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## Legally Mediated Identity: The National Environmental Policy Act and the Bureaucratic Construction of Interests

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Wendy Espeland

In representing the interests of a group, law may simultaneously construct the subject holding those interests. When groups question the implications of an imposed subjectivity, the politics of identity may become a forum for resistance. I examine law's potential to shape identity, based on a controversial decision affecting Yavapai residents of the Fort McDowell Reservation in Arizona. A proposed dam threatened to move the Yavapai from their ancestral land. To develop the Environmental Impact Statement required by the National Environmental Policy Act of 1969, the U.S. Bureau of Reclamation adopted a rational decision framework that some Yavapai believed misrepresented them. Their resistance stimulated a reinterpretation of their collective identity, a defense of their distinctiveness, and a reassertion of their right to represent themselves. The effect of this reappraisal was a new appreciation and articulateness about Yavapai distinctiveness, an invigorated sense of their own history and, most important, their enhanced empowerment.

If a rigid separation of form and content leads to error in the analysis of a work of art, how much more in the interpretation of human feelings.

—Max Horkheimer

It's true that we have to consider a piece of land as a tool to produce something useful with, but it's also true that we must recognize the love for a particular piece of land.

—Bertolt Brecht

The land is our mother. You don't sell your mother.

—Yavapai teenager

**P**olitics is often conceived as a process in which interest groups mobilize resources to accomplish their goals. Power is typ-

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Thanks to Mindie Lazarus-Black, Bruce G. Carruthers, John Comaroff, Paul Culhane, Ken Dauber, Paul Friesema, Carol Heimer, Royce P. Jones, Elizabeth Mertz, Debra Schleaf, Paul Schnorr, Peter Siegleman, David Shulman, John Walton, and the anonymous reviewers for *Law & Society Review* for helpful comments. Earlier versions were presented at the Law and Society annual meetings, Chicago 1993, the Center for Urban Affairs and Policy Research at Northwestern University, the American Bar Foundation, and the Midwest Faculty Seminar. I am grateful to these audiences for their good questions and helpful responses. Address correspondence to Wendy Espeland, Department of Sociology, Northwestern University, Evanston, IL 60208.

ically understood as someone's, or some group's, ability to get something done, based on the resources available to them. I examine here a premise underlying this conception of power. Instead of presupposing actors with interests, I analyze what is often a more subtle form of power, one that may be antecedent to how people act on their interests: the potential of power to construct the particular type of subject who is allowed to have an interest. The construction of a "subject" is a fundamental and sometimes opaque form of power. As Michel Foucault (1982:206–7) has argued, access to this form of power depends on disclosing the tactics and techniques, the "how" of power, rather than simply examining the intentions or resources of the powerful. My analysis addresses how a bureaucratically implemented law created a forum and a framework for reinterpreting the collective identity of a Native American community involved in a dispute over the location of a dam in central Arizona.

My discussion here is about the potential of law to shape identities. The relationship between what is often considered the exemplar of the "public" sphere—law—and what we might suppose is our most "private" realm—our conceptions of our self—may seem like a study in oppositions, but like many oppositions, the one often informs (if not requires) the other. As with most social relationships, unraveling how and how much law shapes identity is a complex, variable process, one I believe is best revealed in the details. I examine here a case in which one important law, the National Environmental Policy Act of 1969 (NEPA), influenced how one community, the primarily Yavapai residents of the Fort McDowell Indian Reservation, came to reinterpret their past, their culture, and their politics.<sup>1</sup> I argue that the framework the agency devised to comply with NEPA imposed an implicit identity on those whose interests the agency was charged with representing. The agency's attempt to represent Yavapai interests was challenged by the Yavapai community, in part because the Yavapai recognized that the parameters and assumptions of the investigation contradicted their understanding of themselves and their culture. Their resistance stimulated a reinterpretation of their collective identity, a defense of their distinctiveness, and a reassertion of their right to represent themselves. The effect of this reappraisal was a new appreciation and articulateness about

<sup>1</sup> My evidence is drawn from fieldwork conducted in the Bureau of Reclamation and on the Fort McDowell Reservation, interviews with participants (who were promised confidentiality), and archival work on the history of the bureau and the relationship between the Yavapai and the government. For one year, I was employed as social analyst in the bureau's formal investigation known as the Central Arizona Water Control Study. I have also reconstructed the bureaucratic and legislative history of the proposed project, using media reports, private documents (e.g., Anonymous 1988), and public documents (Anderson 1981; U.S. Department of the Interior 1873, 1874; U.D. Department of the Interior, Bureau of Reclamation 1947, 1972, 1976a, 1976b, 1977, 1981a, 1981b, 1981c, 1982a, 1982b, 1982c; U.S. Department of the Interior, Water & Power Resources Service 1979).

their distinctiveness, an invigorated sense of their own history and, most important, a tremendous sense of empowerment.

For more than 40 years, the Bureau of Reclamation, an agency in the Department of the Interior, had been planning to build a dam, best known as Orme Dam, at the confluence of the Salt and Verde rivers in Arizona. It was the Yavapai's misfortune that they lived just below this wonderful dam site and that the spillway of the proposed dam would flood most of their small reservation, where they had lived since 1903 on a tiny portion of what had once been their ancestral land.<sup>2</sup> My interest in this case is less in providing an account of the outcome of this decision—of explaining why Orme Dam has not yet been built—than in analyzing the nature of the cultural confrontation this law inspired. NEPA erected a bureaucratically mediated forum for interpreting the interests of the Yavapai community. In doing so, the meaning, boundaries, and significance of “Yavapai culture” and the contours of “Yavapai identity” became public and contested features of the decision. Before describing NEPA and the bureaucrats who were charged with implementing it, I recount two major events in Yavapai history that provide important context needed for understanding the stakes of this decision for them, events that foreshadow my argument.

### “Trail of Tears” 1981

In 1981, during an unusually hot Arizona September, members of the Yavapai community at Fort McDowell began a 32-mile desert march from their reservation to the state capitol in Phoenix. This dramatic political event was designed to protest the proposed dam that would force them from their land. Launched with prayers and singing, the marchers, carrying signs protesting the proposed dam, walked alongside a busy highway for three days in temperatures reaching 110 degrees. Nearly 100 Yavapai (about a quarter of the reservation community) made the trek, including some frail but determined Yavapai elders and toddlers in wagons pulled by parents. Louisa Hood, a woman in her 60s with crippling arthritis, marched despite her doctor's admonitions. “The doctor said I should stay home,” she said quietly. “But I wanted to march with the crowd” (Tulumello 1981). Those who were too sick or weak to march rode alongside in cars and pickup trucks, offering support and water for the marchers. John Williams, a quiet, serious man in his 70s, told one reporter he was marching for his grandmother. Each night, as the marchers

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<sup>2</sup> In addition to forcing the resettlement of the Yavapai from their land and flooding sites sacred to them, including the tribal cemetery, the effect of the dam would have been ecologically devastating. It would have inundated miles of unique desert riparian habitat that was home to a number of threatened and endangered species of plants and wildlife and would have destroyed important archaeological sites.

camped, they held a small pow-wow to inspire and entertain themselves, with singing, drumming, dancing, and storytelling. The march culminated in a large political rally at the capitol, where tribal leaders delivered to the governor a hand-written bark scroll designed, they said, to make it hard for bureaucrats to file away and forget; the scroll proclaimed in simple, eloquent language their deep attachment to their land, the harm its loss would cause them, and their determination to retain it.

The march was a successful political protest, well timed and garnering broad, sympathetic media coverage. It generated powerful images, the kind that television loves and that linger in your mind: a small group of women, all in their 70s, walking together in long camp dresses and new tennis shoes, a sensible accommodation of old to new; an old man marching with his walker, surrounded by chattering teenagers hoping to distract him from his slowness and pain; parents fanning the hot, sleepy babies they carried in their arms. These were some of the scenes that made the evening news. But this march was more than a well-executed protest. Named by participants "The Second Trail of Tears," it was explicitly cast as a reenactment of an earlier, brutal, and involuntary Trail of Tears that is a centerpiece of Yavapai history.

