagpra/DOCUMENTS/INDEX.htm>).

In order to adapt regulatory theory to apply to regulatory processes associated with Federal Indian Law and Policy, the conceptual modules and charts created by theorists William Gormley, Jr., Lea-Rachel D. Kosnik, and Elizabeth Bailey have been adapted to fit Federal Indian Law and Policy. Regulatory models fitting the regulatory conditions for NAGPRA and the NHPA Section 106 tribal consultation process have been created.

CHAPTER 1: THEORY IN AMERICAN INDIAN STUDIES (AIS)

Theory and methodology are the foundations for research in all academic disciplines, and American Indian Studies is no different. However, in AIS theory and methodology has become a complex issue with debates over whether or not AIS has its own unique theoretical concepts; particularly as it is common practice for AIS scholars to incorporate the theories of their home disciplines into their AIS scholarship. Some AIS and Native American literature theorists (Champagne 2007, Krupat 2002, McKinley Jones Brayboy 2005) believe that the adaptation of these existing theories (such as Critical Race Theories, Group Social Action theories, Post-colonialism, Social theory) work in certain contexts, but do not address some of the core tenets and values of American Indian Studies. AIS theorist Duane Champagne summarizes this viewpoint in his article “In Search of Theory and Method in American Indian Studies.” He states that existing theories and there, “...conceptualizations have a certain validity; they represent broad theories and assumptions of group social action” (Champagne 2007: 357). He tempers this statement with the belief that, “The primary focus of indigenous studies should concentrate on defining, analyzing, theorizing, making policy, and supporting indigenous nations” (Champagne 2007: 361). This argument centers on striking a balance between integrating other disciplines’ theory into AIS, while still developing solely AIS theoretical concepts.

Other AIS scholars and theorists (Paula Gunn Allen 1986, Robert Allen Warrior 1992, Craig Womack 2009) disagree with this sentiment and believe that existing

theories are not applicable. They argue that theory and methodology should be developed specifically for AIS with Native American interests at the center, rather than using an adapted Westernized theory. These theorists, respectively, create Indian critical theories, “rooted in the land and culture of American Indian communities, focusing on issues of Native sovereignty and nationalism, discussing concepts such as autonomy and self-determination, and ultimately, emphasizing a Native resistance movement against colonialism” (Pulitano 2003: 60). Some scholars see this viewpoint as incomplete because it does not overtly address the impact of colonial contact. In Sean Teuton’s review of Elvira Pulitano’s controversial book *Toward a Native American Critical Theory*, he notes that her main argument is that Native American theorists such as Gunn Allen and Warrior:

...are naive and uncritical for not contending with the extreme constructivist critique in (poststructuralist) postcolonial theory: that the agency of resistant ideas is always at least in part thwarted by colonial state power. But holding this view of theory—and worthy Indian critical theories—as necessarily poststructuralist, Pulitano might discover asymmetry in relation to her other view of Indian literary theory as a definitive, internally generated discourse that “also subsum[es] the forms and methods of Western discourse” (7). (Teuton 2006: 157-58).

These sentiments by authors such as Pulitano are prevalent in AIS. However, theorists such as Gunn Allen and Warrior do serve a purpose in furthering the AIS theoretical discourse, with theoretical concepts based upon traditional tribal perspectives. The arguments presented by both sides contain valid points and have created a contest over what constitutes theory and methodology in AIS. These debates over theory define the general discourse of the academic discipline.

Key Tenets of AIS Theoretical Framework

American Indian cultural emphasis on retaining culture, identity, self-government, and stewardship of land and resulting contestations with the U.S. government and society forms a body of empirical social action that constitutes the subject matter of American Indian studies as an academic discipline.

-Duane Champagne, "In Search of Theory and Method in American Indian Studies"

As an academic discipline, AIS has developed basic premises and tenets that have defined its research, scholarship, and theoretical concepts. These key tenets can be broken down into five distinct categories concerning specific topics integral to the study of AIS. Clara Sue Kidwell in her article "American Indian Studies: Intellectual Navel Gazing or Academic Discipline?" outlines these tenets as:

1. Native American's have a strong connection to their land
2. Historical events should be viewed from the side of the Native Americans not just the European
3. Sovereignty is inherent to all Indian Nations
4. Native American language is a key component of culture and should be preserved
5. How contemporary Native American artistic expressions representation of traditional cultural values (Kidwell 2009: 3)

The first tenet is based on the belief that Native American people have a strong affinity to their land. Also, that their land has a significant role in their culture and traditions. The strength and significance of this sentiment varies depending on the tribal group being studied (Kidwell 2009:3). The tenet can be used by AIS scholars as a

philosophical outlook to frame their research. This philosophy has been integrated into several theoretical models⁶ and can be associated with the study of tribal natural resources within the field of AIS.

The second major tenet of AIS is that historical evidence describing the interactions between Europeans and Native Americans should be analyzed from the perspectives of both the colonizer and the colonized. In order to analyze the historical evidence from the tribal perspective, oral history and oral traditions should be treated as legitimate sources of information by AIS researchers (Kidwell 2009: 3). As the field of AIS has progressed, this tenet has become important to the preservation of traditional cultural properties where tribal elder's testimonies on oral traditions are used as valid ethnographic sources. Vine Deloria, Jr. was a proponent of this premise and some of his later research was based upon this tenet. In a 2003 lecture to the School of American Research in Santa Fe, New Mexico Deloria, "...shared his research which involved collecting Native North American origin stories, including those with elements of Native people's cosmologies and oral histories and comparing them with the continent's geological record" (Denetdale 2004: 131). Deloria's research challenged western scientific viewpoints and exemplified the second tenet of AIS.

The third tenet, "...which is particularly problematic for the U.S. government to comprehend, is that sovereignty is an inherent right of Indian nations. In contemporary America tribal sovereignty is grounded in treaties with the U.S. government that assured

⁶ Theoretical models: is a framework where theories hypotheses are tested using real life examples (Sprangers and Schwartz 1999).

tribal rights to control of land” (Kidwell 2009: 3). The concept of sovereignty is important to AIS and to Federal Indian Law and Policy. For an AIS scholar working within Federal Indian Law and Policy this tenet is particularly important when reviewing the significance of cases and federal policies affecting tribes. Understanding tribal sovereignty is important and necessary for those scholars working within AIS.

The fourth tenet is that Native American languages are essential parts of Native cultures and need to be preserved. The preservation and revitalization of language is an important topic within AIS and connects Native American languages with the sustainability of culture (Kidwell 2009: 3). Native American language is not only broken down linguistically, but also is considered for its educational value for Native American youth. Some Native American languages are in danger of becoming extinct if an emphasis is not placed on ensuring fluency in the younger generations. This is a serious problem that AIS scholars are trying to fix with the development of Native American language revitalizations programs. Language is an important part of Native American culture, and its maintenance has become an important part of AIS scholarship.

The fifth tenet addresses contemporary Native America; specifically the study of contemporary art, music, dance, and literature produced by Native American artists (Kidwell 2009: 3). This tenet is important because it focuses on the connection between modern Native American society and traditional cultural practices. Researchers for this tenet want to know: How do you define what is or is not Native American art, literature, or music? What issues are important to Native American authors and artists? How are

traditional values used? These questions and this tenet are relevant to Native America today and its issues.

These five tenets represent the major premises of the academic discipline of American Indian Studies. These tenets are the foundation of AIS theoretical concepts and reflect the type of research being conducted by AIS scholars. They work together to help conceptualize and explain principles such as culture, land, and self-government that are unique to AIS scholarship (Champagne 2007). These five major tenets shape and guide the research by AIS scholars. Understanding them is important when considering how they are integrated into the theory generated for AIS.

How Existing Theory is Incorporated into AIS

What many Native scholars of that era wanted understood was that an *academic discipline* requires that a body of intellectual information such as the Natives of this land possess about the world be internally organized, normatively regulated, and consensually communicated.

-Elizabeth Cook-Lynn, "Who Stole Native American Studies?"

Since AIS is a relatively young academic discipline and its scholars are interdisciplinary, theory has been taken and adapted from existing theories outside of AIS. Adaptation of existing theories has been successful in some cases, but in others radical change would be needed in order to make the theory fit the major tenets of AIS and its non-westernized paradigm. Theorist Duane Champagne argues that:

...many current theories-such as class, ethnicity, critical, and postcolonial-do not provide full or complete analysis of American Indian history and culture. Improving existing theories or categorizations will involve significant revision, and it is doubtful that existing theories can conceptualize or explain the cultural, land, self-government, and colonial histories of indigenous nations. Since indigenous experience is not well accounted for by existing theoretical conceptions, indigenous issues and experiences are under-theorized and often theoretically and conceptually placed in residual categories because they do not work well with existing theoretical conceptions (Champagne 2007: 361).

Though Champagne's argument does have validity, there are many AIS scholars who believe that existing theories are adaptable; especially when the theory addresses a concept within AIS that has been imposed upon Native Americans by western culture. Also, existing theories intended to explain minority group social action can be applied to Native American social and political activities when appropriately modified to fit the AIS paradigm (McKinley Jones Brayboy 2005).

An example of how an existing theory can be adapted to AIS is the developing Tribal Critical Race Theory (TribalCrit) authored by Bryan McKinley Jones Brayboy. TribalCrit is a variation and adaptation of Critical Race Theory (CRT) and has applicability to the AIS subject area of Native American Education. CRT has previously been adapted to more accurately conform to the principles of specific minority races such as Latino Critical Race Theory and Asian Critical Race Theory (McKinley Jones Brayboy 2005). CRT was established in the mid-1970s as a reaction to inadequacies in Critical Legal Studies (CLS)⁷. CLS was not inducing change fast enough for CRT scholars (McKinley Jones Brayboy 2005).

CRT focuses on concepts associated with race and racism in society and the legal system, as well as other forms of racial subjugation (McKinley Jones Brayboy 2005). CRT theorist Daniel Solorzano writes, “although race and racism are at the center of a critical race analysis, they are also viewed at their intersection with other forms of subordination such as gender and class discrimination” (1998: 122). Though the concepts covered in CRT can be applied to Native American communities, there are central tenets of the theory that need to be changed. McKinley Jones Brayboy has created the TribalCrit adaptation of CRT so that the theory will address the unique issues associated with Native American communities and groups.

⁷ Critical Legal Studies (CLS) is left-leaning legal scholarship that argues that the law must focus on how it is applied to specific groups in particular circumstances. CLS exposes contradictions in the law and illustrates the way that laws create and maintain the hierarchical society in which we live (McKinley Jones Brayboy, 2005: 428).

McKinley Jones Brayboy was able to create TribalCrit by indigenizing the central tenets of CRT. For example, a central tenet of CRT is that racism is endemic throughout all societies. McKinley Jones Brayboy adapted this tenet to reflect a Native American perspective. Instead of considering racism to be endemic, TribalCrit considers colonization to be endemic to society with racism as a secondary concern (McKinley Jones Brayboy 2005: 430). This example shows how an AIS scholar adapts an existing theory to reflect a Native American perspective. TribalCrit shows how the premises of an existing theory (CRT) are adapted to reflect the core tenets of AIS. This type of adaptation is not singular. AIS scholars need to reach out to acquire this theoretical knowledge, especially if it has the potential to add to AIS scholarship.

Summary

In summary, theory and methodology in American Indian Studies is a multifaceted issue with many different factors that contribute to the discipline's theoretical discourse. In order to understand what theory is in AIS, a basic knowledge of the core tenets of the discipline is needed. The five major tenets of AIS outlined by Clara Sue Kidwell in her article "American Indian Studies: Intellectual Navel Gazing or Academic Discipline?" are: (1) Native American's have a strong connection to their land; (2) historical events should be viewed from the side of the Native Americans not just the European; (3) sovereignty is inherent to all Indian Nations; (4) Native American language is a key component of culture and should be preserved; and (5) how contemporary Native American artistic expressions represent traditional cultural values (Kidwell 2009: 3). The

five major tenets of AIS establish the viewpoints, paradigms, and principles important to the field's academic research. These tenets are often the foundational elements added to existing theories brought into AIS. These elements are also the basic premises of theory and methodology promulgated by AIS scholars.

Theory in AIS is a combination of different perspectives, and each scholar has their own idea about what constitutes theory. The two main perspectives of AIS theory are:

1. That the adaptation of existing theories (Critical Race, Social, Class, Group) works in many circumstances, but AIS scholars still need to work on developing solely AIS theories
2. That AIS theory and methodology should be written by Native scholars with Native American interests at the core of the theory.

These two perspectives create the core debate over the theoretical discourse that defines an academic discipline.

As AIS developed, it incorporated and adapted existing theories from the home disciplines of its scholars. Though viewpoints differ on the applicability of existing theories such as Critical Race Theory, Class, or Social Group Action Theory to the unique viewpoint of AIS scholarship, they continue to be used as a theoretical framework for research done in AIS. This concept of adapting theory to AIS is particularly important to this thesis and the applicability of regulatory theory from Economics and Political Science to AIS. The research of AIS scholars such as Champagne and

McKinley James Brayboy show that bringing in theory from other disciplines can be successful and is common in the interdisciplinary field of AIS.

The adaptation of existing theory by AIS scholars is most successful when the theory explains a westernized concept imposed upon Native American culture, land, or governments. A good example of this would be Federal Indian policy and regulations. Therefore, adapting existing regulatory theory to address the specific concerns and tenets of Federal Indian policy and regulation would positively add to the theoretical framework of AIS. The theory of regulation explains patterns that occur in the process of creating federal regulations, the political aspects of regulations, and has pre-made predictive theoretical modules that could be adapted and used to reflect the regulatory processes carried out in Indian Country. The incorporation of regulatory theory fits into past patterns on how existing theories from other academic disciplines are acquired and used in AIS. The theory of regulation does have the ability to be adapted as a useful theoretical tool for AIS, its scholars, and its research.

CHAPTER 2: REGULATORY THEORY AND ITS APPLICABILITY TO AIS

Governance through regulation (that is, via rule making and rule enforcement) is at the same time both constraining and encouraging the spread of neoliberal reforms.

-David Levi-Faur, "The Global Diffusion of Regulatory Capitalism"

There are two prevailing theoretical concepts used by political scientists and economic theorists to explain and dissect federal regulations: the theory of regulation and the economic theory of regulatory constraint. Both theories have their own separate etymologies, but since they were developed they have converged, separated, and re-converged multiple times. Understanding the current usages and developments in regulatory theory and its economic counterpart is important in order to be aware of the direction the theory is heading, as well as its future applications. This chapter is dedicated to a literature review of the theoretical models of regulatory theory, and to showing how those models are applicable to AIS.

