Donald R. Sutherland

Bureau of Indian Affairs

The Bureau of Indian Affairs (BIA) evolved from the British colonial system of regional Indian superintendents, whose main function was to regulate trade with Indian tribes. The Continental Congress continued this system through its Ordinance of 1786. In 1793, the United States began assigning Indian agents to particular tribes or areas. These superintendents and agents, plus other personnel within the United States War Department assigned to deal with Indian matters, reported to the Secretary of War. They were not, however, organized as a unit until 1824, when Secretary of War John C. Calhoun administratively established an Office of Indian Affairs. It was not until 1834 that Congress formally created the Indian Department within the War Department. In 1849, Congress transferred the Indian Department, which became the BIA, to the newly created Department of the Interior.

Today, the BIA administers the trust responsibility of the United States on approximately 54 million acres of lands that the government holds in trust for the beneficial use of the Indian owners of those lands. The BIA conducts this responsibility through 12 Area (regional) Offices, each of which has a number of Indian Agencies under its jurisdiction. These agencies each serve a single Indian tribe or small group of tribes. The Deputy Commissioner of Indian Affairs, Area Directors, and Agency Superintendents constitute the line of authority within this system.

As with much else in the BIA, cultural resources management has been subject to varying concepts about Indian lands and how these lands should be treated. In the Antiquities Act of 1906, the United States Congress made no distinction between Indian lands and other lands owned or controlled by the United States. Accordingly, the role of the BIA at the inception of statutorily imposed cultural resource management was minimal.

All duties relating to the Antiquities Act in the BIA were delegated, through BIA-specific implementing regulations, to Agency Superintendents. These duties were limited, within their jurisdictions, to examining permits issued under the Act and the work done under those permits; confiscating, reporting on, and obtaining instructions on the disposition of antiquities that may have been illegally obtained; posting copies of the Antiquities Act and its interdepartmental implementing regulations in conspicuous places "at all agency offices where the need is justified," and warning notes "on the reservations and at or near the ruins or other articles to be protected"; "immediately" notifying all licensed traders "that failure to cease traffic in antiquities will result in a revocation of their license"; and inquiring and reporting "from time to time … as to the existence, on or near their reservations, of … archeological sites, historic or prehistoric ruins … and other objects of antiquity."

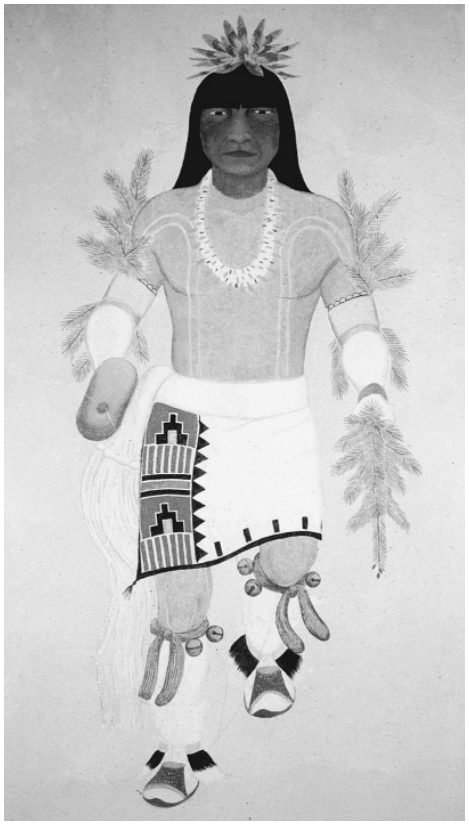
Permits under the Antiquities Act were issued for the BIA by the Secretary of the Interior. In fact, it was not until 1974 that permission from the Indian landowner or the concurrence of BIA officials was even required in order to obtain a permit. That same year, the Secretary delegated the authority to issue Antiquities Act permits for the BIA to the Departmental Consulting Archeologist (see article by McManamon and Browning, p. 19). The BIA did not establish full authority to issue these permits on its own until 1996, when it completed regulatory changes merging the process for issuing Antiquities Act permits with that for issuing permits under the Archaeological Resources Protection Act of 1979 (ARPA).

In ARPA, Indian lands are distinguished from public lands, but in most respects are treated like public lands for the purposes of the Act. The role of the BIA in issuing permits under ARPA and in enforcing violations of the Act on Indian lands is similar to that of other agencies, such as the Bureau of Land Management, that manage public lands. How Indian lands are defined in ARPA, however, is not the same as

they are defined or viewed in other cultural resources statutes.

Indian lands under ARPA are lands that are held in trust by the United States or that are subject to a restriction against alienation imposed by the United States (restricted fee land). Most of the land the federal government holds in trust is in the lower 48 states. Most of the restricted fee land is in Alaska. Even though ARPA treats Indian trust lands much the same as public lands, the government does not exercise the same rights of ownership over these as it does over its public lands.

The best way to understand what holding land in trust means is to view rights to land as a bundle of straws, each one representing a single right. These may include water rights, hunting or fishing rights, the right to erect structures, or the right to transfer title or to lease. The government does not hold all of the straws, just those for transferring title, leasing, or exploiting certain natural resources. Even in these cases, the government may not treat Indian land as if it were its own land. The government's role as trustee is to approve realty actions or business arrangements with non-tribal parties that are initiated by an Indian landowner, and this approval is not discretionary. It is based on a determination that the transaction is to the benefit of the Indian landowner.



Interior building south penthouse mural by Velino Herrera. Photo by David Olin, conservator.