### **Trail of Tears 1875**

Over a century earlier, in February 1875, about 1,400 Indians, most of them Yavapai, began a long, brutal resettlement march from the reservation at Camp Verde, Arizona, to the Apache reservation at San Carlos, Arizona, some 200 miles away (Mariella 1983:96–99; Espeland 1992:266–69). This march was instigated by a group of well-connected and corrupt contractors who sold reservation supplies to the government. These contractors, known as the Tucson Ring, were disturbed that the Yavapai at Camp Verde were becoming too self-sufficient, thus cutting into their profits (Mariella 1983:88–90; Bourke 1891:217–24; Bronson 1980:42). Through heroic efforts that included digging a 5-mile irrigation ditch with sharpened sticks, buckets, and even spoons, the Yavapai had managed to develop agriculture to the point that they could almost feed themselves (Corbusier 1971:17).<sup>3</sup> They had worked so hard to do so because, after having been forced on the reservation in the first place, they were promised they could remain at Camp Verde forever. Now, just five years later, Ulysses Grant ordered their removal to the San Carlos reserva-

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<sup>3</sup> One eyewitness was so impressed by the Yavapais' labors that he called the "digging of that ditch by hand with every conceivable sort of implement . . . worthy of a place in the greatest annals of the west" (Corbusier 1971:17). W. S. Schuyler reported that irrigated crops grown by the Indians at Camp Verde were "as fine looking as any I have seen in the Territory" and that the Indians understand they need to soon "become self-supporting" (U.S. Department of the Interior 1874:299).

tion, the mountainous Apache reservation where poor land made farming difficult and where the Yavapai would be a small minority unable to even speak the language of most other inhabitants.

The march lasted nearly two weeks. Despite the protests of the Yavapai and their ally, William Corbusier, the camp doctor, Commissioner Alfred Dudley conducted it with deliberate cruelty. Instead of waiting till warmer weather, he initiated it during the cold winter months, when snow covered the mountains and when rivers and streams were full. Instead of using horses or donkeys, as the soldiers did, Dudley insisted: "They are Indians: let the beggars walk" (*ibid.*, p. 267).

We have four eyewitness accounts of the march. Based on Dudley's account, John P. Clum, the Indian Agent at San Carlos, reported that "the removal . . . was effected with comparative ease and great satisfaction, nothing more serious occurring than a fight among themselves while en route, in which seven were killed and ten wounded" (U.S. Department of the Interior 1873:10). Corbusier accompanied the Yavapai on the march and kept a journal of his experiences; he noted that the Army quickly ran out of supplies (for the Indians) and how hard it was to bear the noisy cries of hungry children. He noted that of the some 25 babies born during the march, some froze to death because their mothers weren't given blankets or allowed to rest after childbirth (Corbusier 1971:215).

Maggie Hayes, a child on the march, left her account:

We had to walk all the way. The soldiers had ponies to ride. There was no road, very few trails. Many had no moccasins, but those who did, gave them to others who needed them more. Our clothing was torn to rags on the brush and cactus. With bleeding feet, weary in body and sick at heart, many wanted to die. Many did die. Rations were meager. It was winter time. We were not allowed to take the time and strength to bury the dead, and who would want to bury the dying? We waded across many streams. The river was running strong. . . . We were forced to cross the best way we could. Some of the weaker ones washed away. (Bronson 1980:42)

John Williams described his grandmother's account of the march:

The soldiers make them go straight over the mountains. The people don't have a wagon or horses. . . . Just walk. My grandmother had babies, children to take along on that trail. . . . One old man, he carried his wife in a burden basket. That woman was too old to walk; real old. Her husband is old, too. They make it to San Carlos, but don't live very long there. Some of them were real sick. The soldiers just poke them with the gun to make them walk faster. But some of them just went down and died. They leave them there, like dogs. Like killed flies they leave them there. . . . It is winter. It is raining so there is

lots of water in the rivers. But the soldiers make them cross. . . .  
 My grandmother was sick after that. . . . Maybe she was slow.  
 The scout hit her with a gun, right at the wrist. Her wrist was  
 crooked all the time after that. (Mariella 1983:96–97)

The Trail of Tears is a pivotal event in Yavapai oral history. (Yavapai is not a written language.) A story all Yavapai know, it is often told as a reminder of the senseless brutality of white man, of the unreliability of promises government officials make, and of the pain of losing your land.<sup>4</sup>

In casting their protest march in 1981 as a reenactment of this original Trail of Tears in 1875, the Yavapai were clearly emphasizing the parallels between their earlier forced resettlement and their impending one. They were trying to convey—to decisionmakers, politicians, and their neighbors—the deep cultural and psychological importance of their land. They were also trying to express their difference, their distinctiveness, in a dramatic, public way. But the second Trail of Tears was more than an example of clever political strategy, an astute manipulation of powerful images and symbols. This march was part of a complex process of the symbolic reappropriation and reinterpretation of their past, a process that was, in this case, stimulated and shaped by law, by the NEPA.

### The National Environmental Policy Act

In 1970, Richard Nixon signed NEPA into law. NEPA was a novel piece of legislation with an enormous and largely unanticipated impact on federal policymaking. The stated goal of NEPA was to make environmental quality a national priority by outlining a national policy on the environment.<sup>5</sup> The act has three main provisions: the first “substantive” section sets out a series of environmental goals that should inform national policy; the second section requires all federal agencies to establish procedures for incorporating environmental issues into their decisionmaking; the third section established a new Council on Environmental Quality (CEQ) to coordinate and manage federal environmental efforts, including establishing the guidelines agencies must follow to comply with the law. The novelty of NEPA is that

<sup>4</sup> The Yavapai never considered San Carlos their permanent home and continually expressed their wish to be allowed to resettle on their own land. Beginning in the late 1890s some Yavapai were allowed to leave the Apache reservation. Increasingly, they returned home to find much of their land occupied by white settlers (Mariella 1983:99). Finally, in 1903 Theodore Roosevelt established the current reservation at an abandoned army camp on a tiny portion of what had once been their homelands.

<sup>5</sup> For a fuller discussion of the legislative history of NEPA, see Liroff (1976:10–35), Anderson (1973:1–14), and Finn (1973); for detailed analyses of the effect of NEPA on various federal agencies, see Taylor (1984), Caldwell (1982), Culhane (1990), Mazmanian & Nienaber (1979), Espeland (1992:202–58), and Friesema & Culhane (1976). Since NEPA has been widely imitated both locally and internationally, its influence extends well beyond U.S. federal agencies (Rodgers 1990).

the law did not rely on traditional strategies for bureaucratic reform which included changing the legislative mandate of each federal agency or establishing a new, powerful regulatory agency to monitor the environmental implications of all federal policy. Instead, as Serge Taylor (1984:7) has pointed out, NEPA substitutes analysis for reorganization. In his words, "Since the statute's sponsors lacked sufficient power to change the decision premises of all agencies directly, they tried to change agency policies indirectly by requiring a different type of information to enter into the decision-making process."

NEPA is perhaps best known as the law that requires federal agencies to prepare Environmental Impact Statements (EIS) in advance of any action that might "significantly affect the quality of the environment." An EIS is subject to unusually specific procedural guidelines; broadly, the impact statement requires federal agencies to show that a "rational" decision procedure was used to describe and evaluate the economic, social, and environmental impacts of proposed policy for a range of alternatives, including one plan to "do nothing." These alternatives then compete with one another as a solution to some specified problem or some set of goals.