The theory of regulation has been around since the New Deal era when scholars began to question the authority and oversight given to bureaucrats within federal agencies by Franklin D. Roosevelt's New Deal legislation. At the time, scholarly discussion centered around one specific theoretical model, the "command-and-control" regime. "Simply put, the legislator's or regulator's task in a command-and-control regime is to develop a single set of specifications relative to particular regulatory subject matter that defines not only what the entire regulated community must do but also how it must do it" (Wilkins and Hunt 1995: 3). An example of this type of regulation would be the

Contractors State License Board (the regulator), which requires all sign contractors (the regulated community) to obtain a license to work in the State of California, and which also classifies and regulates the type of jobs the sign contractor is able to perform. The California Code of Regulation states that, “A sign contractor fabricates, installs, and erects electrical signs, including the wiring of such electrical signs, and non-electrical signs, including but not limited to: post or pole supported signs, signs attached to structures, painted wall signs, and modifications to existing signs” (Title 16, Division 8, Article 3: §832.45. Class C-45). The licensing board’s regulations are defining who is a qualified sign contractors and what tasks they are allowed to perform as a licensed contractor; which is typical of a command-and-control regime. The command-and-control regulatory method is the most obvious choice for regulators and legislators because it is the most direct approach. Congress wants to lower car exhaust emissions; the easiest way to accomplish this is to pass legislation imposing strict limits on emissions for new cars and trucks produced by US automakers (Wilkins and Hunt 1995). As the field of regulatory theory progressed, analysis showed that the direct approach was not necessarily the best way to make enduring policy. With the required adaptation of a regulated community to technological advances, unexpected and divergent changes are problematic (Wilkins and Hunt 1995).

Even though the command-and-control approach has faults and newer incentive-based⁸ approaches have shown better outcomes, legislators have been slow to adapt to

⁸ Incentives-based regulatory theory deals with the constructive side of economic critique; specifically regulatory efficiency analysis and cost-effectiveness analysis (Wilkins and Hunt 1995, 5).

new regulatory methods. It was not until the early 1990's that Congress began to implement policy that acknowledged the beneficial outcomes associated with incentive-based approaches to regulatory method. The two major forms of economic analysis associated with incentive-based regulatory theory are cost-effectiveness analysis⁹ and regulatory efficiency analysis¹⁰. "This new model of regulation has been widely embraced by regulatory thinkers and offers an opportunity to enhance the substantive aims of government while reducing both the cost of administration and the ultimate cost of compliance to the regulated" (Wilkins and Hunt 1995: 13). Incentive-based regulatory theory has resulted in policy regulation with a distinctive incentive based approach such as "sin tax"¹¹ or "civil fines"¹² which are meant to motivate the regulated communities' adherence to rules and guidelines. As incentive-based regulatory theory has progressed it has diverged into two separate schools of thought dependent upon the scholar's home discipline (political science or economics). These schools of thought have separated themselves into the two major theoretical frameworks that are used to explain federal, state, and local regulations—regulatory theory or the economic theory of regulatory constraint.

⁹ Cost-effectiveness analysis is a form of economic analysis that compares the relative costs and outcomes (effects) of two or more courses of action. Cost-effectiveness analysis is distinct from cost-benefit analysis, which assigns a monetary value to the measure of effect (Bleichrodt and Quiggin 1999, 683).

¹⁰ Regulatory efficiency analysis focuses on whether a given regulation produces net positive social and economic benefits when considering all of the direct and indirect social costs prevented by and caused by the regulation (Wilkins and Hunt 1995, 5).

¹¹ Sin tax is a kind of sumptuary tax: a tax specifically levied on certain generally socially proscribed goods, usually alcohol and tobacco.

¹² Civil fines are a term used to describe when a state entity, government agency, or private party seeks monetary relief against an individual as restitution for wrongdoing by the individual. For example, OSHA imposes civil fines on safety violations therefore raising the price of having dangerous working conditions (Wilkins and Hunt 1995).

The Theory of Regulation: Theoretical Models

Regulatory politics is more than just the aggregation of interests. It is a drama in which ideals, interests, values, roles, rights, and standard operating procedures all matter, to varying degrees, depending on the level of salience and complexity.

-William T. Gormley, Jr., “Regulatory Issue Networks in a Federal System”

Regulatory theory in its newest incarnation is taking strides towards becoming more reliable. In the past few years this theory has developed several new theoretical models that deal with the politics of policymaking. The theoretical model that has the most applicability to American Indian Studies (AIS) is Regulatory Politics. The three most prominent regulatory models developed for regulatory politics are: the principal-agent theory, Lowery’s dimensions of federalism model, and, the most relevant model for this thesis, Gormley’s salience and complexity model (Gerber and Teske 2000).

The principal-agent theory is the most basic theoretical model used by regulatory politics scholars. It is based upon the idea that federal policy and bureaucrats are influenced by conflicting principals (interest groups, public opinion, press, political interest). “While valuable, in a world of multiple principals, principal-agent models need more specificity to determine the circumstances under which different sets of principals are likely to be influential” (Gerber and Teske 2000: 850). Therefore, the principal-agent theory has minimal application outside of the federal realm where interest in policy can be high profile and the impacts of specific principles are easier to trace.

Lowery’s dimensions of federalism model looks at policy by dimensions—vertical and horizontal. Depending upon the situation and the policy the vertical and horizontal

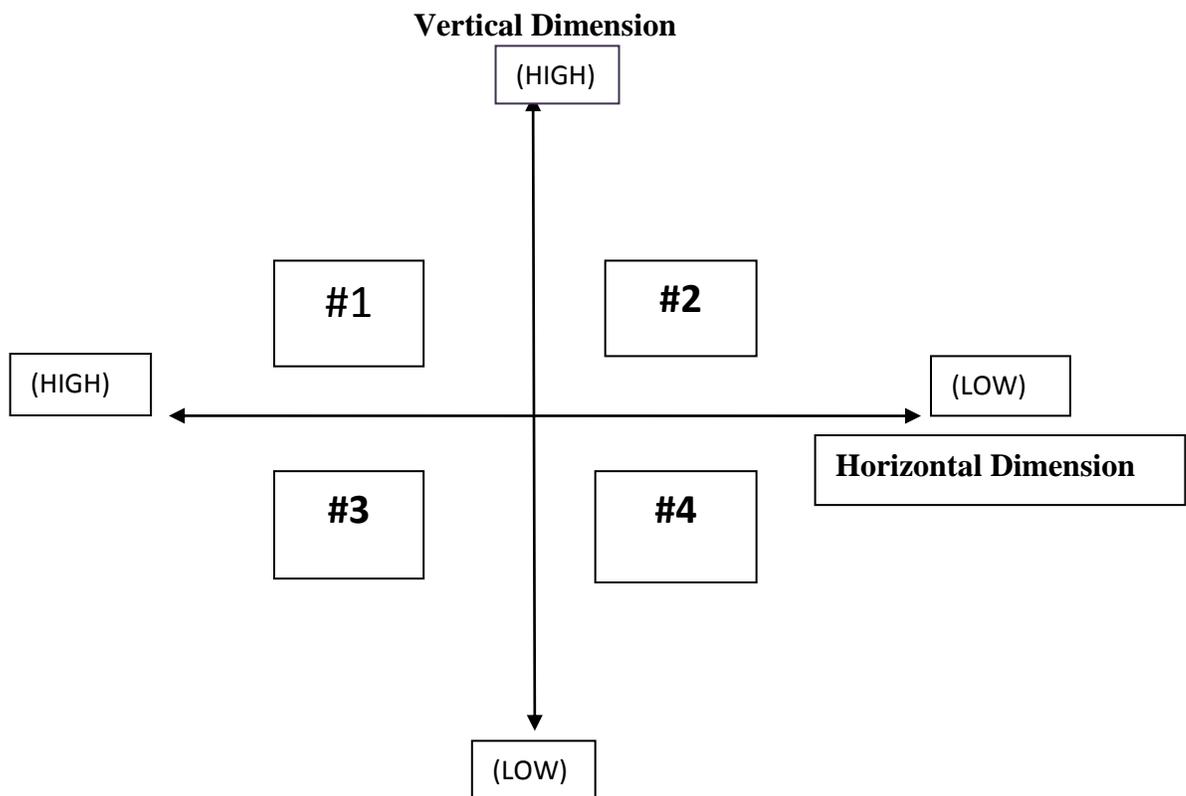
dimensional axis context can change between a number of structural conditions such as federal involvement, interstate competition, intrastate competition, economic regulation, or social regulation. The model has application mostly at the state level of regulation and has not been broadly used by scholars in the theoretical field of regulatory politics. Figure 1 depicts the visual representation of Lowery's dimensions of federalism model. The model works as an explanatory tool for whatever policy regulation Lowery is analyzing. The vertical dimension in this model is federal involvement, while the horizontal dimension is interstate competition. Once the dimensions of the axis are set they are then used to assess a specific regulatory situation. Political Scientist Ann O'M. Bowman's example of this is based on Lowery's assessment in his book "The Dimensions of Federalism: State Governments and Pollution Control Policies". Bowman believes that Lowery is asserting that:

...the consistency and exceptionalism of state leadership is in four specific issue areas in pollution control policy: stationary source air pollution, point source water pollution, mobile source air pollution, and nonpoint source water pollution. (For tangible referents, think factories, municipal waste treatment facilities, automobiles, and agricultural runoff, respectively.) Although each of the issue areas shares certain characteristics, they differ in degree on two dimensions (Bowman 1993: 521).

These degrees of difference enable the issues to be placed into one of the four matrixes in the visual model based on how high or low the level of vertical and horizontal involvement is in the issue. If the issue area is placed into the high vertical involvement and low horizontal competition (area #2) then the correlation can be made that the issue has a high need for the federal government to get involved if the states do not resolve their issues. Therefore the state is more likely to resolve competition to avoid federal

involvement in their affairs (Bowman 1993). This is the basic concept of Lowery's theoretical model and how it is applied to analyze regulatory situations. However, the model deals with the regulatory interplay between the federal government and the state. Since most of Federal Indian policy regulations are set at the federal level this model has little applicability to American Indian Studies (except perhaps in the case of the Indian Gaming Regulatory Act's state compacts).

Figure 1: *Lowery's Dimensions of Federalism Model*



The most well developed theoretical model for regulatory politics is Gormley's salience and complexity model. The model differs from previous theoretical frameworks because it does not rely on deductive reasoning. Gormley's model is based upon the idea that regulatory politics, "...varies systematically across issue areas, depending on levels of public salience and technical complexity. Each different combination of salience and complexity produces a different kind of regulatory issue network" (Gormley 1986: 597-98). These regulatory issue networks form the different subject areas that can act as factors during the creation of policy regulations. Gormley defines some examples of these subject or issue areas within the categorical placement model he developed (Figure 2). These issue areas are characterized by how salient or complex they are to the actors involved in the production of the regulation. During the creation of policy regulation there are two types of participants in the process—the regular and the irregular. The regular participants are those people always involved in the regulatory process such as regulated industry official and bureaucrats (Gormley 1986). These are not the participants that can vary and act as determining factors in the regulatory process that distinction lies with the irregular participants (politicians, press, citizen action groups).

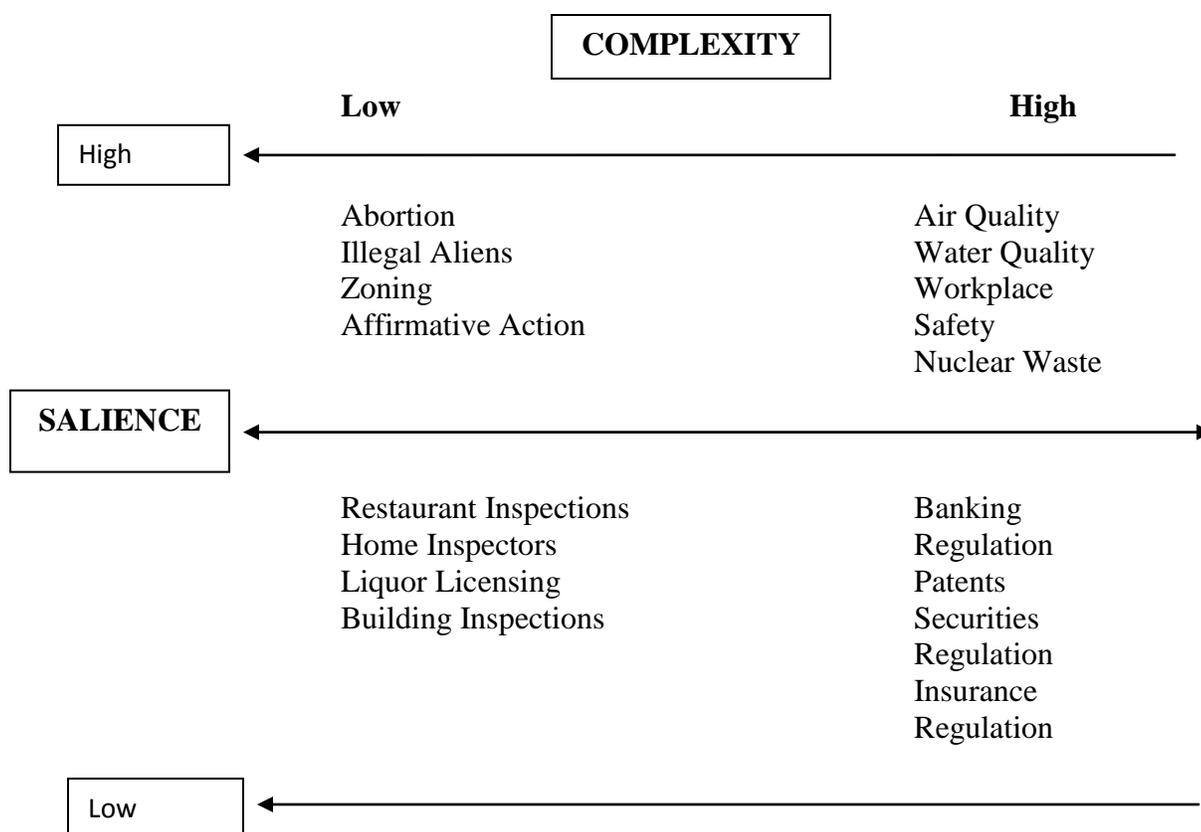
"The importance of salience and complexity is that they determine which irregulars¹³ will participate, when, where, and how. Salience and complexity shape the contours of regulatory politics. They affect incentives to participate, the choice of tactics, the selection of a forum, and the kinds of criteria that are invoked" (Gormley 1986: 603).