In the Native American Graves Protection and Repatriation Act (NAGPRA), Indian lands, called "tribal lands," include all of the lands within the exterior boundary of an Indian reservation. As with ARPA, these lands are treated in many ways like public lands for the purposes of the Act. Not all of the lands within the exterior boundary of a reservation, however, are Indian trust lands.

Because of various historical circumstances—most particularly the General Allotment Act of 1887, which for several decades before the process was halted allotted Indian reservations in severalty to individual Indians—much land within the exterior boundaries of reservations passed into private ownership. On some reservations, more than half of the land within the exterior boundary is no longer Indian-owned. Other historical circumstances have created an opposite situation, such as in Oklahoma, where there are Indian trust lands that are *not* within the exterior boundary of any reservation.

The fact that the Indian lands to which ARPA and NAGPRA apply do not coincide primarily affects permitting and enforcement under these statutes. ARPA permits are required on Indian trust lands, whether they are inside or outside the exterior boundary of an Indian reservation, but are not required for private lands within this boundary. NAGPRA applies to all lands that are inside, but not necessarily to Indian trust lands that are outside, the exterior boundary of a reservation. For ARPA, permitting is further complicated by the fact that Indian trust lands may be tribally owned or be allotments owned by Indian individuals or groups of individuals. The procedures for issuing and administering permits for these two types of trust lands also differ.

The National Historic Preservation Act of 1966 (NHPA), like NAGPRA, also includes all lands within the exterior boundary of an Indian reservation in its definition of "tribal lands." Unlike NAGPRA or ARPA, however, these lands are treated more like private lands than public lands for purposes of the Act. For example, on public lands, the land-managing agency must comply with Section 106 of NHPA for activities that take place on those lands. That is not the case with Indian lands. Neither Indian landowners nor the BIA have to comply with Section 106 for activities Indian landowners undertake on their own lands, unless there is an associated federal action, such as a land transfer or lease approval. BIA compliance with Section 106 is triggered by its own federal actions, not by the fact that something is happening on Indian lands.

That Indian lands behave more like private lands than public lands under NHPA has led to some misunderstanding among the public as to how the BIA manages cultural resources on Indian lands. We might say that, except for sites

and items covered by ARPA and NAGPRA, the BIA does not manage cultural resources on Indian lands. Remember, holding Indian land in trust does not entitle the federal government to treat that land as if it were its own land. The government does not hold the "straw" for cultural properties. Cultural properties belong to the Indian landowner.

The BIA has no legal authority to prevent an action by an Indian landowner that would alter the character of a historic property. For example, the BIA may not nominate properties on Indian lands to the National Register of Historic Places or conduct surveys on those lands without the consent of the Indian landowners.

Although the legal framework is complex, the BIA has never had a very large professional staff to manage its cultural resources responsibilities. The BIA actually had little to do with cultural resource management on Indian lands from 1906 until the NHPA was enacted. Faced with new responsibilities under NHPA in the early 1970s, two BIA Area Offices in the Southwest entered into contractual agreements with an office established in the Southwest Region of the National Park Service (NPS) to assist federal agencies with Section 106 compliance and with permitting under the Antiquities Act. The tie between the BIA and the NPS became closer in 1974 with the passage of the Archeological and Historic Preservation Act and when the Departmental Consulting Archeologist began issuing Antiquities Act permits for the BIA. In 1975, the Albuquerque Area Office of the BIA decided it could handle Section 106 compliance more economically on its own than by contract, so Bill Allan was hired as BIA's first cultural resource management professional. A year later, the Navajo Area Office added an archeologist, Barry Holt. The NPS continued offering support to other BIA offices until 1984. The BIA's Washington, DC, office established a formal program in 1980 headed by an environmental protection specialist, George Farris. In 1984, the BIA decided that it would start its own cultural resource management program nationwide. The program currently employs fewer than 25 cultural resource professionals.

Because of the trends over the past two decades toward self-determination in the relationship of Indian tribes to the United States, it is unlikely that the BIA's professional cultural resources staff will become much larger. Under the Indian Self-Determination and Education Assistance Act of 1975, Indian tribes may enter into contracts with the BIA through which they may assume responsibility for all or part of a federal program for Indians. Since cultural resources compliance is a part of many federal programs for Indians, most cultural resources activities, such as data gathering or making professional recommendations to federal agency officials, are eligible for "638" contracts. When this happens, the professional positions associated with these activities may be taken over by a tribe as a part of the contract. So far, this has only happened with the Navajo Nation and the San Carlos Apache Tribe where BIA professional staff served a single tribe. Where staff serve multiple tribes, the BIA has not yet found a practical way to contract out portions of their time.

The trend toward Indian self-determination is also reflected in the recent amendments to NHPA, which allow Tribal Historic Preservation Officers to assume the responsibilities of State Historic Preservation Officers. This has encouraged a number of tribes to hire their own professional cultural resources staff, which could eventually reduce the need for such staff in the BIA. To date, however, only about 16 of 557 federally-recognized Indian tribes have assumed historic preservation responsibilities. Since many of these other tribes may never wish to follow suit, the BIA's professional staff is more likely to shrink or remain static over time than it is to disappear.

The passage of NAGPRA has been a watershed event in the history of cultural resource management from the perspective of the BIA. The Act has stimulated Indian people to become more assertive in taking charge of their own cultural resources through such means as tribal preservation offices and cultural resources ordinances. It has also stimulated the public to become concerned about the protection of Indian burial sites and, through this, more alert to threats to archeological sites in general. And, finally, it has stimulated cultural resources professionals, especially archeologists, not only to reassess their relationship to Indian people, but rethink their entire field of study.

Donald R. Sutherland, Ph.D., is the BIA's Federal Preservation Officer in Washington, DC.