NEPA guidelines require agencies to develop a set of alternatives, predict their expected outcomes or consequences, and specify the causal connections implicit in these predictions, including the environmental "costs and benefits" of each alternative. An agency must evaluate these alternatives in light of how well each meets its objectives and document that the public was involved in these evaluations. Neither NEPA nor the procedural guidelines for applying NEPA explicitly require that the categories for evaluating alternatives be made commensurate among alternatives.<sup>6</sup> The explicit comparison of the alternatives that NEPA does require, however, has encouraged attempts to make evaluative categories commensurate according to some, often quantitative, index. Furthermore, while the legislation does not force an agency to select the alternative that maximizes environmental values, in part, because of the multiple objectives that characterize many federal projects, the documentation of environmental impacts that NEPA requires has prompted a greater justification of the agency's final choice. Paradoxically, NEPA's requirement (title I, sec. 102B) that "presently unquantified environmental amenities and values" be incorporated into decision-making resulted not in the proliferation of qualitative analysis

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<sup>6</sup> CEQ guidelines do require that "the agency should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharpening the issues and providing a clear basis for choice among options by the decision maker and the public." S. 1502.14. Also, environmental effects and values must be identified in "adequate detail so they can be compared with economic and technical analysis" (S.1501.2, CEQ, 1978). See Schnaiberg (1986:316–61) for an interesting critique of the impact assessment process.

but in a tremendous surge of research on how to quantify previously unquantifiable entities.<sup>7</sup>

NEPA turned out to be an instrument of radical administrative reform (Caldwell 1982:51–74; Taylor 1984). NEPA-induced reform did not always occur quickly or uniformly (Andrews 1976:150–51; Liroff 1976:74–141), but for many agencies (including the Bureau of Reclamation), compliance eventually meant completely overhauling their existing decisionmaking procedures.<sup>8</sup> Although NEPA's stated goal is to promote policy to improve the environment, it only requires that agencies document that their decision procedures comply NEPA's guidelines for impact statements.<sup>9</sup> In effect, NEPA tries to accomplish substantive goals with procedural means. Some have argued that this reliance on procedure has limited NEPA's effectiveness in achieving substantive goals of environmental protection and improvement. For example, Andrews (1976:157) wrote:

A central and crucial characteristic of the NEPA mechanism was its dependence upon procedural instruments for the achievement of substantive policy goals. This is characteristic of legal formalism. Such instruments have strengths, chief among which is the sensitivity of both agencies and courts to procedural correctness in the administrative process; but they also form important limitations. Chief among these limitations is their inability to directly change either the agencies' decisions or the makers of those decisions.

In this sense, the gap between procedure and goals embodied in NEPA reflects the tensions that Max Weber described between value rationality and formal rationality.

After NEPA was enacted, the bureau was forced to prepare an environmental impact statement analyzing the social and envi-

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<sup>7</sup> For example, as early as 1973, a report on the status of the development of environmental indices (all quantitative) was prepared for Henry Jackson's Senate Committee on Interior and Insular Affairs. The lack of adequate environmental indices was cited as a serious impediment to implementing NEPA, particularly in regard to the CEQ's duty to monitor and report annually on the state of the environment (Curlin 1973:vi, 3). Indices for air quality, shifts in land use, recreational resource, and noise pollution are among those described in the report. After enactment of NEPA, many manuals were prepared by both agency personal and hired consultants with directions for measuring and quantifying such elusive concepts as "quality of life" and "social well being" or even the "visual or aesthetic quality" of an area. See, e.g., Fitzsimmons et al. 1977.

<sup>8</sup> See, e.g., Serge Taylor's (1984) careful analysis of the effect of the law on the Army Corps of Engineers and the Forest Service. Of course, NEPA's effect was not limited to administrative reform. NEPA is noted for helping to galvanize and sustain the modern environmental movement. In John Walton's (1992) intriguing analysis of the 80-year water war between Owens Valley and Los Angeles, he shows how NEPA provided a timely new weapon that ultimately helped to revive local rebellion and transform it into a social movement.

<sup>9</sup> The law also required that an impact statement be made public and that its preparers formally solicit and respond to feedback about their findings; this public scrutiny, in conjunction with the court scrutiny generated by lawsuits, was a way to ensure that information portrayed in an EIS could be used by others to challenge a decision they disliked.



ronmental consequences associated with the proposed dam. Orme Dam was part of a controversial and expensive plan to bring Colorado River water to central Arizona. This project, known as the Central Arizona Project and first proposed in 1944, consisted of an elaborate series of dams, pumps, and aqueducts. Since the bureau had been promoting, studying, and repackaging the Orme Dam for more than 40 years, it is possible to track, in the documentation, the changes that resulted from NEPA (Espeland 1993). One of NEPA's most obvious effects is that the law is directly responsible for forcing the bureau to even consider the consequences of the dam for the Yavapai. Before NEPA, during the first 30 years of developing and promoting Orme Dam, the bureau never formally acknowledged that the Yavapai were even relevant to the decision. Although numerous reports and studies had been prepared on the project (which, after repeated attempts, was finally authorized by Congress in 1968), the Yavapai literally do not show up in any of these documents and are not acknowledged as relevant to the decision. Nor are the Yavapai mentioned in the first EIS prepared on the Central Arizona Project in 1972. It was only after the bureau learned that the EIS represented a new and potent weapon for environmental groups and, when the courts forced the agencies to hire new kinds of employees to prepare them, that NEPA was taken as something other than a minor legal loophole to be plugged. As one seasoned manager told me: "How were we supposed to know that this law would matter? That it would be any different than all the other laws they keep passing?"

This realization of NEPA's significance was a gradual and contested process within the bureau. For example, the first EIS that dealt exclusively with Orme Dam was written in 1976—the first time the bureau included any analysis of the dam's consequences for the Yavapai. This analysis, conducted by external consultants, concluded that since the Yavapai had been subjected to forced relocations in the past, and since they had somehow survived, Yavapai culture possessed strong "survival elements" and that the tribe was likely to survive the threat posed by Orme Dam. Needless to say, this was a controversial interpretation of Yavapai history and culture. One consequence of this EIS was that it helped to galvanize organized opposition to the dam among members of the Yavapai community and their supporters.

### **Rational Decisionmaking as a Response to NEPA**

Partly because of the controversy generated by the 1976 EIS (which the bureau later rescinded), a new study was launched in 1978 to evaluate a series of plans for providing Phoenix with more flood protection and an improved water supply. This study was the largest, most expensive, and most complicated one the

bureau had ever conducted. Hoping to buy time and provide a forum where political consensus might emerge, the bureau intended the study to be a test case for its new procedures for complying with NEPA and the new Principles and Standards issued by the Water Resources Council. The study would culminate in the requisite EIS and planning documents and in what most participants hoped would be a decision about Orme Dam that would finally stick.

Those in charge of designing and managing the formal investigation were a group of newer, nontraditional personal the bureau had been forced to hire after NEPA—planners, sociologists, biologists, decision experts. The distinguishing feature of these employees was that they were not engineers in an organization that had been dominated by engineers since its founding in 1902. This group was in a difficult spot; its members were charged with resolving the seemingly intractable conflict over Orme Dam and with the arduous task of implementing NEPA in an agency that was, to put it mildly, hostile to the law; all this while simultaneously carving out for themselves some base of authority and autonomy within the organization.<sup>10</sup> They responded by invoking science and rationality in interpreting NEPA.

While NEPA does not require that environmental impacts be quantified, one pressing concern for managers was how to meaningfully incorporate and integrate the diverse information required by NEPA, data they believed was crucial to making a good decision. In the past, information that was hard to integrate or quantify or that was detrimental to dam-building was often simply excluded from decisions, a response now prohibited by NEPA. To resolve the problem, this group became convinced that an explicitly rational decision framework, based on rational choice models developed in economic and cognitive theory, would improve the quality of the bureau's decisions and restore public confidence in the bureau's legitimacy.