The chart shows that salience and complexity are two important factors that need to be

¹³ Irregulars are the parties that participate in regulatory proceedings only under a specific set of circumstances. Ex. judges, press, citizens, technical professionals, etc. (Gormley 1986)

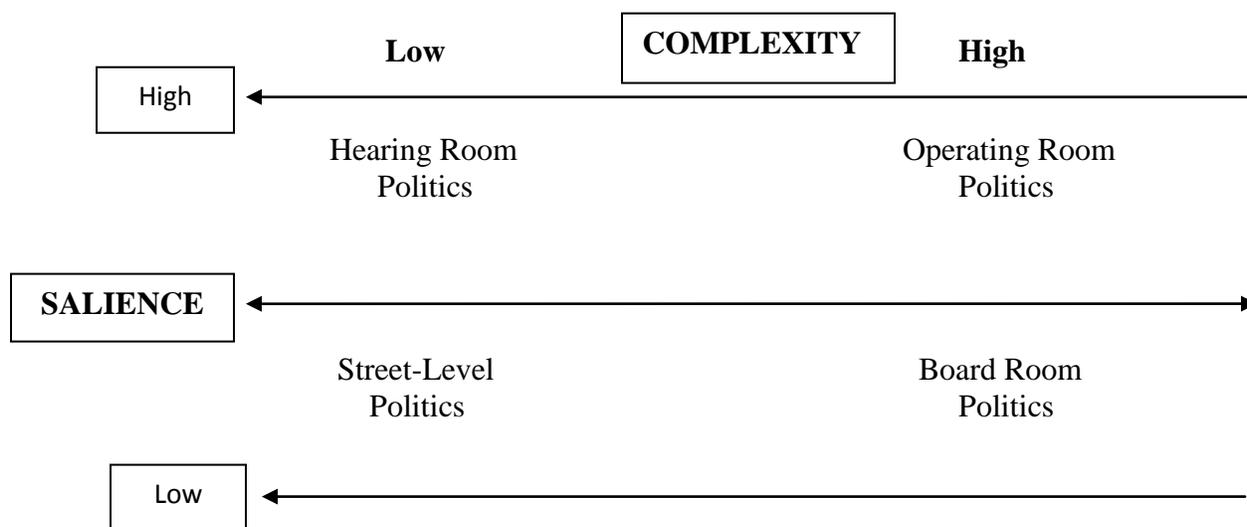
considered when making generalizations about regulatory politics (Gormley 1986). Classifying regulations as either salient or complex is important when considering policy because it can help predict patterns and potential policy outcomes. For example, a highly complex issue can be a huge barrier when a layperson wants to be involved because they cannot understand all the technical aspects. As Figure 2 shows, policy regulations that are low in technical complexity and high in public salience (abortion, illegal aliens) are the issues that receive the most attention because they have huge public appeal that force political accountability.

Figure 2: Gormley's Issue Areas
Adapted from Gormley (1986)



The issue areas listed above turn into the four policy domains that Gormley uses in his analysis of regulatory politics. The four policy domains are: Board Room Politics, Street-Level Politics, Operating Room Politics, and Hearing Room Politics. These domains are typified by how salient or complex a regulatory issue and its proceedings are during the creation of new statutes and regulations. Figure 3 shows how the four policy domains fit into Gormley's Issue Areas model.

Figure 3: Gormley's Regulatory Politics Policy Domain Types
Adapted from Gormley (1986)



Each policy domain is characterized by the type of regulatory issue it “governs”. Board room politics occur when situations are high in complexity and low in salience. This type of regulatory environment attracts little interest from the public due to its technical complexity. With no public pressure the media and politicians are happy to take a back seat to the only real stakeholders in the issue, the bureaucrats, professionals, and

business groups (Gormley 1986). In this environment there are two possibilities “clientele politics¹⁴” and the regulatory industry solving their own disputes through concession and compromise (Gormley 1986).

Whichever pattern emerges (clientele politics, intramural disputes between regulated industries, or conflict between a regulated industry and the wider business community), the key decisions are likely to be made by a small number of individuals. They may be made informally in restaurants, in private homes, on yachts. Or they may be made more formally in corporate board rooms. In either case, the key decisions are made by corporate executives. For this reason, "board room politics" conjures up an apt image for this issue area. When issues are highly complex but not very salient, the dominant participants will be members of the business community (Gormley 1986: 608).

The opposing policy domain to Board Room politics would be the type of regulatory environment that occurs in the domain where policy is highly salient and there is low complexity i.e. Hearing Room politics. In Hearing Room politics the issues are understandable (with no barrier to their involvement due to technical complexity) and are often important enough to people to make them assert public pressure (Gormley 1986). This type of regulatory environment ensures that the regulatory proceedings take place in a more public forum; such as Congressional hearings or with extended periods of public comment. An example of this type of regulatory environment would be a zoning issue where citizens are likely to get involved to avoid commercialism in their “backyard”. The issue of re-zoning a building is not complicated, but citizens living around the building can be very vocal resulting in a denial of the re-zoning. “Ultimately, when issues are high in salience and low in complexity, politicians determine the allocation of resources, subject to gentle judicial review” (Gormley 1986: 610). Where the regulatory

¹⁴ “Clientele politics”-is a regulatory environment where regulated communities or industry are largely left alone to regulate themselves (Gormley 1986).

environment of Hearing Room politics receives a huge amount of public scrutiny, the policy domain of Street-level politics inspires little public interest and is often considered a “bloodless” form of politics (Gormley 1986). Street-level politics are low in salience and complexity. This type of policy is almost completely controlled by the low-level bureaucrats in charge of enforcing the regulations. An example of bureaucrats involved in street-level politics would be restaurant inspectors or social workers. This policy domain is rife with potential problems because it requires low-level bureaucrats to be passionate and inspired in a routine workplace.

Not surprisingly, the most talented public servants prefer to work elsewhere. The same conditions exacerbate a bureaucratic tendency to make decisions on a case-by-case basis rather than through rule-making. There is no effort to set priorities, because politicians do not insist on them and professional convictions do not require them. In street-level politics, a leadership vacuum results in insufficient supervision, inadequate policy evaluation, and poor performance (Gormley 1986: 611).

The final policy domain, Operation Room politics, deals with issues high in salience and high in technical complexity. This particular policy domain has all the public pressure of Hearing Room politics, but the technical complexity prevents politicians and citizens from fully understanding the issue without the help of technical advisors or professionals. Due to the salience of the issue Politicians need to address it, but they might not understand or know the potential economic or technological ramifications of any policy regulations that they might set (Gormley 1986). Therefore, politicians respond to the pressure to solve an issue such as nuclear waste or clean air, but do so in a limited manner with procedural, not substantive intervention in the issue. This normally results in the creation of new agencies or the reorganization of existing agencies

where the substantive control falls into the hands of upper-level bureaucrats (so that politicians can avoid any repercussions on themselves). The procedural changes also include deadlines for the upper level-bureaucrats to solve any residual policy problems, ensure changes are legally or technically sound, and act as crisis managers (Gormley 1986). Operating Room politics is probably the most dynamic of the regulatory environments and has applicability in regulatory situations of interest to American Indian Studies.

These four policy domains, Gormley's issue areas, the concepts of salience and complexity, Lowery's Dimensions of Federalism model, and the principal-agent theory form the theoretical framework of regulatory theory's regulatory politics theoretical model. Regulatory theory has developed into a respected discipline and with the inclusion of testable empirical data is making strides towards use in analysis in other levels of policy and types of regulations (state or local). Knowing and understanding these concepts brings visibility to the patterns within the regulations, while also showing how they can be applicable to federal regulations that are covered and addressed in American Indian Studies.

The Economic Theory of Regulatory Constraint

As the theory of regulation has expanded and developed its own theoretical framework its scholars have begun to separate themselves from adopted economic modes of analysis. The major cause of separation of the economic theory of regulatory constraint from regulatory politics is that economists are more concerned with the profit and profit loss incurred by firms conforming to regulations than the social aspects (which they consider secondary, unlike in regulatory politics). Economic modes of analysis used by regulatory theorists are cost-benefit analysis and cost-effectiveness analysis. These two analytical tools have been used by economists for years and have been adapted to fit different circumstances in government, business, and in regulation. Economists have also created and adapted their own models for measuring the constraint that regulations put upon the regulated firm or community (Averch-Johnson, Kuhn-Tucker Theorem for Regulatory Models, etc.).

Cost-benefit analysis is used as an analytical tool for making a variety of economic decisions. It specifically relates to governments and regulations because it is used as an analysis to assess the validity of moving forward on a specific project or to determine whether or not to impose a new business regulation. The analysis is performed by weighing the expected costs against the expected benefits. Benefits and costs are normally quantified in terms of profit (money loss or gain), but in the case of social impacts (environment or human life) a value of time equation is used to numerically quantify items as to their present value. Some of the equations or key indicators that agencies use when they are performing cost-benefit analysis are: NPV (net present

value), PVB (present value of benefits), PVC (present value of costs), BCR (benefit cost ratio= PVB/PVC), net benefit (PVB-PVC), and NPV/k (k=level of funds available) (*US Federal Highway Administration: Economics Analysis Premier 2003*).

Cost-effectiveness analysis differs from cost-benefit analysis because it deals with the costs and outcomes of two courses of action in the form of a ratio and not in terms of monetary value. Commonly, this type of ratio is applied in the health service field as a quality-adjusted life years (QALY)¹⁵ (Bleichrodt and Quiggin 1999). Cost-effectiveness analysis is used by economists to study regulation in order to show the costs of specific outcomes should policy regulations be violated or upheld. Cost-effectiveness analysis has not been widely used for economic analysis of regulations and its applications are still being considered. These two analytical tools have been used by economists who study the impacts of regulations on the economy and society.

Economists do not only rely on these two tools for analyzing regulations, but have also adapted and created regulatory models such as the Averch-Johnson and Kuhn. “Averch and Johnson were the first authors to extend the traditional economic theory of the firm to include a regulatory constraint on the firm’s behavior” (Bailey 1973: 3). The model acted as the basis for the methodology of all regulatory models that are, “...static, deterministic, and in a partial equilibrium” (Bailey 1973:3). The Averch-Johnson model is meant to show how a firm or regulated party acting as a profit maximizing venture would survive when subjected to regulatory constraint. The expected outcome of the

¹⁵ QALY- is the ratio of years added to a person’s life by a specific medical intervention (drugs or medical procedures). QALY factors in both the quality and quantity of the life a patient would lead with the medical intervention (Bleichrodt and Quiggin 1999).

model is that the regulatory constraint would limit the firm or regulated party's earnings on its capital investment (Bailey 1973). The components of the Averch- Johnson model, as outlined by Elizabeth Bailey in her book *Economic Theory of Regulatory Constraint*, are:

$$\text{Maximize } \Pi(L,K) = R(L,K) - wL - rcK$$

$$\text{Subject to } \frac{R(L,K) - wL}{cK} < s, s > r$$

Where

- L = physical units of labor
- K = physical units of capital
- w = wage rate per physical unit of labor (constant)
- c = acquisition cost per physical unit of capital (constant)
- r = market cost of borrowing funds (constant)
- s = fair return on investment set by regulator (constant)
- $C(L,K) = wL + rcK$ = total costs
- $R(L,K) = p(q)q(L,K)$ = revenues as determined by the firm's demand and production functions
- $q(L,K)$ = a continuous and twice differentiable production function which transforms physical units of labor and capital into output of the firm; production requires both inputs, $q(L, 0) = q(0, K) = 0$
- $p(q)$ = inverse demand function which uniquely determines the price of the product given the output level, $p' < 0$

$$\Pi(L,K) = R(L,K) - C(L,K) = \text{profit} = \text{revenues} \text{ minus costs}$$

$$i = \frac{R(L,K) - wL}{cK} = \text{actual rate of return earned by the firm}$$

$$\text{cK} \qquad \qquad \qquad (Bailey 1973: 66-67)$$

This methodology has in the past been altered to fit different regulatory situations. The important difference between the economic viewpoint and the political science viewpoint is that economists are more interested in the monetary impacts of regulations—rather than the social impacts that political scientists seek to measure. Economic models

have been adapted to include the social aspects of the regulatory environment, but that is not their primary concern. For example, Lea-Rachel D. Kosnik did an empirical study on the sources of bureaucratic delay using a modified regulatory model. This particular model is meant to summarize the different pressures that are put upon a particular regulatory process (hydroelectric dam relicenses issued by the Federal Energy Regulatory Commissions in the case of Kosnik's study). Kosnik's model was built to test three hypotheses on bureaucratic behavior:

(1) that interest groups can affect the regulatory process (regulatory capture theory), (2) that the legislature can affect bureaucratic behavior (congressional dominance theory), and (3) that case-specific effects influence bureaucratic behavior (regulatory discretion theory), and it tests these theories in particular as they influence regulatory delay, as distinct from the larger literature on final regulatory outcomes (Kosnik 2005: 261)

The model Kosnik is using was built to answer these hypotheses. This model can be modified to fit into other regulatory environments to consider the impact of social factors and pressures on the carrying out of a regulatory process—a common occurrence in regulations studied by American Indian Studies scholars. This is the benefit of incorporating economic models and theories of regulatory constraint.

Figure 4: Kosnik's Regulatory Model for Tracing Bureaucratic Delay

$$\min_{r_i} \sum_{i=1}^N c_i(t_i, I_i, P_i)$$

$$\text{Subject to } t_i \geq a(r_i, S_i), \quad N$$

$$\sum r_i \leq b \text{ and } r_i \geq 0,$$

Where N is the total number of projects to be relicensed

o_i = the environmental mitigation requirements/ regulatory outcomes

i = project

t_i = time/speed of decision

D_i = relicensing decision

b = budget

r_i = resources devoted to regulatory process

S_i = project characteristics

c_i = net costs

$I_i(t_i, o_i)$ = outside interest groups

$P_i(t_i, o_i)$ = legislative oversight

$$c_i = c_i(t_i, I_i, P_i)$$

Summary

American Indian Law and Policy is an important part of American Indian Studies and serves as one of the discipline's four concentrations of study. American Indian law and policy (or Federal Indian law and policy) has been developing since American Indian's first contact with Europeans. Federal Indian law and policy is composed of the treaties, litigation, and policy between Native Americans, the federal government, and other parties that define the unique relationship that Native American tribes have as sovereign entities in the United States. It also deals with the government-to-government relationships that Native Americans have with federal or state governments and how those relationships are maintained. Law and policy also is concerned with helping the development of strong tribal governments.

As an important component of American Indian Studies, Federal Indian law and policy has been studied, researched, and analyzed using various theories and methodologies from the law, sociology, and political science. The theory of regulation has the potential to add to the growing dialogue and debate about how federal regulations impact Indian country, as well as help to highlight some of the patterns on how Native American issues are treated within federal policy. A case study of how the theory of regulation and the economic theory of regulatory constraint can both be used to analyze a regulatory process from Federal Indian law and policy is outlined in chapters three and four. The regulations and policy being examined are those promulgated for the Native American Graves and Protection Act (NAGPRA) and National Historic Preservation Act (NHPA) Section 106 process.