In addition to integrating various kinds of information, advocates believed that these models could help make bureau decisions more democratic. These flexible models for incorporating and integrating public preferences could transform often volatile, chaotic "public participation" into a rigorous, retrievable, and scientifically defensible system. Although NEPA required agencies show that the public was informed of and involved in the decision, "public involvement" within the bureau was initially an ambiguous and controversial idea. The 1976 Orme EIS was a public relations nightmare, succeeding mainly in mobilizing opposition to Orme and raising public doubts about the bureau's capacity to conduct a rigorous, impartial investigation. Advocates

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<sup>10</sup> For a more detailed account of the political controversy surrounding this decision, and the motivations and influence of this group in interpreting NEPA, see Espeland 1992:202–58.

argued that the adoption of their procedures could improve the bureau's public credibility by expanding the public's role in the decision and by relying on scientifically established procedures for rational decisionmaking. As one planner put it, the bureau "wasn't doing public service properly. They weren't providing the kind of information people needed to arrive at a decision. What was needed was to step back and conduct an objective, scientific analysis. . . . We needed a strong public involvement process to support the study."<sup>11</sup>

The framework used in the investigation was partly dictated by federal regulations and partly by the desire of some groups within the bureau to adopt a formal rational decision model. Part of this framework's appeal was that it could document to a wide range of relevant audiences—to opponents, other federal agencies, and especially to the courts—that (1) certain kinds of information, among them public preferences, were included; (2) that alternatives were carefully considered; (3) and that the decision procedures were "rigorous," "objective," and "fair." While the details of the decision framework are too complex to be easily summarized, two characteristics are especially pertinent to how the interests and values of the Yavapai were portrayed: how different impacts were made commensurate and the consequentialist causal logic underlying the framework.

Rational choice models are premised on the assumption that in order to make careful comparisons among alternative plans for accomplishing some goal, it is necessary to make the components of choice commensurate, to create a common metric that is the basis for displaying differences in magnitude among the relevant decision factors. Commensuration in rational decision-making requires that the separate dimensions of value be integrated via trade-offs, in a deliberate balancing of competing claims of values. Price and utility are two metrics that are often used; in policy decisions, cost-benefit analyses are a common form of value integration. Embedded in this logic is the assumption that all value is relative: that the value of something can only be expressed in terms of its relation to something else. This form of valuing denies the possibility of "intrinsic" value, "pricelessness" of any absolute category of value. Commensuration presupposes that in deciding something, transforming the relevant information into this form does not alter its meaning in ways that are detrimental to deciding. Rather, the parsimony conferred from commensuration improves clarity and rigor.

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<sup>11</sup> The position of these advocates provides a vivid illustration of Theodore Porter's (1992a, 1992b) argument that quantification generally and formal, quantitative decision technologies in particular are best understood as responses to charges of arbitrariness and partiality and to pressure for increasing democratic openness. He writes (1992a:30): "Quantitative rigor is most valued when there is a political need of its odor of objectivity, as a defense against suspicions of ideological bias or, worse, corruption." In his view, quantification is often a sophisticated procedural response to a set of political problems.

Various methods for commensuration were used in components of the analysis. For example, in the economic impacts of the proposed plans, impacts were expressed as prices in a cost-benefit analyses; in the public value assessment, people's preferences were expressed as a number derived from a multi-attribute trade-off scheme. The social analysis culminated in a "Social Well Being Account" where the cumulative social impact of each plan was expressed numerically. This required that all the social impacts, ranging from the forced relocation of the Yavapai to the reduction of floods to the forced relocation of a small portion of a non-Indian population, be made commensurate through a rating and weighting scheme.

### The Yavapai View of Land

Viewing value as something that is fundamentally relative is at odds with how most Yavapai understand and value their land. As is true for many Native Americans, land is an integral feature of Yavapai understanding of their culture. It is the basis of a complex relationship that they describe as "participating with the land." Members believe that being Yavapai involves having a special relationship to this land and that this relationship can only be had with the land that generations of their ancestors also "participated in" and fought to preserve. Their relationship to land is an important component of their collective identity as Yavapai, and it is also an important feature of how individuals understand themselves. One's relationship to land is intimately felt and hard to express. One young man explained it this way:

It's kind of hard to put into words because you're born in this place and you feel a part of this place. It's kind of ingrained into you. Like you've been around this area for a long time. I don't know, it just becomes part of you. There's no real dividing line that separates you from [the land], that says that you don't belong here. It's just there.

The land provides a sense of continuity for the Yavapai, and its psychological significance is linked to its historical significance. Knowing that one's ancestors lived, died, and are buried on the same land provides residents with a tangible link to the past. One woman told me: "Most of [my relatives] lived here; they died here. Most of my relatives, they came and some of them have died here, and those that are being born, they won't be able to participate in this land" if Orme is built. Another resident told a reporter: "God gave this land to us. God promised this land to the Yavapai. He promised no other land. We have always been here, since God made us people. Where would we go? Our ancestors still live here" (*Arizona Republic*, 12 Dec. 1981, p. 6).

The Yavapais' relationship to their land helps to define them as a people and as individuals. They believe that their land is

unique and intrinsically valuable, just as people are unique and intrinsically valuable, and that the value of land cannot be expressed as a commodity, or as somehow commensurable with other valued things. For the Yavapai, Orme Dam threatened their identity and the loss of their land represented cultural extinction. In trying to derive a price for their land, the bureau was, in effect, creating a market for their "selves." As Norman Austin, the tribal chairman put it, "if that Orme Dam goes through, my people will be no more" (*Christian Science Monitor*, 14 Oct. 1981, p. 14).

### **Selection, Distortion, Silence: The Politics of Framework**

Although the Yavapai did not use these terms, their land was to them an incommensurate value, and money or other land, regardless of the amount, could not capture its value or compensate for its loss. To the Yavapai, it was absurd and immoral to try to attach a price to land and to their culture, to, in effect, "sell their mother." Their land was an incommensurate value, and nothing else would represent its value or compensate for its loss. The decision models developed by the Bureau of Reclamation, however, could not accommodate incommensurable values and, as a result, subverted the symbolic boundaries that the Yavapai drew around their land and their heritage, boundaries that defined these as intrinsically valuable.

Another pattern imposed by the decision framework was that impacts were "measured" on the basis of the consequences of various alternatives. Information is organized according to a causal logic that tracks changes in future states of affairs. The consequentialist logic underlying the decision model makes it very hard to talk about issues that are not easily reduced to causal language. For example, the consequentialism underlying the bureau's rational choice procedures cannot accommodate history in any meaningful way. It is hard to incorporate the significance of history in spelling out its consequences in causal terms for future impacts or a future state of affairs.<sup>12</sup> History cannot be used as a decision "factor" because it does not reflect impacts in a future condition. The significance of historical events does not "change" for each alternative in future states, regardless of how one feels about the indeterminacy of historical texts or the inevitability of reinterpretation. Events of the past cannot be used to measure or project the changes in future states of affairs that the

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<sup>12</sup> Two common characteristics of history make it especially hard to meaningfully incorporate within a rational choice framework: history often emphasizes the idiomatic properties of periods and events, and it is often written in a chronological or a narrative form. Designating something as unique is impossible within a commensurated framework, and the significance of sequence is obliterated by the reduction of context to discrete factors.

proposed alternatives would cause. It is theoretically possible to incorporate the historical significance of the Yavapai by simply attaching a higher price to land or to assume that the factors used to represent the present condition somehow reflect the cumulative impacts of history. This is, however, an abstract, obscure, and almost uninterpretable representation of history. In practice, it does not communicate what most Yavapai believe is important to know about them.

For the Yavapai community, it was not simply their land or their lifestyle that was at stake but their ability to survive as “a people.” The Yavapai understand themselves as a unique cultural group with a distinctive history. For them, the “cost” of losing their land extends back to the sacrifices of their ancestors and the legacy they fought to preserve and pass on. For the past 150 years, Yavapai history is largely a history of a people resisting forced relocation, of trying to stay with their land.<sup>13</sup> While virtually all Native American peoples have been forced from their land, what is remarkable about the Yavapai is how persistently they have had to defend against resettlement and the extraordinary costs they have born. The Yavapai are highly conscious of this heritage. Their bitter experience with actual and attempted forced resettlement, beginning when the U.S. Army tried to starve them onto reservations in the 1860s, to the Orme struggle in the 1980s, are central features of the oral tradition of the Yavapai. As one man put it:

Sometimes when I think at night, tears come into my eyes when I look back on history, how my people were treated, how my land was taken. Today that land is worth billions. But to the Indian it is worth more than that. It was their home, where they were told to live by the Great Spirit. Our ancestors were slaughtered [here]; they look down on us with tears in their eyes and they say “Stay with it. Stay with it.” We will stay with it.

A woman said:

This really is our home. This is where our ancestors lived. Where my great-grandmother lived and died here. And she told my grandfather before she died, she said: “Don’t ever let them take this land away. Hold on to it.” So we’re trying our hardest to hold on to this land.

Losing the land that their ancestors fought so hard to preserve would mean betraying the ancestors’ struggles and wishes. This sense of failure would be painful and profound. This “cost” would also extend to future generations who could not be Yavapai as a result of their contemporary defeat.<sup>14</sup>

<sup>13</sup> For a more detailed account of Yavapai history and how it shaped present conditions, see Mariella 1983, Khera 1978, and Espeland 1992:259–320.

<sup>14</sup> At best, in the 1981 Social Assessment, the Yavapais’ history of forced resettlement and resistance to resettlement was briefly described; this history was used to justify the large weight given to the significance of the land for the Yavapai, to help explain predictions about the negative impacts of relocation for them, and to justify the significance

The exclusion of history does not affect all the interest groups equally in this decision. The ahistoricity of the decision procedure biases the presentation in ways that harmed the Yavapai more than other parties. The Yavapai believed that the exclusion of their history from the framework fundamentally misrepresented the stakes of the decision for them, since past injustices and broken promises were not explicitly part of the decision calculus. Ignoring Yavapai history meant excluding relevant information about which most white people knew little, or held wildly distorted views—the Hollywood version of the “Apache” wars; it was also information that was uncomfortable for white people to confront. Yavapai residents felt that the exclusion of their history made their relocation seem more comparable to relocation of white residents.

More fundamentally, Yavapai history helps define for them their uniqueness, including their unique relation to the land. Inattention to this history fosters or perhaps even ensures the failure to grasp this relationship. The exclusion of Yavapai history from the decision also left a silence that others felt free to fill with their own distorted versions of the past. Some Orme supporters disputed the distinctiveness of the Yavapai and their special claim to the land at Fort McDowell. In doing so, they were trying to minimize the effects of the forced relocation.

To discredit Yavapai claims, some supporters of Orme Dam deliberately misrepresented Yavapai history. For example, in 1975, an editorial (“Heap Big Offer”) in Arizona’s largest, most powerful newspaper exhorted the Yavapai to accept the government’s “generous” offer for their land, writing:

[T]here is bound to be opposition from those who automatically assume that the white man mistreats the red man. As a matter of fact, despite lamentations to the contrary, the McDowell Apaches<sup>15</sup> are not being driven off their ancestral lands. The tribe itself is not an ethnological entity, having been formed by stray Mohaves and Apaches a relatively short time ago. . . . They would not live astride the Verde River if the U.S.

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of the Indian relocation as a component of the study. This historical narrative merited only a quick mention in the social analysis. It appeared only in the final social report (which elaborated the findings presented in the EIS), a document, unlike the EIS, that was not widely circulated. No mention of Yavapai history was made in the EIS or in the most widely circulated briefing documents. Nor did it appear in the overall summary of the social analysis of the alternative plans that, in its quantified form, merely compared Indian relocations with non-Indian relocations, and weighted these for each of the designated alternatives. At worst, in the 1976 EIS the details of Yavapai history were ignored and past resettlements were used to defend the potential of the Yavapai to survive another forced resettlement.

<sup>15</sup> This was a sensitive issue for the Yavapai since they have been persistently and strategically mislabeled as “Apache” or “Apache-Mohave” by the federal government for more than a century, with terrible consequences. Being mislabeled “Apache” meant that white settlers and the military were more likely to kill them, since killing an “Apache” had been considered a civic act (Khera 1978:2); it also made it easier to justify their forced resettlement to the “Apache” San Carlos reservation.

Government hadn't given them this land . . . in 1891. Actually, the original tribesmen volunteered to give up their natural nomadic life as hunters and raiders in order to take advantage of the government offer. (*Arizona Republic*, 25 Aug. 1975, p. 8)

None of this is true. The "McDowell Apaches" were not Apaches nor were they some mixture of "stray" Mohaves and Apaches. White settlers were responsible for this misnomer. The Yavapai language is related to the Yuman family of languages (the Apache language is a member of the Athapaskan or Dene family of languages; Khera 1978:2). The first documentary evidence of Yavapai living in the area comes from the 16th-century diaries of Spanish explorers. The Yavapai entitlement to this land was documented historically and legally established in 1965 during formal land claim proceedings (Schroeder 1974, 1982). The Yavapai "volunteered" to move to a federal reservation only after they had been starved and slaughtered into submission by the U.S. Army. Such deliberate attempts to misrepresent their past angered and mobilized the Yavapai community; for many white readers, however, such accounts were all they knew about Yavapai history.

The framework's neglect of history also meant that the cumulative consequences of past government policies on the reservation were ignored. For nearly 80 years, the government refused to aid or even allow the Yavapai to develop the reservation in anticipation of their imminent resettlement. This meant that while white settlers and other reservations were receiving funds to develop water or agriculture, the Yavapai were prevented from developing their land and its resources. This relative lack of development was then used by Orme supporters to argue that reservation land was being wasted by Indians who were unwilling or unable to develop it. The overall effect of excluding history in the decision framework was to make it easier to justify the bureau's proposed project by minimizing the significance and distinctiveness of the Yavapai cultural heritage, the importance of understanding land as incommensurable, and the extent to which, in the past, white people's gains have been at the expense of indigenous people.

Another pattern stemming from the consequentialist logic informing the decision models was the exclusion of ethical concerns. It is difficult to capture moral dilemmas in consequentialist thinking since it is hard to ascertain how morality implicates future states in any direct, causal sequence. Yavapai leaders argued that the decision they confronted was ultimately a moral decision. One man described the taking of Indian land by force as "the white man's original sin." But "how many times can one commit original sin?" he asked. "You still come to take our land by force—over and over and over. And now, you come again" (Casserly 1981:10). The legacy of broken promises that had long



characterized their relationships with the federal and local governments was a moral issue that many Yavapai believed could not be extricated from this particular decision. For example, in the executive order signed by Theodore Roosevelt creating the reservation, the Yavapai were promised that they would never again be forced from their land. As one Yavapai man put it:

The President told us we could live on this land forever. The white man keeps trying and trying to break that promise. Doesn't that matter? Where in all these studies do they say "You shouldn't break a promise?" Where? You tell me.

The Yavapai argued that it was wrong for the government to violate another promise to the Indians, but this type of concern is difficult to address in the rational choice framework, since this model emphasizes evaluating choice based on the consequences of specific, projected action. It is difficult to discuss the implications of breaking yet another promise to the Indians in causal terms, in how this "wrongness" will alter future states. The resulting pattern is that the moral implications of the policy were not formally addressed in the decision documents. Some Yavapai leaders argued that the exclusion of these ethical issues distorted the stakes of the decision for them.

Fairness in the distribution of costs and benefits is another moral issue that was neglected within the rational procedures employed. There are usually clear winners and losers in public choice, since those who bear the costs often do not enjoy the benefits. Although fairness was a common theme in public discourse about the dam, within the context of the decision procedure there was no formal way to represent its distributive effects. Like broken promises, "fairness" is hard to capture in consequentialist terms.

The consequentialist logic of rational choice models is poorly equipped to incorporate symbolic values and systematically excludes these from the decision framework. Just as it is difficult to make causal connections based on moral principles, it is also hard to show how the symbolic significance of something implicates future states. The symbolic significance of the incommensurability of land, of the cultural boundary that the Yavapai draw around land and the other features of their culture they believe to be intrinsically valuable, cannot be captured in consequentialist terms. Incommensurable categories are a specific form of boundary, often signaling which classes of things or ideas have special symbolic value. Furthermore, the belief in the incommensurability of some categories may also provide people with signals about how use to or interact with those things, ideas, or people (Raz 1986:345–53).