CHAPTER 3: FEDERAL INDIAN LAW AND POLICY: HOW REGULATORY POLITICS APPLIES

Regulation is a unique policy domain because it is almost always technical in nature and usually necessitates significant delegation of authority from politicians to more expert bureaucrats. This produces both normative and scholarly imperatives to investigate how such delegation is subjected to democratic influences.

-Brian J. Gerber and Paul Teske, "Regulatory Policymaking in the American States: A Review of Theories and Evidence"

The theory of regulation has developed over decades and has constantly been expanded into new levels and modes of policy. It has not yet been broadly used within American Indian Studies to analyze Federal Indian Law and Policy. What makes this particularly interesting is how well Federal Indian policy fits into the theoretical constructs of regulatory politics. Federal Indian policy can consistently be found within Gormley's policy domain of Operation Room politics. According to Gormley, Operating Room politics includes policy that is highly salient and highly technically complex when it is developed and passed by Congress. Politicians feel intense pressure from the public, their constituents, interest groups, and lobbyists to resolve an issue with federal legislation. In order to do this, they draft new policy. However, often an issue is not easily understood by politicians because of the level of technical complexity and they resort to the development of procedural legislation. Congress leaves the substantive work to high level bureaucrats who have to consult with professionals to resolve the technicalities within the regulations (Gormley 1986). This description of Operating Room politics fits nicely into the political environment that surrounds Federal Indian policy. When an issue concerning Native Americans reaches Washington it is often at

the height of its saliency (i.e. Indian Gaming, Civil Rights, or treatment of Native American remains) and with the public involved Congress is moved to take action—even though they might not fully grasp the complexity of the issue at hand. This is a situation that has occurred repeatedly in Federal Indian policy. What is interesting about Federal Indian policy is that it continues to fit into the framework of regulatory politics and Gormley's policy domains. Although after its passage, Federal Indian policy tends to fall out of the domain of Operating Room politics and into another policy domain—Board Room politics.

After its passage, Federal Indian policy usually loses the high level of salience it needed to get Congressional attention in order to enact legislation. Politicians no longer feel pressure because they think they have addressed the issue, and move on to the new hot button issue. This is especially true when they might not have grasped the technical complexity of the issue to begin with. This downward slide in saliency pushes Federal Indian policy into Gormley's Board Room politics policy domain.

Board Room politics operates in a political environment where the issue has a high level of technical complexity, but a low level of public saliency. Without the public interest, political and media pressure subsides and policies regular players emerge—bureaucrats, professionals, and the affected business or interest group (in the case of Federal Indian policy this would be an affected interest group i.e. Native Americans and their communities) (Gormley 1986). When federal policy in the policy domain of Operating Room politics loses its high level of saliency it shifts into the policy domain of Board Room politics. This shift in policy domain commonly occurs to Federal

Indian policy after it is passed. The national scrutiny has moved on to a new policy issue and leaves the administrating agency bureaucrats (in the case of Federal Indian policy NPS, BIA, Department of the Interior), professionals (in the case of Federal Indian policy archeologists, tribal lawyers, tribal government officials), and the regulated industry interest group (in the case of Federal Indian policy Native Americans and their communities) to create and deal with the federal policies regulations. This is largely due to the fact that:

Agencies that confront less salient issues, though subject to interest group pressure, are less subject to oversight by politicians, who care more about other issues. Also, interest group pressure is more likely to be lopsided, emanating from the regulated industry rather than from a broader cross-section of groups. Another key difference is that less salient issues generate fewer policy disputes between the two political parties. Partisanship, like photosynthesis, depends on sunlight (Gormley 1998: 364).

The policy domain of Board Room politics can be a dangerous place to operate. With no public and political pressure agency bureaucrats do not feel any stimulus to quickly resolve regulatory issues, and are satisfied to maintain the status quo. The policy has been created, the regulations have been promulgated, and therefore it is the regulated industries job to function within them. However, functioning within the regulations in the policy domain of Board Room politics can often be frustrating for the regulated industry or community because fighting bureaucracy often involves a huge amount of red tape and can prove futile.

A perfect example of this particular situation in Federal Indian Policy is the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). NAHASDA simplified the access of Native American tribes to federal block grants for

housing development on the reservation (<http://www.hud.gov/offices/pih/ih/codetalk/nahasda/>).

So what is the problem with this legislative policy? The problem is that after its passage the policy fell into the domain of Board Room politics. The agency promulgated the regulations, but left implementation to the regulated industry (Native American communities). Native American tribes, such as the Navajo Nation were not notified that funds were available, and had trouble understanding the regulations and application process to receive the funds (Spitz and Klain 2000). The agency did not have pressure (political or public) to manage and educate the regulated community on how to access the funds provided by the act. In this case, the Navajo Nation had to take upon themselves' monetary responsibility to hire professionals that understood the regulations so that they could receive the housing funds for the Nation (Spitz and Klain 2000). This is just one example of where Federal Indian policy can fit into regulatory politics.

Understanding the normal projection taken by Indian policy can help tribes know where in the process to capitalize on the high level of salience in order to promote the importance of the issue. In order to further explore the applicability of regulatory politics to AIS, one Federal Indian policy (NAGPRA) is examined here regarding its progression through the legislative process and regulation promulgation.

Case Study: NAGPRA

The Native American Graves Protection and Repatriation Act established a framework that is designed to facilitate the repatriation of Native American human remains and funerary objects, sacred objects and objects of cultural patrimony.

-Makah Indian Tribe and NATHPO June 2008, “Federal Agency Implementation of the Native American Graves Protection and Repatriation Act”

The Native American Graves Protection and Repatriation Act (NAGPRA) was signed into law on November 16, 1990. NAGPRA was the result of decades of political protest, legal action, and Native American lobbying to rectify and resolve issues surrounding the treatment of Native American human remains¹⁶, funerary objects¹⁷, sacred objects¹⁸, and objects of cultural patrimony¹⁹. The issue of the repatriation and reburial of Native remains, sacred objects, and funerary objects first came to the political forefront in the late 1960s with the founding of organizations such as the American

¹⁶ “Human remains” are the physical remains of the body of a person of Native American ancestry. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets. For the purposes of determining cultural affiliation, human remains incorporated into a funerary object, sacred object, or object of cultural patrimony must be considered as part of that item. [43 CFR 10.2 (d) (1)]

¹⁷ “funerary objects” are objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects. [25 USC 3001 sect 2(3)(A)]

¹⁸ “sacred objects” are Specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents. [25 USC 3001 sect 2(3) C)]

¹⁹ “objects of cultural patrimony” are which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group [25 USC 3001 sect 2(3)(D)].

Indian Movement (AIM). AIM played a significant role in the early controversies and confrontations about repatriation. According to Larry J. Zimmerman co-editor of *Indians & Anthropologists: Vine Deloria Jr. and the Critique of Anthropology*, “AIM sought to target archeologists as exploiters of Indians, especially when archaeologists excavated human remains the Indian claimed to be from their ancestors. AIM’s tactics ranged from disrupting digs to destroying field equipment and excavation notes” (92). AIM had a strong youth element on college campuses and helped stimulate repatriation activists in the next generations. Repatriation and reburial issues continued to slowly build momentum throughout the 70s and 80s with small victories (e.g. Zuni’s successful recovery of *Ahayu: da*²⁰) adding fuel to the issues fire and raising its public salience. Politicians, when repatriation and reburial issues were at their highest level of salience in the late 80’s and early 90’s, sought to resolve the conflicting interests of the public, Native American lobbyist, and scientific communities once and for all with national legislation. In 1988, the Senate Select Committee of Indian Affairs held the first political hearing to discuss potential repatriation legislation, but determined that Native American groups, the scientific community, and museums should have the opportunity to weigh in on the issue before federal legislation was constructed (Bruning 2006; U.S. House of Representatives 1989: 13). In response to this decision a year-long dialogue was held at the Heard Museum in Phoenix, AZ. The dialogue resulted in the publishing of a report

²⁰ *Ahayu: da*- popularly known as the “war gods” are carved wooden images representative of the twin gods Uyuwewi and Ma’a’sewi. The Ahayu: da act as protectors of the Zuni people and can affect the weather. After the winter solstice ceremonies the war gods are placed in shrines in perpetuity, and no one has the authority to remove them from the shrine. In fact, Zuni leaders believe removing the Ahayu: da would cause widespread destruction and mayhem. The Zuni instigated a project in 1978 to have all the war gods that had been wrongfully taken from Zuni shrines to be returned. This project resulted in the successful recovery and repatriation of 69 Ahayu: da (Merrill, Land, and Ferguson 1993).

calling for the creation of national legislation that would balance scientific interest and Native American issues (Bruning 2006). Therefore, NAGPRA's passage occurred at the height of its public saliency, but the issues that are the foundation for the act were never considered simple. There was always a high level of technical complexity due to the need to balance conflicting viewpoints on the issue.

At this point in its legislative progression, NAGPRA was in the policy domain of Operating Room politics. Legislators were "operating" on the issue by trying to find a solution that would "patch up" all of the conflicts and find an amicable solution for moving forward.

Repatriation and reburial issues by 1990 (when NAGPRA was passed) had reached their height in public salience with the media, the public, and Native American lobbyists all emotionally invested in the cause. Also, adding to the salience of the issues were scientific interest groups exerting their own opposing pressure on politicians because they were worried about the potential ramifications of the proposed legislation on their scholarship. These strong opposing viewpoints not only raised the saliency, but also added to the technical complexity of the policy. NAGPRA's technical complexity rests in the conflicting viewpoints surrounding the issue of repatriation and reburial; the definition of the objects being addressed by the legislation; how the law will be implemented; how the legislation would deal with the future discoveries; and funding. Congress addressed some of the technical complexity, but, as in the case in most policy conducted in the Operating Room policy domain, the real work would be left to the high

level bureaucrats promulgating the regulations (Gormley 1986). Politicians at this level respond with:

...action of a very limited sort-procedural, not substantive, intervention. Thus, politicians create new agencies or reorganize existing agencies. They set deadlines requiring bureaucrats to act by a certain date. They mandate citizen participation in administrative proceedings or they establish an office of consumer affairs. They alter intergovernmental relationships, ostensibly to promote greater accountability, in reality to disperse responsibility. In short, the role of politicians is almost purely procedural... (Gormley 1986: 612).

Politicians held true to this supposition with NAGPRA when they laid out the procedure for the policy, set the deadlines for the regulated parties to conform to its mandates, and then left the details to be worked out in the regulations developed by professionals and agency bureaucrats. Feeling that their duty was done, Politicians moved on, as did the media and public who felt NAGPRA was the solution they sought. The level of policy salience lessened as the public, media, and politicians moved on to other causes soon after NAGPRA's passage.

This lowering of public salience of NAGPRA issues started its shift into the policy domain of Board Room Politics, leaving bureaucrats, professionals, and Native American interest groups the only parties still actively involved. NAGPRA has now progressed into a new policy domain where the bureaucrats are in the driver's seat and the only pressure they feel on a regular basis is from the regulated community (Gormley 1986). This fits the regulatory environment of NAGPRA since its passage. The National Park Service (under the Department of the Interior) houses the National NAGPRA program and is charged with implementation. The National NAGPRA program oversees the enforcement, implementation, and carrying out of NAGPRA and its regulations. The

Department of the Interior promulgated the federal regulations, beginning NAGPRA's term in the Board Room politics policy domain. The regulations were finalized on January 3rd, 1996 (6 years after the passage of NAGPRA).

This final rule establishes definitions and procedures for lineal descendants, Indian tribes, Native Hawaiian organizations, museums, and Federal agencies to carry out the Native American Graves Protection and Repatriation Act of 1990. These regulations develop a systematic process for determining the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated (43 CFR Part 10: Summary).

The time between the publishing of the final rule and the passage of NAGPRA was due to the technical complexity of the policy, but also to a lowering of salience of repatriation issues. The agency bureaucrats felt less pressure to complete the regulations with only low level pressure from politicians (their bosses). Once the regulations were published tensions began to rise within the regulated community while they attempted to find the best way to implement their rights under NAGPRA. These tensions culminated when Kennewick Man²¹ was discovered and public salience temporarily increased on repatriation issues. This case, with the rise in public salience, could have raised NAGPRA out of the Board Room politics policy domain, but the technical complexity of the issue kept it out of the "Operating Room" where federal legislators would feel pressure to pass amendments to the law.

²¹ "Kennewick Man" was a high profile NAGPRA case concerning a set of Native American human remains uncovered along the Columbia River in Kennewick, Washington. Radiocarbon dating put the remains at circa 8000-8500 BP. Due to their age, the remains aroused scientific, Native American, and media interest due to inconsistent reporting and suggestions of the skeletal characteristics not representing Native American features. This controversy received a high amount of public attention, but as the court case began to drag on the level of public attention exponentially decreased (Bruning 2006).

This type of judicial review is common in the Board Room policy domain because the technical complexity is often confusing and judges tend to rule on legal technicalities rather than unraveling the issues complexity. According to Gormley, “Judicial intervention is unlikely to be invoked, because conflicts are usually manageable. If the courts do get involved (and this is relatively unusual), it is to serve as referee for intramural disputes within the business community (Gormley 1986: 606-607). In the case of NAGPRA and the Kennewick Man case, the “business community” in dispute is the professionals (archeologists, scientific community) and Native American community (business/interest group). Kennewick Man is really the only legal challenge to NAGPRA that could have raised NAGPRA’s saliency into the “Operating Room”, so the policy is continuing to conform to its policy domain (Board Room politics).

Since the passage of NAGPRA there have been few legal challenges (~40). As Gormley describes, the cases are meant to settle disputes between the affected regulated parties (McKeown and Hutt 2002). After NAGPRA’s passage, implementation of the regulation has continued to operate within the Board Room politics policy domain with little heightening of salience and a consistent level of technical complexity. In fact as time passes, the salience of the issue continues to slide because familiarity with the regulations and compromises setting precedence has lessened the controversies. This fits into a common pattern within Board Room politics, “...what Wilson calls “clientele politics,” where a single regulated industry more or less marches to its own drumbeat (Gormley 1986: 607). This is the current state of NAGPRA within its policy domain of Board Room politics.

There are other aspects of NAGPRA that also fit into Board Room politics. For example, since a significant amount of time has passed the bureaucrats administering NAGPRA's regulations have not felt pressure from a "broader cross-section" of the public in years, and the only pressure being exerted is from the regulated industry (Gormley 1998). With this type of situation, changes and the promulgation of new regulations are not necessarily a top priority for the administering agency. An example of this would be the fact that the final rules on the regulations dealing with the disposition of "culturally unidentifiable human remains"²² have just been published (March 15 2010) almost twenty years after the passage of NAGPRA. This kind of occurrence is typical of a low salience, highly technically complex policy.

²² Culturally unidentifiable human remains according to NAGPRA are Cultural items for which no culturally affiliated present-day Indian tribe or Native Hawaiian organization can be determined. [43 CFR 10.9 (d) (2)].