Part of the stakes in making incommensurate qualities commensurate is that the symbolic logic of incommensurable boundaries is undermined. Although boundaries we define as incom-

measurable help constitute some of our most cherished categories, their symbolic significance largely transcends our capacity to “measure” their “empirical” impact. Often, what has symbolic significance is the very judgment that something is incommensurable. A belief in incommensurability may, itself, be a qualification for having certain kinds of relationships. For example, believing that friendship cannot be bought or that each child is unique is, in a way, a prerequisite for entering into relations as friends or parents as they are socially defined. The philosopher Joseph Raz (1986:345–53) calls such categories “constitutive incommensurables.” They are beliefs attached to institutions or forms of life, and their symbolic significance derives from social conventions and contexts that sustain their meaning. For the Yavapai, land was a constitutive incommensurable, for it was a belief that was closely linked to one’s capacity to be a Yavapai.

The distortions that emerge from the bureau’s rational procedures stem not only from what it excluded but also from the kind of information that was included and the form it was given. For example, the discrete factors that were used to express the consequences of the proposed alternatives resulted in an artificial compartmentalization of Yavapai culture; the unity and the integrity of the impacts are not captured, and there is no mechanism other than simple quantified aggregation for expressing the interrelatedness of how the Yavapai experience their land and their culture. Carving up impacts into discrete, imposed categories or components is a forced fragmentation that minimizes the pervasiveness and cumulative experience of the impacts. Some Yavapai also believed that the often overwhelming complexity of the decisionmaking procedures distracted people from the real and relatively straightforward stakes of the decision. As one elder expressed it: “White men like to count things that aren’t there. We have a way of life that will be destroyed if that dam comes through. Why don’t they just say that?”

For the Yavapai, the inability of the rational choice framework to accommodate ultimate or incommensurate values made it an inaccurate, even a dangerous, representation of their interests. Since the models do not permit incommensurate values, they cannot capture the value of land and the value of a way of life. The Yavapai critique of this distortion was not couched in the often opaque language of rational choice theory but in vivid, practical terms. They argued that land and money were not, for them, comparable, and that money was an inappropriate expression of value. How could something that is sacred be given a monetary value? they would ask. As one of their leaders told a reporter: “We cannot compromise our principles, our birthright, our integrity. How do you negotiate honor? We will never negotiate” (Casserly 1981:5). The inappropriateness of doing so was something they were unable to explain to many other partici-

pants. Their refusal to negotiate on a price for their land was often misinterpreted by some bureaucrats and politicians as a bargaining strategy.

In transforming what is, for some group, an incommensurate value into a price, as was done in the bureau's benefit-cost analysis, or into some weighted value summarizing the social impacts to the tribe, as was done in the social analysis, or as a component of a preference function, as was done in the public values assessment, the "cost" or "value" represented bore almost no relationship to the impact the tribe would experience. The very expression of value given the Yavapai land and culture was a contradiction of that value. Obviously, if participants view these procedures as distorting their values or interests, and if these distortions influence the outcome of decisions, they clearly matter. When the "costs" of a proposed policy are obscured or when they are expressed inappropriately, at the crudest level decisions are made with "bad" information; such distortions, however, may be important in other ways as well. They may influence how political debates are structured, who is allowed to participate in decisions, and who is granted authority to speak on behalf of affected parties.<sup>16</sup>

The Yavapai were angered at how their history was misrepresented in the long struggle over Orme Dam. They were also weary of having to publicly defend the uniqueness and significance of their community against powerful interests who wanted their land. They understood, all too clearly, how politicized their difference had become. Their very understanding of themselves as a unique cultural group already presupposes a self-consciousness and scrutiny that reflects the challenges they have faced and the mediating structures that have shaped their encounters with the government and with other settlers. Culture that is not questioned, compromised, or compared does not require a label; it is taken for granted and does not demand the articulate description and defense that the Yavapai have been forced to provide. For the Yavapai, NEPA granted an unprecedented opportunity for inclusion; however, since they could not control the terms of their inclusion, NEPA also required them to provide yet another defense of their difference. This time, their defense was shaped in reaction to the conceptions of rationality, the limitations of

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<sup>16</sup> For example, the use of these models requires that the important parameters of choice be dictated by decision experts; the causal predictions made about the future impacts of alternatives must be defensible according to some external source of authority and are typically made by credentialed experts. This illustrates one of Foucault's most general points that a pervasive, taken-for-granted feature of modern thought is its elaborate specialization and ranking according to criteria of "scientificity" that makes local forms of knowledge or practical reason less relevant, less applicable, and inferior. Within this decision framework, Yavapai authority, based on practical reason and personal experience, becomes less salient and less valued as the authority of experts becomes both more dispersed and specialized.

consequentialism, and the partiality of science that framed the investigation.

One consequence of this defense of themselves and their land, however, was a heightened sensitivity, appreciation, and re-interpretation of what made them Yavapai. Being continually placed in the unusual position of having to define what makes them a unique people with ancestral rights to their property made them sensitive to attempts to make their concerns commensurate with that of other parties in the decision. Their repeated and protracted struggles with the government required them to construct a portrait of themselves in categories that made sense to them, that would privilege their experience and authority, and that were defensible and stable and sturdy enough to withstand intense scrutiny.

The Yavapai community, because of past experience, distrusted the government's ability or willingness to represent their interests in "neutral" terms. As the tribal president told me, "We know that government studies are always slanted in their favor." They also disagreed with the categories used to represent their interests, knowing that these were "white man's" categories, which would not serve them well. Many also suspected that even if the formal study supported their position, its findings would be ignored. This distrust and disapproval did not lead to them boycotting the formal study, however, since they recognized such a strategy as too risky. Most residents agreed to cooperate with the formal study, allowing themselves to be interviewed at length and letting strangers come to the reservation to participate in community events. But their distrust did, I think, greatly influence their response to the proposed plan. Instead of relying on the study to represent their views and interests, the Yavapai continually resorted to other, external political means of making their position known and trying to affect the outcome, and the strategies they adopted reflected their understanding of the political importance of defining and asserting their difference. In effect, the Yavapai reasserted the political nature of what experts, in implementing NEPA, had tried to make technical.

The community took great pains to publicize and explain their difference, their otherness, to other groups and to the media. While relying on well-known techniques of protest, they adapted these in ways that highlighted their distinctiveness. The reenactment of the Trail of Tears is one poignant example of this. This march was a dramatic reinsertion of their history back into the decision; it was a vivid public and symbolic expression of their cultural and historical distinctiveness, from the style of praying that launched the march to its culmination with a bark scroll designed to subvert normal bureaucratic practice. The genre, the protest march, was a familiar part of American politics and so was accessible and interpretable to white audiences. Cast as a reenact-

ment, it was also the public assertion by the Yavapai of the continuity of both their oppression and their culture. It was a symbolic response (where symbolic value had been systematically excluded) to the question of cultural continuity posed by powerful white opponents who assumed that continuity was the premise of cultural authority.<sup>17</sup>

In the end, the Yavapai and their supporters prevailed. In 1981, Secretary of the Interior James Watt made the final decision not to build Orme Dam. An alternative policy was adopted under which, instead of a confluence structure, an existing dam would be raised, another dam would be replaced, and a new dam would be built at a different site.<sup>18</sup> This decision surprised many people and was considered a huge victory for the Yavapai community. Each year, near the anniversary of Watt's decision, the community celebrates with a joyous pow-wow commemorating their struggle and their success in stopping the dam.

The long and painful history of Yavapai efforts to stay with the land has irrevocably changed its meaning for them and their understanding of their relationship to it. As one man told me: "What we have, who we are, is something we have fought for, and in the fighting we have learned about ourselves, our heritage, and what these mean to us." As a result of having to spend years explaining to others their special claim to their land, of self-consciously taking stock among themselves about the content and meaning of their culture and their collective identity, of developing new and more elaborate explanations of their attachment to this place, their appreciation has deepened and their explanations of their difference have become more self-conscious, more articulate, and more institutionalized.<sup>19</sup>

The community has changed in other ways as well. I am told that some residents feel a renewed sense of pride in their heritage and greater sense of their political efficacy. There is a greater importance and pride associated with knowing Yavapai history, which now includes the "Orme Victory," as it is known. The community is planning to make films and videos about their

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<sup>17</sup> As Victor Turner (1974:60–155) has argued, the relations among symbols and process are complex, reflexive, and dynamic. Social action acquires form through its association with symbols and metaphors, and once this association has been made, the interpretation of the symbol and the structure of action is permanently transformed. Once Miguel Hidalgo seized the Virgin of Guadalupe and once Thomas à Becket refused to relinquish the cross he carried before his inquisitors, the path of insurrection was irreversible and the script of martyrdom was irresistible. For the Yavapai, once history has been symbolically appropriated for political struggle, as the reenactment did, it forever changes both the meaning of the symbol and the interpretation of the event.

<sup>18</sup> Note that if NEPA had not forced the bureau to prepare a range of alternatives, this compromise would not have been devised. Orme Dam would surely have been built had there been no acceptable alternative.

<sup>19</sup> For example, brochures explaining "Why We Celebrate" are available for tourists who attend the annual pow-wows and a new commemorative T-shirt is designed and sold each year.

struggle to preserve their land “so that young people will appreciate what we’ve had to do to keep it and why it means so much to us.” Just two years ago, the community organized another very effective political protest concerning the Indian Gaming Law that included barricading FBI agents and equipment when they attempted to raid the reservation casino. This dramatic protest was publicized nationally, and its participants believed that their experience during the Orme struggle helped to provide not only the skill but the sense of efficacy and courage needed to attempt this daring action. As the tribal president recently told me, “[When] the government raided the reservation for gaming equipment, we fought and prevailed. Our experience with Orme helped us realize that we’re going to lose something which is a great benefit to the Tribe. We had no recourse or leverage to work with so we fought and won.” Now, Yavapai identity includes a sense of being political and being effective.

The Yavapai struggle to stop the dam generated broad publicity for the community; as a result, Yavapai residents became adept at granting interviews and giving speeches, and they generally became more experienced and sophisticated political actors. Their political significance is now recognized beyond the reservation as well; politics on the reservation is accorded a new significance and is now seen as legitimate “regional news.” Reservation events that in the past would never have been mentioned in the news are now routinely covered. The accomplishments of the Yavapai community have also inspired other native groups. Lawrence Aschenbrenner, an attorney with the Native American Rights Fund, said of their struggle (Blundell 1981:35):

It’s pretty amazing. All sorts of well-intentioned people told the Yavapai they were sticking their heads in the sand, that if they’d just negotiate, they could make a heck of a deal. The \$33 million was a tentative bargaining offer, really. What these people have done is an example to other tribes who can now say, “By God, if we get together and don’t give up, we can win too.”

### **Conclusion: Power and the Legal and Bureaucratic Construction of a Subject**

One common approach to studying law is to understand it as a potent form of ideology, as a set of ideas and practices that support the interests of a dominant group at the expense of some subordinate group. Just how, or by which particular processes, law serves the interests of the powerful has been the subject of extensive scholarship and debates. Law has been interpreted as a legitimating myth for particular political structures (Scheingold 1974:13–22). Another view, perhaps best illustrated by Anatole France’s famously ironic observation that law’s “majestic impartiality forbids rich and poor alike to sleep under

bridges, to beg in the streets, and steal bread" (quoted in Hunt 1976:184), challenges its universalistic pretenses. Since Marx, law has been analyzed for how it serves particular interests by obscuring important differences in its universalist claims. Another way that law reproduces inequality is that it may ignore the needs and claims of the poor and the less powerful who are unable to marshal the resources necessary to assure that laws addressing their concerns are enacted and enforced. Law has also been analyzed for how it has created structures that provide unequal access to experts, information, or to "justice" (Cappelletti & Garth 1978) or for making it hard for those who wish to practice public interest law to sustain their ideals (Granfield 1992). Others have shown how the legal profession is deeply stratified in ways that ensures that the most privileged practitioners serve the most powerful clients (Heinz & Laumann 1982). Sometimes debates about the ideological significance of law focus on explaining the relative autonomy of law, the extent to which law is or is not independent of the influence of powerful groups of actors.<sup>20</sup> For example, E. P. Thompson (1975:263–68) argued that if law is to function as effective ideology, it must rely on standards of universality and equity and at least appear just and independent of "gross manipulation." Law, in acquiring distinct forms and rhetoric, will occasionally inhibit power and protect the powerless, and thereby reproduce its legitimacy.

Regardless of the particular legal mechanisms that serve to reproduce power, these critical approaches emphasize law as a resource, one that may be more or less strategic, that benefits some group or class, either in the short or long term. My case demonstrates an even more fundamental form of power. It reveals how law, as it is interpreted and implemented by a concrete set of actors, not only represents the interests of some group, or even constructs their interests but also, simultaneously and often implicitly, constructs the subject who is holding those interests.

"Standing" is one way of thinking about how legal subjects are constructed. NEPA was important for expanding who had "standing" in decisions affecting the environment. It reinforced an emerging body of administrative law that granted formal, legal standing to the people who would experience not only the economic effects but also the environmental or social consequences of federal policy. For the Yavapai, formal legal standing was a big improvement over the total suppression of their interests that had, for more than 40 years, characterized the bureau's

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<sup>20</sup> For an overview of this debate see Lempert & Sanders 1986:401–27. A parallel debate exists among scholars who study the role of the state in protecting and reproducing the interests of capitalists. Best known is the exchange between Nicos Poulantzas (1975) and Ralph Miliband (1969), two Marxists who disagree about the source of state autonomy.

treatment of their claims. There is nothing subtle about power that is expressed as resounding and enduring silence.

But more is going on in this case than simply determining who can count as having a legal interest in some policy. My case shows how the expression of interests is sometimes also the expression or reconfiguration of the subject who is having an interest—in this case, of what it meant to the Yavapai to be Yavapai. In treating universalistically all those who were designated as having “a stake” in the outcome of this decision, the law, as it was implemented by the bureau, transformed all relationships to the proposed policy into some common standard: qualities became quantities, difference became magnitude. While the law was explicitly intended to empower new groups with an interest in preserving and improving the environment, the standing that it granted, and the procedural scrupulousness that it eventually fostered, carried with it assumptions about who and how someone could have an interest. Law was a means or a stimulus for imposing a particular kind of identity. What was presumed to be a neutral and fair way of categorizing and sorting information turned out to be a framework that many Yavapai felt misrepresented not only their interests but them. Law also required that culture be transformed into a category called an “impact” and that culture be interpreted as an entity about which predictions can be made, sustained, and documented. Culture must be amenable to precise predictions about how the sometimes small variations in policy will differentially change the future, including future culture.

The Yavapai community accepted the standing that NEPA conferred but rejected the implicit identity that accompanied this standing. Their actual relationship to NEPA was remote. Most residents were largely unaware of the law and how it had motivated and shaped the investigation in which they were both subjects and reluctant participants. But in reacting to how the bureau was representing them and interpreting their interests in its attempt to implement and comply with the law, the Yavapai community was forced to grapple with fundamental questions of identity: Who are we? What unites us? What defines our culture? Why are we different? How do we represent our difference to others? In rejecting other’s representations of their identity, they recognized the tacit form of power that a framework can impose. Participating in the formal EIS process was troubling to them because they knew that the debate’s *forms* mattered, that these were nonnegotiable, and that these harmed them. They recognized that, in this decision, their ability to define themselves was at stake since the procedures used misrepresented them in ways that they believed diminished them and their claims. To counter this, they adopted political strategies based on representing themselves, on the reassertion of their cultural authority and their ability to describe themselves in their own terms. They used



their distinctiveness, itself a consequence of past bitter struggles with the government, against the procedure; they reasserted their substantive values when bureaucrats were trying to translate these into the terms of instrumental rationality. In doing so, the Yavapai created a new interpretation and a renewed appreciation of their own "otherness." Knowing who they were was part of a complex process of knowing and reinterpreting who they weren't and why they were different; in this instance, this process was stimulated by law and shaped by legal and bureaucratic practice.