Summary

What this review of NAGPRA has shown is that a piece of Federal Indian policy conforms to the theoretical frameworks used by the theory of regulation's regulatory politics model. This type of analysis can be repeated with each piece of Federal Indian policy. Highlighting patterns in a policies progression through the legislative process can show where the proposed regulatory community should push for reform (during the height of salience so that other parties outside of the regulated community can add weight to the regulated communities regulatory problem increasing chances of their agenda being met). Analysis of this type can be done on the surface or delve down deeper into a specific regulatory issue to determine what factors could be affecting the implementation of the regulations. Regulatory politics gives AIS scholars a new way to look at Federal Indian policy, and a new way to search for solutions to frustrations within that policy. In regulations, as with policy timing is everything and being able to predict when the time is hot to take action on a specific policy could immeasurably help scholars, tribal officials, and lawyers trying to enact change in Indian Country.

CHAPTER 4: NHPA SECTION 106 PROCESS: HOW THE ECONOMIC THEORY OF REGULATORY CONSTRAINT APPLIES

The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

-36 CFR PART § 800.1 Purposes

I would consider any consultation successful in which there has been a collaborative effort and all parties acknowledge and respect the observations, comments and concerns of the other.

-Dr. Richard L. Allen, “A Traditional Cultural Property Study of New Echota”

This chapter will focus on the National Historic Preservation Act’s Section 106 process requiring tribal consultation during the identification and evaluation of adverse effects on historical properties. The Section 106 process was established in the National Historic Preservation Act (NHPA) of 1966, as amended. The NHPA was signed into law by President Lyndon B. Johnson on October 15, 1966. The main purpose of the act was to assure the future preservation and maintenance of historic properties significant to the cultural heritage of the United States. The act’s purpose states that, “...the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans” (16 U.S.C. 470 (b)4). The NHPA contains four important components that directly affected how historic preservation is handled in the United States; shifting preservation from the private sector to the realm of

the government. These four components are: (1) the creation of the Advisory Council of Historic Preservation (ACHP), (2) the creation of the State Historic Preservation Offices (SHPO) and Tribal Historic Preservation Offices (THPO), (3) the creation of the National Register of Historic Places to list buildings, sites, archeology, battlefields, districts, engineering, architecture, and objects significant in the history and cultural heritage of the United States, and (4) the establishment of the Section 106 review process (King 2004; Neumann and Sanford 2001; 16 U.S.C. 470a(a)1). Each of these components has its own importance, but for the purpose of this chapter discussion focuses on the Section 106 process and the required tribal consultation associated with it.

The Section 106 process was developed in the regulations promulgated to carry out the directive from Section 106 of the NHPA. Section 106 simply states:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking (16 U.S.C. 470f, Section 106).

Section 106 establishes the need for a regulatory process governing and overseeing the work and consultation associated with reviewing an area of potential effect (APE) for every project involving federal funding or licensing. The agency must take a series of steps in order to be in compliance with the Section 106 process. (1) The agency must determine if their project is an undertaking with the potential to affect properties eligible or already listed on the National Register (Neumann and Sanford 2001). (2) The agency

or its contractor must identify the historic properties located in the APE, evaluate the eligibility of the historic properties, and make a determination on whether or not the project requires investigation of its potential adverse impacts. (3) The potential adverse impacts are investigated and the agency will make a determination on whether or not mitigation is needed (Neumann and Sanford 2001). (4) The final step of the Section 106 process is to try and mitigate any adverse impacts on any site, property, or object eligible for or already included on the National Register of Historic Preservation (Stipe 2003; King 2004; Neumann and Sanford 2001). These four steps are the normal ones an agency would use in order to comply with the Section 106 process.

However, in certain circumstances a fifth step might have to be taken in order to reach an agreement on the mitigation of adverse effects. This fifth step only occurs when, due to the scope of the project, the Advisory Council on Historic Preservation (ACHP) either elects to enter into the Section 106 process or is asked by one of the process's participants to enter for advice, guidance, or dispute resolutions (36 CFR Subpart A § 800.2 (b)). The ACHP will choose to enter a specific undertakings Section 106 review process for any or all of the following reasons: the undertaking has a serious impact on important historical properties, the undertaking has raised important procedural questions about policy and interpretation of the regulation, the undertaking has the potential to cause disputes and procedural problems, the undertaking has raised tribal concern (36 CFR Appendix A to Part 800). "Historically, around 3 percent of Section 106 cases have required ACHP review in a given year" (Neumann and Sanford 2001: 38). This process for including the ACHP and how consultations with the ACHP are

performed is fully explained in the Section 106 regulations, 36 CFR 800, “Protection of Historic Properties” written by the Advisory Council of Historic Preservation, the agency charged with the oversight of the process (ACHP November 2008).

What is Consultation under Section 106?

The history of United States Indian policy evidences an evolving, difficult and complex relationship with tribes. The fundamental basis of required consultation is recognition of Tribal sovereignty. Over the years, the federal government has refined the obligation of Federal Agencies to interact with Tribes on a government-to-government basis in a series of laws, amendments to existing laws, and executive orders, all of which direct Agencies to engage in consultation with Tribes. Today, the relationship of the federal government and federally recognized Indian Tribes has evolved to the point where consultation on a government-to-government basis is not only the law, it is considered sound management policy and the right way for the United States to do business.

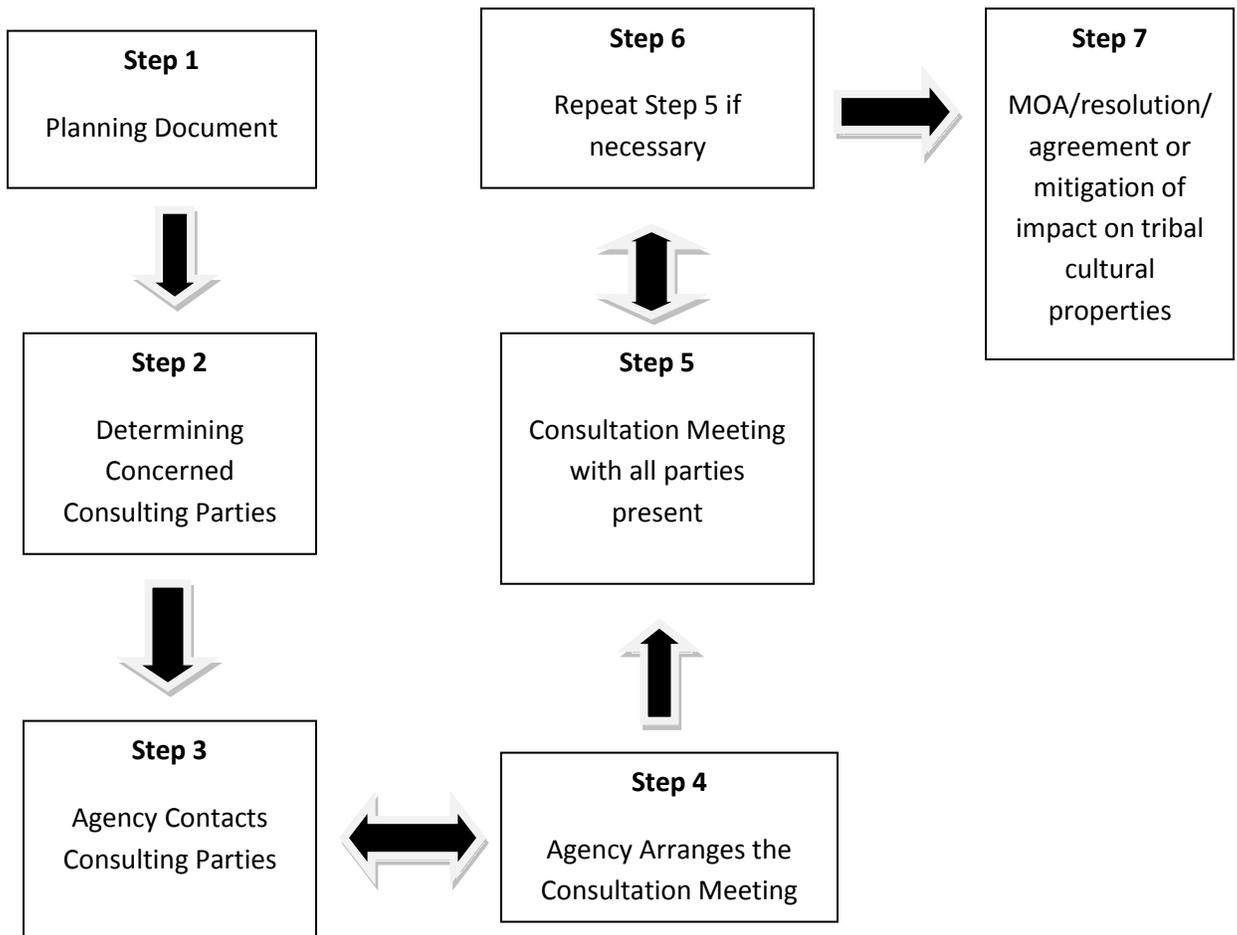
-Sherry Hutt and Jaime Lavallee for the NATHPO May 2005, “Tribal Consultation Best Practices in Historic Preservation”

Tribal consultation is an important part of the Section 106 process. Consultation with tribes has been mandated by several different federal laws, executive orders, and federal regulations (e.g. NAGPRA, NHPA, NEPA, AIRFA, ARPA, EO 13175, EO 13007, EO 12898). Under the NHPA, as amended, consultation with tribes is mentioned within the law twice (16 U.S.C. § 470a (d)(6)(B) & 470h (1992)), and appears as a requirement in the Section 106 process regulations, 36 CFR PART § 800.2 (c)2. Tribal consultations should occur during the planning stage of a federal undertaking no matter the size or scope of the particular project. According to the research presented by Sherry Hutt and Jamie Lavallee in the NATHPO report “Tribal Consultation: Best Practices in Historic Preservation”, there are seven protocol steps that occur during consultation (Hutt and Lavallee May 2005). The report determined that the inclusion of these seven steps in

the consultation process would result in a good project consultation. Step One is that the federal agency conducting the project prepares a planning document covering the entire Area of Potential Effect (APE) of the project and the potential eligible sites. Step Two is that the agency should determine and contact the Native American tribes that would have an interest in the APE of the undertaking (Hutt and Lavallee May 2005: 41). This can be accomplished by using past precedence, contacting appropriate Tribal officials in the geographic area, consulting the aboriginal land map from the Indian Claims Commission, asking involved Tribal leaders or the THPO if there are any other potentially interested Native American tribes, or by using any other available means. Step Three is that the agency contacts all of the consulting parties to request a consultation meeting along with submitting their project plan and any pertinent additional information (Hutt and Lavallee May 2005: 41). Step Four is that the agency makes all of the arrangements for the consultation meeting (time, place, travel arrangement, funding, agenda) making sure to consider potential barriers to a tribe's participation, the goals of the meeting, and any possible confidential or sensitive information associated with potential religious sites. Step Five is the actual consultation meeting between all parties (Hutt and Lavallee May 2005: 41). Step Six is to repeat Step Five if necessary to accomplish all goals associated with project. Step Seven is to prepare a Memorandum of Agreement (MOA) to document the resolution of adverse effects and provides a sense of finality to the consultation process concerning the tribal concerns about cultural sites (Hutt and Lavallee May 2005: 41). These seven steps outline the basic process of tribal

consultations done under the Section 106 process. A visual representation of the seven protocol steps is outlined in Figure 5 below.

Figure 5: The Tribal Consultation Process. *Adapted NATHPO May 2005.*



How tribal consultations occur can vary, but these seven steps are important factors to consider. Tribal consultations for the Section 106 process often consider the

other pertinent federal legislations that require tribes input, including NAGPRA, Archeological Resource Protection Act (ARPA), and National Environmental Protection Act (NEPA). For example, NAGPRA concerns are often addressed at the beginning of a project so that any discovery of human remains or cultural items would fall under the planned excavation regulations rather than face dealing with an inadvertent discovery (Hutt and Lavalley May 2005).

The major goal of tribal consultation is to resolve adverse effects associated with federal undertakings to the satisfaction of a tribe. “Consultation means the process of seeking, discussing, and considering the views of others, and, where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed”²³. During consultation the agency is required to make a “reasonable effort”²⁴ to determine eligible and potentially eligible sites to the National Register known to the tribal consultants and other interested parties.

²³ Secretary of Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, Federal Register 24 April 1998.

²⁴ “Reasonable Effort” is terminology taken from the 10th Circuit’s ruling in *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995). The case determined that in this particular case the Forest Service (the agency) did not exert a “reasonable effort” to determine and mitigate the potential effects of a road project on traditional cultural properties of the Pueblo of Sandia that were eligible for the National Register. The decision was based upon the ideal that the agencies definition of “lack of specificity” exceeded the level of specificity required for the agency to be aware of the Pueblo’s areas of concern and mitigate them. Also, the agency could not claim ignorance of potential areas of concern because it was common knowledge the area contained the Pueblos traditional cultural practice sites. The court determined that a “good faith” effort on behalf of the agency would extend to a consultation with the tribe beyond a singular initial letter and briefing.

Analysis Using Economic Theory and Models

Tribal consultation under the NHPA Section 106 process is a required element of federal undertakings and has been turned into a heavily regulated industry. The Section 106 process is triggered by plans for a specific project that (e.g. a new highway, land development, dam, or other earth modifying undertaking) involves federal money, a federal license, or being proposed by a federal agency. Federal undertakings require consultations with tribes and other interested parties under Section 106 of NHPA. Inherently, these projects are undertaken for economic and political reasons generally, to meet the public's interest. Therefore, applying economic theories and models to analyze the Section 106 tribal consultation process would not be an analytical or theoretical stretch. In fact, before the projects enter the planning stage, where tribal consultations should take place, the agency or government running the project would have performed a cost-benefit analysis.

For example, if the US Department of Transportation's Federal Highway Administration (FHWA) is deciding whether or not to fund the Arizona Department of Transportation's (ADOT) plan to renovate an existing highway in Southern Arizona, due to unsafe road conditions and high rate of fatal car crashes, a cost-benefit analysis would normally be done. When considering the project, ADOT and the FHWA determine that it will cost \$25 million dollars to perform the necessary upgrades and safety improvements. To determine whether or not the project makes economic sense for the FHWA, a cost-benefit analysis could be used. First, the FHWA would determine the present value of costs (PVC) and the present value of benefits (PVB) of the highway renovation project.

PVC would be determined by adding up the total cost over a five year period of the road's upkeep and maintenance at present conditions under the five year contract to the state (\$15 million), any lawsuits concerning deaths associated with unsafe road conditions (\$5 million), the cost of human life lost due to fatal car crashes on the highway (\$15 million), the five year contract cost with the state for cleaning up debris from car crashes (\$10 million), and cost of FHWA employees oversight and reports produced in administering the highway (\$5 million). Therefore, the total PVC for the highway would be roughly \$50 million.

PVB would be determined by projecting the potential cost reduction on highway maintenance over a five year period as well as the \$25 million dollar budget if the highway renovation project did occur. So PVB would be the \$25 million dollar renovation budget, the five year contract with the state for upkeep and maintenance (\$10 million), lawsuits associated with fatal car crashes (\$500,000), five year contract cost for state clearance of car crashes on the highway (\$5 million), cost of FHWA employees oversight and reports (\$3.5 million), and the cost of human life from fatal car crashes (\$1 million). Therefore, the total PVB would equal \$45 million. The net benefit of the project would then be -\$5 million (PVB-PVC) and the benefit cost ratio (BCR) would be 90% (PVB/PVC). What the analysis shows is that in this particular case the benefits of the project would outweigh the potential costs and lower the FHWA PVC on the highway within the next 5 years. The cost-benefit analysis would serve as the persuasive in house argument for the agency to decide to pursue the project.

The cost-benefit analysis showed that the FHWA would benefit by undertaking the highway renovation project. Therefore, with the highway renovation plan going forward, Section 106 of the NHPA would apply and tribal consultation would occur. Cost-benefit analysis can also be employed at this stage in the planning process when determining the right-of-way of the highway renovation and expansion. The PVB of moving the right-of-way in consideration of an area with a high number of potentially eligible sites versus the PVC of sticking with the original engineer planning and having to mitigate the impacts in that area could seriously affect the economic feasibility of the project. If the original budget estimates for the project (\$25 million) increases due to unforeseen mitigation concerns, the net benefit of the project could become zero or less than zero making the project not fiscally feasible and could halt the project all together. This type of occurrence is possible during the discovery phases of the project where traditional cultural properties are identified during tribal consultation (especially in a state like Arizona with a huge archeological and Native America presence).

Cost-benefit analysis could be a useful tool for tribes to utilize during consultations. If a tribal representative understands the funding basis for a project, which is important to a lot of agencies sponsoring projects, they can argue on that basis. Tribes also need to know the budget the agency is working with to mitigate the adverse effects of the project, and could structure their suggestions to get maximum protection (benefit) of their traditional cultural properties at the given cost. The potential problem with this is that the tribe might have to determine the monetary value of a traditional cultural property, a commoditization that could be considered offensive to many Native American

people. Cost-benefit analysis as well as cost-effectiveness analysis could be used in these situations and potentially benefit tribal participation in Section 106 process consultations.

Cost-benefit analysis is not the only economic tool that can be utilized in the analysis of tribal consultations done for Section 106 projects. The adapted form of regulatory equations developed by Lea-Rachel D. Kosnik in her article “Sources of Bureaucratic Delay: A Case Study of FERC Dam Relicensing” can be adapted and applied to the tribal consultation process under Section 106 of NHPA (Kosnik 2005). Figure 5 above outlines the seven protocol steps taken when doing a Section 106 process project’s tribal consultation requirement. These seven protocol steps were determined from an empirical survey study done by the National Association of Tribal Historic Preservation Officers (NATHPO) in conjunction with the Advisory Council on Historic Preservation. It was published in their May 2005 report “Tribal Consultations: Best Practices in Historic Preservation” (Hutt and Lavelle May 2005). The survey was mailed out by the NATHPO to federal agency heads, tribes, and federal preservation officers with questions concerning specific projects they had worked on where they considered the tribal consultation successful. They tabulated the results of the survey and used the data in a Boolean assessment in order to extrapolate what steps are needed to obtain a successful tribal consultation (Hutt and Lavelle May 2005). As Hutt and Lavelle state, “...Boolean analysis allows for various events to be compared and the essential common aspects of consultation to be identified. The data table lists all formulas by response. The “truth table” allows for a weighted analysis, as recurring formulas can be segregated from single, outlier responses. Ultimately, a single formula emerges to predict success” (Hutt

and Lavelle May 2005: 20). The formula that resulted was used and distilled to create the seven protocol steps associated with tribal consultations (Figure 5 above). Figure 5 above shows that the tribal consultation process starts with the agency planning document. The steps in this process can be identified in relation to variables important in regulatory equations. The analysis conducted on the NATHPO survey falls in line with the adaptation of Kosnik's regulatory equations when they are applied to the tribal consultation regulatory process.

Kosnik's regulatory model was built to quantify the sources of bureaucratic delay retrospectively for the licensing of hydroelectric dams by the Federal Energy Regulatory Commission (FERC) from 1982 to 1998. The model was built to provide an understanding of the determinants of delay in that specific regulatory process (Kosnik 2005). What makes this model adaptable to the regulatory conditions of Federal Indian policy is that it was built to quantify the decision-making times and their effects on the regulatory outcomes. Figure 2 below shows Kosnik's regulatory model in its original form before it was modified for the Section 106 tribal consultation process.

Figure 6: Kosnik's Regulatory Model for Determining Bureaucratic Delay

$$\min_{r_i} \sum_{i=1}^N c_i(t_i, I_i, P_i)$$

$$\text{Subject to } t_i \geq a(r_i, S_i), \quad N$$

$$\sum r_i \leq b \text{ and } r_i \geq 0$$

Where N is the total number of projects to be relicensed

o_i = the environmental mitigation requirements/ regulatory outcomes

i = project

t_i = time/speed of decision

D_i = relicensing decision

b = budget

r_i = resources devoted to regulatory process

S_i = project characteristics

c_i = net costs

$I_i(t_i, o_i)$ = outside interest groups

$P_i(t_i, o_i)$ = legislative oversight

$$c_i = c_i(t_i, I_i, P_i)$$

The modification of Kosnik's regulatory model will require the reassignment of the variables and the equation to fit the regulatory environment of the Section 106 tribal consultation process. The Section 106 tribal consultation process would begin when the federal undertaking has reached the point where tribal consultation is required. At this point the agency initiating the consultation process is seeking an agreement (D_i) with the tribes in regard to mitigating the adverse effects of the project on tribal cultural properties

and other historic properties eligible for the National Register (O_i). The agency hopes to achieve their desired outcome (O_i) for their project (i) as fast as possible in the time (t_i) they have allotted and with the resources (r_i) they devoted to fulfilling the Section 106 process. Once the consulting parties have been determined and the agency reaches the 4th and 5th step, then other factors enter the regulatory equation. First, the budget (b) that the agency can allocate to help transport tribal members for the consultation meeting has to be determined. Secondly, the specific project characteristics (S_i) become important to the federal agency in determining how the consultation meeting is handled. The 4th and 5th steps are also where all of the interested consulting parties ($I_i(t_i, O_i)$) formally come together for the first time in order to address all of the issues associated with the appropriate legislative oversight and political pressures ($P_i(t_i, O_i)$) (Hutt and Lavelle May 2005; Kosnik 2005).

When all of these regulatory variables are considered the regulatory equations can be used and created by scholars using supposition, hypothesis testing, and the empirical data on completed projects Section 106 tribal consultation processes. These equations are: the Mitigation/Tribal Consultation Result equation, Agency production function equation, the Net Cost Equation, and the Full Project Null Hypothesis. These equations and their variables are discussed below within the summary of the regulatory equations created by Kosnik (2005) as they have been adapted for the NHPA Section 106 process (Tribal Consultations).

**Regulatory Equations Adapted for NHPA Section 106 Process
(Tribal Consultations)
Adapted From Kosnik (2005)**

SUMMARY OF EQUATION VARIABLES:

$O_i =$ substantive outcome of MOA and project mitigation ex. archeological mitigation of adverse effects, tribal concerns, classification of traditional cultural properties in area of potential effect (APE)

$i =$ project

$t_i =$ time/speed of reaching a MOA and resolving project impact

$D_i =$ final agreement/MOA

$b =$ project budget/consultation budget

$r_i =$ resources devoted to the agencies fulfillment of the Section 106 process

$S_i =$ project characteristics

$C_i =$ net costs experienced by the agency while undergoing the Section 106 process

$I_i(t_i, O_i) =$ outside interest groups ex. tribal council, THPO, SHPO, historical societies, etc.

$P_i(t_i, O_i) =$ legislative oversight and political pressure ex. Section 106 process, EO 13007, NAGPRA, ARPA, etc.

- 1) The Mitigation/Tribal Consultation Result equation states that the final agreement or MOA documenting project resolution (D_i) is a result of the substantive outcomes (O_i) (i.e. archeological mitigation of adverse effects, tribal concerns, or classification of traditional cultural properties in APE) and timing (t_i):

$$D_i(t_i, O_i)$$

- 2) Agency production function equation states that if the agency (BIA, SHPO, THPO, etc.) is dealing with a substantial project workload and if project is technically complex, the speed of the agency's performance in the mitigation of adverse effects or tribal consultation is dependent on the resources (r_i) available,

where project characteristics are represented by (S_i): $a(r_i, S_i)$

- 3) The Net Cost Equation shows what the net cost the agency (FEMA, BIA, THPO, etc.) incurred while coming to a resolution/agreement for a project mitigation/tribal consultation is dependent on the time (t_i) it takes to create a MOA between all of the concerned parties specifically the interested parties (I_i) (i.e. tribes, environmental groups, historical groups) and political/legislative oversight (P_i) (i.e. politicians, political pressures on project, other legislation-NAGPRA, ARPA, EPA, etc.) involved in the mitigation or consultation:

$$C_i = C_i(t_i, I_i, P_i)$$

- 4) The Full Project Null Hypothesis states that the agency (BLM, ADOT, NPS, etc.) instigating the Section 106 process and tribal consultations seeks to minimize or resolve all of a project's unique pressures (political, social, tribal), subject to the project's resource constraint and agency production function:

$$\min_{r_i} \sum_{i=1}^N c_i(t_i, I_i, P_i)$$

Subject to $t_i \geq a(r_i, S_i)$,

$$\sum_{i=1}^N r_i \leq b \text{ and } r_i \geq 0,$$

Where N is the total number of projects the agency is involved in.

The regulatory equations summarized above can be used during the Section 106 consultation process in order to determine missing variables that could be hindering agreement, or after the process is completed to assess the success of the results. The application of this regulatory model can be both quantitative, when used retrospectively, as the Kosnik original regulatory model, or as a tool for early analysis for high value variables for ongoing projects. The type of application depends on where and which part of the regulatory process is being analyzed with the model. Quantitative analysis for this regulatory model can only be done retrospectively, because when assigning values to social factors the amount of time spent minimizing the factor (variable) is what is

quantifiable for the equation. To be able to quantify the effect of a particular interest group $I_i(t_i, O_i)$, the time spent resolving the concerns of that interest group must be compared with the amount of time spent resolving the concerns of other interest groups in order to assign what value the variable holds. These value judgments will be subjective based on what the researcher places value on, but can only be done when all factors are known for the project.

The second type of application occurs on an ongoing project to assess the potential high value variables that need to be minimized to achieve a satisfactory conclusion. In order to provide a better understanding on how a Section 106 process can be analyzed using these regulatory equations an example will be taken from the Advisory Council of Historic Preservation (ACHP) Case Digest Report (ACHP Summer 2008:13-14). The report is published 2 to 3 times year and covers historic preservation cases that, due to their complexity, have been brought to the ACHP to review. Each report contains five to six cases at various stages in the Section 106 process. The case chosen for analysis was first reported in the summer 2008 report as an historic preservation case from New Mexico, and has yet to be closed.

The following discussion identifies the variables pertinent to regulatory analysis. The project (*i*) deals with the mitigation of adverse impacts associated with authorizing permits for exploratory uranium mine drilling on Mount Taylor in the Cibola National Forest. The Cibola National Forest has received four requests for exploratory drilling on and around Mount Taylor. The Forest has instigated the Section 106 consultation process

in the hopes of reaching a MOA (D_i) to mitigate the adverse impacts of the drilling (ACHP Summer 2008). In an attempt to reserve resources (r_i) the National Forest is combining the four uranium drilling requests together because they all have the same area of potential affect, and using one environmental analysis conserves resources (r_i). The potential outcomes (O_i) of the consultation have to deal with the case's four major issues: (1) the resulting jobs and economic development opportunities offered by the mining enterprises, (2) resolving the environmental and mountain preservation issues, (3) issues surrounding the separation of church and state in land management decisions, and (4) balancing the concerns of how Mount Taylor is managed between all parties while still respecting the tribes' role (ACHP Summer 2008). The Cibola National Forest plans on spending the time (t_i) needed to consult with all of the interested parties (environmental groups, tribal representatives, SHPO, local governments, etc.) in order to resolve all of the potential adverse effects. Project budget (b) has not been resolved, because the determinations have yet to be made on the mitigation of the adverse impacts. Currently, the project (i) has developed specific characteristics (S_i) that will help to establish the parameters for future consultations. These characteristics (S_i) are: in July of 2007 the Cibola National Forest determined that Mount Taylor was a Traditional Cultural Property eligible for listing on the National Register, in May of 2008 the Forest determined that exploratory drilling for uranium mining would have adverse effects on the historical values of Mount Taylor, and the ACHP was brought into the consultation process in May

30, 2008 to resolve the adverse effects for this undertaking (ACHP Summer 2008). At this point in the case all of the consulting parties ($I_i(t_i, o_i)$) have not conferred and the Forest is still identifying interested parties. Even though the case has not progressed very far, the Forest is already receiving political and legislative pressure ($P_i(t_i, o_i)$).

In summary, at this point in the Section 106 consultation process all of the regulatory equation variables have entered the regulatory environment for this particular case (Mount Taylor). The case has not yet been fully resolved with an agreement (D_i) because some of the equation variables have not been fulfilled. Therefore, the Full Project Null Hypothesis cannot be put into equilibrium because in the Mount Taylor case the consultation has not been conducted and there is no final agreement. The variables that still need to be resolved are the interests of the consulting parties ($I_i(t_i, o_i)$) and dissipation of the political and legislative pressure ($P_i(t_i, o_i)$). The dissipation of pressure from interested parties (tribes, environmental groups, mining representatives, etc.) has already established itself as the highly salient issue in this particular preservation case. The potential high value variables in this particular case are the tribal and environmental concerns ($I_i(t_i, o_i)$). These two variables predictably will need to be minimized in order to reach an agreement, and due to the variables high level of concern they will take the longest amount of time to resolve, delaying the regulatory process. This prediction holds true because even at this early stage in the Section 106 consultation process the ACHP has already stepped in to help with the resolution of the adverse

impacts. Therefore, the regulatory equations are stressing the fact that the minimization of the conflicting opinions in this preservation case will favor reaching a satisfactory outcome (O_i) for the Cibola National Forest. This is something that tribal representatives will have to keep in mind when entering into the consultation meeting due to the, “...considerable friction among the applicants, tribes, and other interested parties in the region about the proposed undertaking” (ACHP Summer 2008: 13). This early analysis has the potential to identify other interests groups with a similar agenda as the tribes. The ability to recognize the similarities in other interest groups’ agendas can lead to strong working relationships with those interests groups, which could raise the potential value of the tribes concerns. This would increase the time spent in the consultation process addressing the concerns to the satisfaction of the tribe and the other interested parties, and result in more favorable terms in the MOA (due to the high value that has to be minimized in order to achieve the projects goals; exploratory drilling for mining in the Mount Taylor case).