The politics of identity is a profoundly ideological project, one that may be prior to, or concurrent with, the politics of interests. While we are all, by now, familiar with the "identity politics" that have characterized many modern social movements, identity may also be politicized in more obscure ways: in the general, seemingly benign categories that are used to portray value, grant access, measure impacts, or frame debate; or in our assumptions about what it means to be rational, or to "have" a culture. Nonetheless, since the construction or presumption of a particular type of subject is so basic, once a group comes to believe that its collective identity is threatened, the politics of identity can be a potent form of resistance.

Michel Foucault (1980) argued that power is a relationship and that to study power one must also study resistance to power.<sup>21</sup> The subtle, pliable, and enveloping quality of power is best revealed when it is challenged. In this decision, the power relationship was mediated by legal and bureaucratic forms, and the tacit power of these imposed forms was made more explicit by Yavapai criticism. Their criticisms to the NEPA-inspired framework did not subvert the framework or undermine the bureaucratic or legal legitimacy of these rational techniques, which are now more diffused than ever both within the bureau and outside it; Yavapai leaders correctly perceived their limited ability to shape bureaucratic procedure and that the framework of the investigation was nonnegotiable because, as they expressed it, "white men will do things their way." Despite their objections, in the formal investigation, a "fair market price" was attached to their land, their projected suffering was "quantified," and their culture was "measured."

The Yavapai criticisms were powerful, however, in other ways. Their critique did, I think, prompt them to rethink their difference, to articulate why what was important about them could not be captured in the terms imposed by the bureau and the courts,

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<sup>21</sup> Before Foucault, Georg Simmel (1971) argued the same thing. Simmel believed that power and its resistance are central components of social relations and fundamental for appreciating the centrality of conflict. Opposition is a crucial feature of most relationships since opposition both helps to constitute and sustain them. In his words, "opposition is an element in the relation itself; it is intrinsically interwoven with the other reasons for the relations's existence. It is not only a means for preserving the relation but one of the concrete functions which actually constitute it" (pp. 75–76).

to redirect their political strategies, and to rethink their sense of themselves as effective political and cultural actors. In explaining why land could not be expressed as price, why their removal from land was different from the relocation of white people, and why the moral and historical dimensions of the decision should not be stripped away, they strengthened their resolve to use political means to represent themselves outside the strictures of the investigation. While they may not have convinced the bureaucrats of the narrowness of their framework's categories or the limitations of its logic, the Yavapai practical understanding of its failings informed their resistance. Their insistence on the political, moral, and historical dimensions of the decision was both empowering to them and persuasive to other publics. And in the process of trying to persuade others of these dimensions, they reinforced their importance for their own understanding of their identity, as Yavapai and as individuals.

My analysis of the complex ways that NEPA stimulated and shaped the Yavapai sense of identity shows how intertwined and interdependent are the public and the private realms. Few would now accept the distinction between the public and the private as natural, inevitable, or perhaps even as analytically useful. More useful, I think, is to begin to consider the boundaries that are used to mark these spheres as ideological accomplishments, and to ask how and why they become erected. For the Yavapai community, the question "What shall we do?" that officially motivated this decision could not be distinguished from "Who are we?" Their political accomplishment was to keep these questions conjoined; their answers to the latter question were refined and rearticulated in response to others' failed representations of them.

For the bureaucrats whose proffered solution to the plurality of values and interests confronting them was commensuration and formal rationality, identity entered into the debate primarily as ordered preferences. The formal disinterestedness that was the basis of their procedural authority stemmed from the transformation of individual preferences into something defensible as a "public" choice; it was only through an elaborate and largely invisible array of steps that the final decision could be linked back to the values of individuals. However crude or distorting commensuration may be, quantification permits an authoritative and defensible response to charges of bias. As Porter (1992a:20) has convincingly argued, objectivity in science is not synonymous with truth claims; rather, he contends: "The impersonality of numbers . . . is at least as crucial for their authority as is the plausibility of their claims to truth." In depersonalizing people's claims, rational decision procedures transformed explicit identities into depersonalized, implicit subjects. Where Scheingold (1974) is persuaded that the role of legal ideology is to sustain the myth of the distinction between law and politics, in this in-

stance, law was the vehicle for reasserting the distinction between politics and science, and between the public and the private.

Members of the Yavapai community did, and still are, responding to the categories of value, interest, and, implicitly, identity that were assumed within the bureau's rational decision framework. But rather than resulting in some neat commensurated closure, the effect of the imposition of the categories and assumptions of the rational decision framework was to deepen and make more evident, and perhaps even elicit, incommensurabilities among some groups and between arenas.

Although she uses different terms to describe a comparable process, Viviana Zelizer's (1989, 1994) analyses of the social meaning of money discloses how people's ability to circumvent commensuration by recreating incommensurable categories can be a practical strategy for empowerment, one that emerges directly from experience with these forms. For women denied the right to control money, the ferreting away and marking of household money can be a means of resisting patriarchy, just as trivializing a woman's "pin money" can be a means of reproducing it. Gender, class, power, and morality become encoded in our use of money in ways that creates "special," incommensurable categories of money that subvert its transitivity and anonymity. Zelizer's goal is to show how, *contra* most classical theory, rationalization, as stimulated by and embodied in money, is not necessarily the one-directional, unremitting process that strips economic exchange of its social and moral meanings; nonetheless, given the broad and varied extensions of rational forms that now exist, the symbolic power of the incommensurable categories that we create and defend may well become more pronounced and precious.<sup>22</sup>

One effect of commensuration was to make the stakes of the decision more apparent, as the goal of rationality would have it, but not always in the ways imagined by those who promoted these techniques. The controversy evoked competing sources of authority for the bureaucrats and the Yavapai, criss-crossing lines of power and culture. In doing so, it sharpened distinctions, repoliticized and destabilized some of the signs and practices that rational choice theory presumes can be made to stand still: commensuration as a technical strategy for inclusion became exclusionary; in measuring culture, culture was transformed; in integrating value, value was revaluated; in asserting the universality of rationality, rationality was particularized; in making technical the

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<sup>22</sup> An assumption that we have the capacity to subvert supposedly "fixed" categories is also compatible with that of Cyert & March (1963:116–17), who argued that the endemic conflict within organizations is only "quasi-resolved," since any real attempt to formally mitigate differences would succeed primarily in identifying and exacerbating them.

symbolic, technique became, to some, recognizably symbolic—all in a swirl of politics and practice.<sup>23</sup>

While the economic and political sides of domination have been well analyzed by social scientists, less attention has been paid to the significance of cultural domination (Comaroffs 1988; 1991:309–14). Yet, as Jack Goody (1977:37), Stuart Hall (1992:252), and others have suggested, “modes of communication” and “relations of representation” are a distinct venue of power that demands explanation. Law, whether enacted by bureaucrats, judges, lawyers, or litigants, creates categories that become imposed on and practiced in the world. We should not be surprised that these categories have consequences: whether as basic as dictating causal logic, as implicit as defining which kind of person can have an interest, or as inclusive as controlling how to convey value, the potential of legally mediated categories to mark difference, shape consciousness, and inform the actions of those who confront them is a crucial form of power. As Martha Minow (1990:50–78) has argued, categories of difference and sameness, fundamental to legal reasoning, are categories of inclusion and exclusion that carry with them many hidden assumptions that obscure their political and moral consequences. My analysis discloses some of those hidden assumptions for the categories associated with one important law: a law that has become a powerful impetus for commensuration and rationalization; a law that has transformed the decisionmaking procedures of state and federal agencies in this country; a law that has created an entire industry of environmental analysts and experts in “public involvement”; and a law that has been emulated throughout the world. But the Yavapai response to this particular interpretation of NEPA also shows how legal and bureaucratic categories are not simply static impositions on those whose lives they touch. In the reaction against these categories, troubling contradictions were revealed that shaped the political contest and influenced its outcome. Because identities now seem so fundamental and fragile, the categories that impinge on identity are perhaps among the more potent and least stable.

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<sup>23</sup> I am grateful to an astute anonymous reviewer for having prompted me to at least think more deeply, if not more definitively, along these lines.

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