The Economic Theory of Regulatory Constraint: Averch-Johnson Model

Much of the richness of interpretation that this theory makes possible lies hidden until one studies in detail some particular versions of the model. Certainly the most important and relevant specialization is the regulatory model of Averch and Johnson. This model not only triggered the initial interest in the analytic approach to regulation but also has served as the focal point of most of the subsequent literature on regulatory models. It asserted some of the first theorems about behavior under constraint, theorem which have since been modified and elaborated upon both by economists and by others concerned with the regulatory process.

-Elizabeth E. Bailey, "Economic Theory of Regulatory Constraint"

The Averch-Johnson Model was the first regulatory model used by economists to measure the constraint felt by a firm due to their compliance with regulations. The model has served as the basis and reference point for all of the regulatory models developed for the economic theory of regulatory constraint since its inception (Bailey 1973). As the theory has grown the Averch-Johnson model has been modified to include new variables, more variables, new conditions of constraint, and new outcomes. Therefore, modification of this theoretical model to reflect the regulatory constraint felt by a federal agency performing their regulatory duties under a Federal Indian policy would not be out of the ordinary. Modification of the Averch-Johnson regulatory model requires the introduction of different variables, and regulatory equations. The most familiar modification of the Averch-Johnson model is the Kuhn-Tucker theorem as it expresses a particular regulatory model (Bailey 1973). The Kuhn-Tucker theorem is the model being modified as an example to show how economic regulatory constraint models can be adapted to particular regulatory processes in Federal Indian policy. For the purpose of this research, the Kuhn-Tucker theorem has been modified to express data for

NAGPRA's grant program administered by the National NAGPRA program. In order to understand the modification made to the Kuhn-Tucker theorem variables to express the NAGPRA grant data, a description of the theorem's regulatory model in its original form is articulated below.

Description of Kuhn-Tucker Theorem Regulatory Model Original Form Expressed for the Firm (Bailey 1973: 9)

In the regulatory model, the firm is assumed to

$$\begin{array}{ll} \text{Maximize} & \Pi (z, y, x) = R (z, y) - C (z, y, x) \\ & z, y, x \end{array}$$

$$\text{Subject to} \quad \Pi (z, y, x) \leq G (z, y, x),$$

Where

z and y = productive variables, either input or output quantities
 x = a measure of the degree to which the firm is operating off its production frontier

$R (z, y)$ = revenue generated by the productive variables z and y

$C (z, y, x)$ = total costs, including those of both a productive and a wasteful nature

$\Pi (z, y, x)$ = net profit after all costs have been subtracted from revenue

$G (z, y, x)$ = ceiling level of profit permitted by the regulator

The original model is meant to express data for a profit maximizing firm operating off its production frontier²⁵ due to regulatory constraints. In Federal Indian policy the regulatory models are not often expressed in terms of a profit maximizing firm, but rather in terms of federal agency administration. Therefore, in any modified regulatory model for Federal Indian policy the federal agency acts in place of the firm experiencing

²⁵ A firm operating off its production frontier occurs when the firm does not maximize its profits or commodities on its production-possibility frontier (PPF). A firm's PPF is a graphical representation of a transformative curve that shows where a firm needs to operate in order to achieve a maximum rate of efficiency with the provided resources (Bailey 1973).

regulatory constraint. The productive and input variables (z, y, x) will vary depending on which policy is represented by the regulatory model. The same holds true for the variables resultant regulatory equations $(R(z, y), C(z, y, x), \Pi(z, y, x), \text{ and } G(z, y, x))$. To provide further understanding of how a potential regulatory model for Federal Indian policy would express itself an analysis of NAGPRA's grant program is presented below.

Analysis of NAGPRA's Grant Program

Section 10 of the Native American Graves Protection and Repatriation Act authorizes the Secretary of the Interior to make grants to museums, Indian tribes, and Native Hawaiian organizations for the purposes of assisting in consultation, documentation, and repatriation of Native American "cultural items," including human remains, funerary objects, sacred objects, and objects of cultural patrimony.

-National NAGPRA Grants Program Homepage, <http://www.nps.gov/nagpra/GRANTS/INDEX.HTM>

The National NAGPRA program is charged with the administration and dispersal of NAGPRA grant funds. There are two types of grants available: (1) Consultation and Documentation grants and (2) Repatriation grants. The National NAGPRA program website provides the grant data that is analyzed in the regulatory model. The model expresses the specific variables associated with the agency's administration of the grant program. The analysis consists of five steps: (1) a description of the NAGPRA grant programs regulatory model is discussed; (2) the regulatory model's variables are articulated in tables with the correlating grant data provided by the National NAGPRA website; (3) graphical representation of the NAGPRA grant program production frontier is presented; (4) each year's grant data is analyzed to show how the variables work inside

the regulatory model; and (5) an analysis of the agency's administration of the NAGPRA grant program is given based upon the regulatory model.

**Step 1: Description of the National NAGPRA Grant Program's Regulatory Model
(Adapted from Bailey 1973: 9)**

In this regulatory model, the federal agency (National NAGPRA program) is assumed to

$$\text{Maximize}_{z, y, x} \quad \Pi(z, y, x) = D(z, y) - C(z, y, x)$$

$$\text{Subject to} \quad \Pi(z, y, x) \leq G(z, y, x)$$

Under the Following Conditions

- If the NAGPRA grant program is being administrated at ideal operating parameters, $\Pi(z, y, x)$ and $G(z, y, x)$ should equal zero
- If the NAGPRA grant program is being administrated within normal operating parameters, $\Pi(z, y, x)$ should be less than or equal to $G(z, y, x)$ subject to both amounts being $< 20,000$ if there is a greater discrepancy the program is being administrated within invalid operating parameters
- If the NAGPRA grant program is being administrated within invalid operating parameters off of the PPF, $\Pi(z, y, x)$ would be greater than $G(z, y, x)$

Where

$x = k \geq z$ = the total amount of funds requested by NAGPRA grant applicants in one fiscal year

y = total amount of funds given out by NAGPRA grant program in one fiscal year to grant recipients

z = total amount of funds NAGPRA grant program has to disperse (Grant program budget)

$D(z, y)$ = the discrepancy/difference between the amount of funds the NAGPRA grant program has to disperse and the total amount given out to grant recipients.

$C(z, y, x)$ = the total operating cost for National NAGPRA program; for both the productive and wasteful expenditures

$\Pi(z, y, x)$ = the net amount of surplus funds after all costs have been subtracted from the NAGPRA grant budget

$G(z, y, x)$ = the net amount of reallocated grant funds, where the maximum amount of grant funds available for dispersal minus operating cost (the ceiling level) is subtracted from the actual amount of grant funds awarded

Step 2: Grant Data Tables of the NAGPRA Grant Program's Regulatory Model Variables (Data Retrieved from posted National NAGPRA Fiscal Year Reports)

Table 1: Total Amount of Funds Given to NAGPRA Grant Recipients; variable y

Fiscal Year (FY)	(y)
2009	\$1,792,298
2008	\$1,579,812
2007	\$1,904,282
2006	\$1,894,888
2005	\$1,380,189
2004	\$2,182,000
2003	\$2,201,000
2002	\$2,245,820
2001	\$2,438,000
2000	\$2,252,000

Table 2: Total Amount of Funds Available for Grants; variable z

Fiscal Year (FY)	(z)
2009	\$2.3 million
2008	\$2.4 million
2007	\$2.4 million
2006	\$2.4 million
2005	\$2.4 million
2004	\$2.4 million
2003	\$2.2 million
2002	\$2.2 million
2001	\$2.4 million
2000	\$2.4 million

Table 3: Total Amount of Funds Request by NAGPRA Grant Submission;
variable $x = k \geq z$

Fiscal Year (FY)	($x = k \geq z$)
2009	\$4,535,252
2008	\$2,253,214
2007	\$2,916,199
2006	\$3,824,400
2005	\$3,405,190
2004	\$3,407,334
2003	\$4,377,512
2002	\$4,422,648
2001	\$4,090,638
2000	\$6,091,206

Table 4: Total Operating Cost of National NAGPRA program; variable $C (z, y, x)$

Fiscal Year (FY)	$C (z, y, x)$
2009	\$450,000
2008	\$500,000
2007	\$495,000
2006	\$471,000
2005	\$354,000
2004	unavailable
2003	\$250,100
2002	\$372,750
2001	unavailable
2000	unavailable

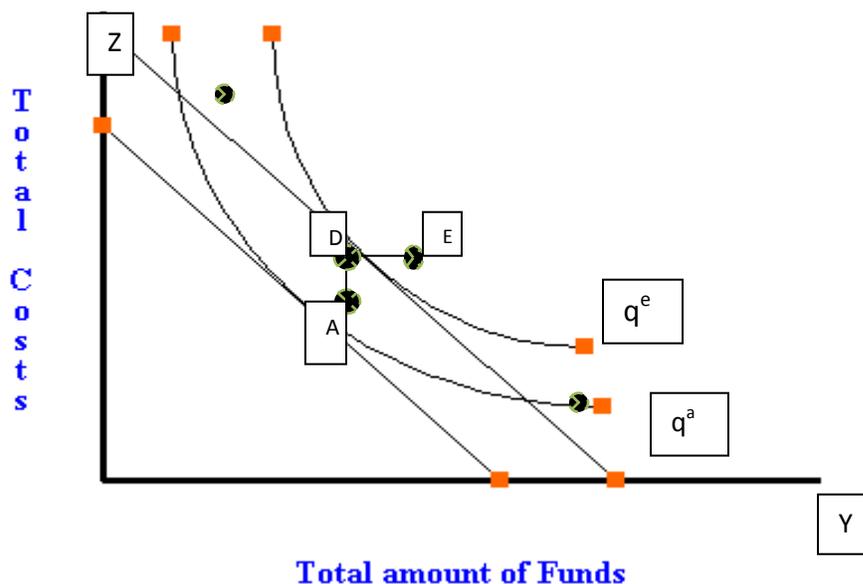
Table 5: FY ____ the Ceiling Level (the maximum amount of grant funds available for dispersal minus operating cost); for the $G(z, y, x)$ variable

Fiscal Year (FY)	<i>Ceiling Level</i>
2009	\$1,850,000
2008	\$1,900,000
2007	\$1,905,000
2006	\$1,895,000
2005	\$1,415,000
2004	unavailable
2003	\$2,201,000
2002	\$2,247,000
2001	unavailable
2000	unavailable

**Step 3: Graphical Representation of the NAGPRA Grant Program
Production Possibility Frontier (PPF)
(Adapted from Bailey 1973:12)**

In economics, graphs provided a visible representation of the regulatory models intended results. Figure 3 below is a graphical representation of the NAGPRA grant program's regulatory model when it is intentionally operating off of the production possibility frontier (PPF). Curve q^c and q^a represent two possible output combinations of costs and funds. The grant program is operating off of the production frontier at point E if the program is only performing at the output combination of q^a . If the grant program is performing at point E it is not expending the funds or limiting the costs at the highest possible level of output (which is represented by curve q^c). So if the NAGPRA grant program is performing at point A there is DA worth of waste in their cost expenditures and DE worth of padding in their funds (Bailey 1973).

Figure 7: Operation off the PPF



Note: Figure 3 was generated in McGraw Hill's EconGraph Toolkit which is an online drawing application for economic graphing (<http://www.mhhe.com/economics/econgk.mhtml>).

Step 4: Putting the Grant Data Variables through the NAGPRA Grant Program's Regulatory Model

In order to provide a visual representation of how the analysis's conclusions were determined the regulatory equation for each fiscal year's grant data are listed below. The equations being quantified are $\Pi(z, y, x) = D(z, y) - C(z, y, x)$ and $\Pi(z, y, x) \leq G(z, y, x)$ from the NAGPRA Grant Program's Regulatory Model presented in Step 1 of the analysis. The values for each of the equations variables were taken from the NAGPRA programs FY report, and are listed in the data tables actualized in Step 3 of the analysis.

1) FY 2009

$$\begin{array}{r} z \\ 2,400,000 \end{array} - \begin{array}{r} y \\ 1,792,298 \end{array} = D(z, y) \\ = 607,702$$

$$\begin{array}{r} D(z, y) \\ 607,702 \end{array} - \begin{array}{r} C(z, y, x) \\ 450,00 \end{array} = \Pi(z, y, x) \\ = 157,702$$

$$1,850,000 - 1,792,298 = G(z, y, x) \\ = 57,702$$

$$\begin{array}{r} \Pi(z, y, x) \\ 157,702 \end{array} \leq \begin{array}{r} G(z, y, x) \\ 57,702 \end{array} \text{ (INVALID)}$$

2) FY 2008

$$\begin{array}{r} z \\ 2,400,000 \end{array} - \begin{array}{r} y \\ 1,579,313 \end{array} = D(z, y) \\ = 820,688$$

$$\begin{array}{r} D(z, y) \\ 820,688 \end{array} - \begin{array}{r} C(z, y, x) \\ 500,000 \end{array} = \Pi(z, y, x) \\ = 320,688$$

$$1,900,000 - 1,579,812 = G(z, y, x) \\ = 320,188$$

$$\begin{array}{r} \Pi(z, y, x) \\ 320,688 \end{array} \leq \begin{array}{r} G(z, y, x) \\ 320,188 \end{array} \text{ (INVALID)}$$

3) FY 2007

$$\begin{array}{r} z \\ 2,400,000 \end{array} - \begin{array}{r} y \\ 1,904,282 \end{array} = D(z, y) \\ = 495,718$$

$$\begin{array}{r} D(z, y) \\ 495,718 \end{array} - \begin{array}{r} C(z, y, x) \\ 495,000 \end{array} = \Pi(z, y, x) \\ = 718$$

$$1,905,000 - 1,904,282 = G(z, y, x) \\ = 718$$

$$\begin{array}{r} \Pi(z, y, x) \\ 718 \end{array} \leq \begin{array}{r} G(z, y, x) \\ 718 \end{array}$$

4) FY 2006

$$\begin{array}{r} z \\ 2,400,000 \end{array} - \begin{array}{r} y \\ 1,894,888 \end{array} = D(z, y) \\ = 505,112$$

$$\begin{array}{r} D(z, y) \\ 505,112 \end{array} - \begin{array}{r} C(z, y, x) \\ 471,000 \end{array} = \Pi(z, y, x) \\ = 34,112$$

$$\begin{array}{r} 1,895,000 \\ 1,894,888 \end{array} = G(z, y, x) \\ = 45,112$$

$$\begin{array}{r} \Pi(z, y, x) \\ 34,112 \end{array} \leq \begin{array}{r} G(z, y, x) \\ 45,112 \end{array}$$

5) FY 2005

$$\begin{array}{r} z \\ 2,400,000 \end{array} - \begin{array}{r} y \\ 1,380,189 \end{array} = D(z, y) \\ = 1,019,811$$

$$\begin{array}{r} D(z, y) \\ 1,019,811 \end{array} - \begin{array}{r} C(z, y, x) \\ 354,000 \end{array} = \Pi(z, y, x) \\ = 665,811$$

$$\begin{array}{r} 1,415,000 \\ 1,380,189 \end{array} = G(z, y, x) \\ = 34,811$$

$$\begin{array}{r} \Pi(z, y, x) \\ 665,811 \end{array} \leq \begin{array}{r} G(z, y, x) \\ 34,811 \end{array}$$

6) FY 2004 (Variables Missing)

7) FY 2003

$$\begin{array}{r} z \\ 2,400,000 \end{array} - \begin{array}{r} y \\ 2,201,000 \end{array} = D(z, y) \\ = 199,000$$

$$\begin{array}{r} D(z, y) \\ 199,000 \end{array} - \begin{array}{r} C(z, y, x) \\ 250,100 \end{array} = \Pi(z, y, x) \\ = -51,100$$

$$\begin{array}{r} 2,201,000 \\ 2,201,000 \end{array} = G(z, y, x) \\ = 0$$

$$\begin{array}{r} \Pi(z, y, x) \\ -51,100 \end{array} \leq \begin{array}{r} G(z, y, x) \\ 0 \end{array}$$

8) FY 2002

$$\begin{array}{r} z \\ 2,400,000 \end{array} - \begin{array}{r} y \\ 2,245,820 \end{array} = D(z, y) = 154,180$$

$$\begin{array}{r} D(z, y) \\ 154,180 \end{array} - \begin{array}{r} C(z, y, x) \\ 372,750 \end{array} = \Pi(z, y, x) = -218,570$$

$$\begin{array}{r} 2,247,000 \\ 1180 \end{array} - 2,245,820 = G(z, y, x)$$

$$\begin{array}{r} \Pi(z, y, x) \\ -218,570 \end{array} \leq \begin{array}{r} G(z, y, x) \\ 1180 \end{array}$$

9 & 10) FY 2001 & FY 2000 (Variables Missing)

Step 5: Analysis of the Agency's Administration of the NAGPRA Grant Program

The National NAGPRA grant program's regulatory model describes the federal agency's ideal operating parameters on their production possibilities frontier (PPF) compared to their actual operating parameters. In order to determine the NAGPRA grant program's actual operating parameters, and whether or not they are operating within normal parameters, the regulatory models grant data variables have to be put into the models equations. For the purpose of this analysis ten years worth of the National NAGPRA programs yearly fiscal budgetary reports were used to assign values to the regulatory model's variables. Once the values were assigned each fiscal year's (FY) data was put through the regulatory model's constraint equations. The results of the equations vary depending upon the year, but the NAGPRA grant program has consistently been performing off the Production Possibilities Frontier (PPF) within invalid operating

parameters. There are two possible explanations of why the grant program is operating off of the PPF: (1) the National NAGPRA grant program has undefined line item expenditures²⁶ or (2) Operation off of the PPF is needed for the grant program to achieve a normal operating parameter. Based on the results from the National NAGPRA grant programs regulatory model equations an argument can be made for both explanations.

First, let's discuss the explanation that the NAGPRA grant program has undefined line item expenditures. Reporting discrepancies suggest undefined line item expenditures is more prevalent in the last five years of the grant program. For all five years, except FY 2007, the net amount of surplus funds exceeded the net amount of reallocated grant funds. What this means is that surplus funds are unaccounted for within the FY budget reports. There can be explanations found within the FY budget report for these undefined line item expenditures, such as legal fees in the FY 2005 or Congressional across the board cuts in FY 2006. In FY 2005, the NAGPRA program was ordered by the federal judge in *Bonnichsen v. United States* to pay an apportionment for the legal fees accrued by the plaintiffs. The total apportionment was \$667,800 which is almost equivalent to the net surplus funds $\Pi(z, y, x)$ determined in the FY 2005 regulatory equations during Step 4. However, technically this expenditure determination of the surplus funds is supposition without the undefined line item expenditures being expressed within the FY budget. This is true especially since the NPS and other outside grants provide additional funding to the National NAGPRA program for these purposes. The only example where

²⁶ Undefined line item expenditures are operating costs not reported in the NAGPRA program FY report, but would show up as operating expenditures in the line item budget for the NAGPRA program or an auditing accounting. These undefined line item expenditures also could be deemed misallocation in the economic sense that reallocated grant funding is not being used efficiently at the highest possible production level (Bailey 1973).

the undefined line item expenditures could be explained is in FY 2007. In FY 2006 the National NAGPRA program reported that the program decided to reallocate grant funds from FY 2005 to provide tuition waivers to tribes for NAGPRA training. The subtraction of this request did not appear in the final accounting of the FY 2006 budget. However, in the dicta of the report the NAGPRA program cited that they included that cost in their FY 2006 budget accounting (NAGPRA program FY 2006: 5).

Other evidence suggesting that these undefined line item expenditures are not included in the final FY budget are the inconsistencies in the National NAGPRA programs FY report. For example, both in FY 2009 and FY 2008 two different amounts were given within the report for the total amount of NAGPRA grants awarded each FY. In FY 2009 the budget reported that \$1.85 million was the total amount of NAGPRA grants awarded. However, in a table within the report's dicta, the total amount of grants awarded in FY 2009 is \$1,792,298, a difference of \$57,702 (NAGPRA program FY 2009: 14). The way the table was laid out also hints at an attempt to hide discrepancies, because the total amount of grants awarded was split (tribes vs. museums) so that it was necessary to add the two sums together to reach the total amount (\$1,792,298). Inconsistencies such as this suggest that accounting for the undefined line item expenditures was intentionally expressed in a way to explain an unbalanced budget with surplus funds. The potential implication of this explanation calls for an audit of the grant program to be performed to resolve these discrepancies with a line item budget accounting of the National NAGPRA grant programs FY.

Besides undefined line item expenditures, another possible explanation is that the National NAGPRA grant program has to function off of the production possibilities frontier²⁷ (PPF) in order to achieve normal operating parameters. Operating off of the PPF is normal for a non-profit organization. Since the National NAGPRA grant program is dependent on Congressional appropriations, as a non-profit organization is dependent on the set amount of promised donations and grants, this could be the simple explanation. Something that adds credence to this explanation is in FY 2003 and FY 2002 there was a negative amount of surplus funds, which is common for a non-profit to plan to make up its deficit in the next FY.

However, there are other indicators that can explain why the NAGPRA grant program operates off of the PPF (the program is intentionally operating below the highest number of possible grant funds in order to absorb escalating operating costs). One indicator is the variance in the operating cost of the NAGPRA grant program. For FY 2007, FY 2006, FY 2005, FY 2003, and FY 2002 the operating cost of the grant program was supplemented by two additional allocations from Congress and the NPS to fund administration operations. Another indicator is that the National NAGPRA program experienced a Congressional budget cut. A Congressional appropriation budget cut occurring across the board is reported in the National NAGPRA program's FY budgets. The amount of the Congressional across the board budget cut (\$34,000) in some cases matches the regulatory equations surplus funds as in FY 2006.

²⁷ Production Possibilities Frontier (PPF) is the representation of the highest level of possible efficiency for the resources or funds available (Bailey 1973).

Both explanations have merit as reasons for the National NAGPRA grant programs normal operating parameters being off of the PPF. Specifying which explanation is taking place within the National NAGPRA grant programs is not as important as noting that both explanations mean that the grant program is not performing at its most efficient level.

CONCLUSION

Regulations and regulatory processes are an important part of the everyday working life of legal professionals, government officials, and bureaucrats in Indian Country. Indian Country is constantly affected by ever-changing federal legislation, regulation, and court decisions. Understanding and analyzing new regulations and legislation is important in order to comprehend their potential ramifications. Therefore, an understanding of the theory of regulation, whose models and theoretical framework explain the construction and patterns within regulation, is important to researchers. The theory of regulation is a growing field. It can adapt to new situations, levels, and aspects within federal, state, and local policy regulations. This particular aspect of regulatory theory is what makes it adaptable to a new regulatory field such as the concentration of Federal Indian Law and Policy within American Indian Studies (AIS).

This thesis has outlined regulatory theory, regulatory politics, several economic modes of analysis, and the economic theory of regulatory constraint; all of which can be adapted and used to analyze policy and regulations within Federal Indian Law and Policy. Using NAGPRA as an exemplum of how regulatory politics can be used to highlight patterns and repeated situational occurrences can only help a researcher's understanding of the regulatory process and future applicability. Similarly, the analysis of the NHPA Section 106 tribal consultations process showed the applicability of economic principles within AIS and Federal Indian Law and Policy.

The potential for using these theoretical applications in scholarly research within AIS, and in the real world for tribal governments is great. Regulatory theory and The

Economic Theory of Regulatory Constraint would provide a helpful theoretical foundation for researchers and officials to use in administrative work, including grant applications. For example, a cost-benefit analysis could be used to show how the potential benefits of the project outweigh the cost; showing the granting institution what benefit their money would bring to the project. Regulatory politics has similar applicability, because when grant writers keep in mind within which policy domain they are working they can predict the response from the regulatory agencies administering the grants (i.e. NAGPRA grants or HUD grants). The more theory and reasoning people can use to support their cause the better.

Another example of where this research can take AIS scholarship is in the analysis of Federal Indian policy using Gormley's theoretical concepts of salience and technical complexity, as well as his four policy domains (Street-Level Politics, Board Room Politics, Operating Room Politics, and Hearing Room Politics). As the analysis of NAGPRA from Chapter 3 showed, Federal Indian policy tends to fluctuate in salience while maintaining a constant level of technical complexity. This pattern is consistently repeated in Federal Indian policy (IGRA, Major Crimes Act, or ICWA). For example, the Indian Gaming Regulatory Act (IGRA) was passed during a period of high salience. The act was passed right after the high profile Supreme Court ruling in *California v. Cabazon Band of Mission Indians*, which caused increased pressure for federal regulatory oversight of Indian gaming. The Supreme Court's decision determined that the states lacked regulatory authority over gambling in Indian Country. Similar patterns can be found in almost every piece of Federal Indian policy. So how can AIS scholars benefit

from determining a Federal Indian policy's level of salience and its location within one of Gormley's policy domains? The answer is simple. By tracking the level of salience within which a particular Federal Indian policy issue is functioning, scholars, professionals, and lawyers can predict when the regulatory environment is positioned to accept change and reform. Predicting the ideal salience levels requires an understanding of the greater nature of politics outside Indian Country. For example, President Barack Obama signed historic health care legislation into law on March 23rd, 2010. Health care issues and reforms are currently a hot button issue at the federal level and carry a high level of public saliency. Federal administrative agencies, during this particular time, are feeling increased pressure to resolve issues involving health care due to the high level of public and political saliency. This type of regulatory environment (with a high level of saliency for health care related issues) would be the perfect time to try for reform, and additional funding for the Indian Health Services and Native American health care issues. Understanding Gormley's models and concepts for regulatory politics gives AIS researchers the ability to recognize these moments of heightened saliency experienced by a particular issue within Federal Indian policy. The ability to recognize these moments could be valuable in pushing the agenda of Native American tribes forward and in securing grant funding.

The Economic Theory of Regulatory Constraint has similar applicability. The analysis of the NAGPRA grant data using a modified version of the Averch-Johnson model was able to show inconsistencies in federal agencies' administration of their regulatory duties. These inconsistencies are not isolated to one federal agency; it is an

endemic problem to agencies charged with carrying out regulations in relation to Federal Indian Policy. The regulatory environment (low saliency and high technical complexity) of most Federal Indian policy allows the agencies to underperform regulatory operations. The analysis of the National NAGPRA grant programs regulatory model showed that the agency was not performing at its most efficient level, and in fact was intentionally operating under parameters set off of the production possibility frontier (PPF). This type of intentional operation off of the PPF can be translated into other Federal Indian Law policy. Specifically, another example would be the Major Crimes Act of 1885²⁸ which gave prosecutorial jurisdiction to the federal government for the crimes enumerated within the act. One of the enumerated crimes is rape, a crime that occurs at a particularly high rate on tribal lands. As a 2007 Amnesty International Report entitled “United States of America: Maze of injustice: The failure to protect indigenous women from violence” clearly shows the US Attorney’s office is underperforming their regulatory, jurisdictional, and prosecutorial obligations to Native American rape victims (Amnesty International 2007). This serves as a particularly chilling example of federal entities not performing their regulatory duties at optimal levels.

The Economic Theory of Regulatory Constraint can also add a method of quantitative analysis for AIS scholars to incorporate into their research. This is

²⁸ Major Crimes Act of 1885 is a federal statute that originally placed seven major crimes under federal jurisdiction when they were committed on tribal land by a Native American against another Native American. The act was later amended to add seven additional major crimes. These major crimes are murder, manslaughter, kidnapping, rape, assault with intent to kill, arson, burglary, larceny, a felony under chapter 109A, incest, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, and a felony under section 661 of this title within the Indian country (23 Stat., 362.; US Code : Title 18, Section 1153).

particularly important because the field of AIS relies heavily on qualitative data almost to its detriment. Adding a quantitative argument strengthens a researcher's conclusions based on a qualitative data set by providing factual and numerical support. For example, AIS scholars may be doing research on the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) and the successful implementation of the Indian Block Grants by its recipients. The AIS scholar has gathered qualitative data by interviewing tribal officials and recipients of the new homes regarding their satisfaction with the program and its implementation. From this data they have concluded that the federal agency (HUD) administering the grants is not performing all of their regulatory duties. The creation of a modified regulatory model to quantify the HUD's role in the regulatory process could serve as a vehicle to prove the researchers conclusions from their qualitative study. Quantitative economic analysis of regulatory constraints could significantly strengthen the work of AIS researchers in the field of Federal Indian Law and Policy.

Incorporating these theories into AIS scholarship would also add to the pool of theories scholars can draw from for their empirical research and as a method to gather data. As shown by this thesis, existing sources of empirical data can be used for analysis by highlighting existing variables within survey and research data. Secondary analysis, primary analysis, and internet data analysis can all be used as data sources to supplement research and support analysis with regulatory theory. As a theoretical tool for analysis regulatory theory, regulatory politics, economic modes of analysis, and the economic theory of regulatory constraint can all be incorporated into AIS scholarship, bringing a

new, fresh, and dynamic approach to understanding Federal Indian law, policy and regulation.

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