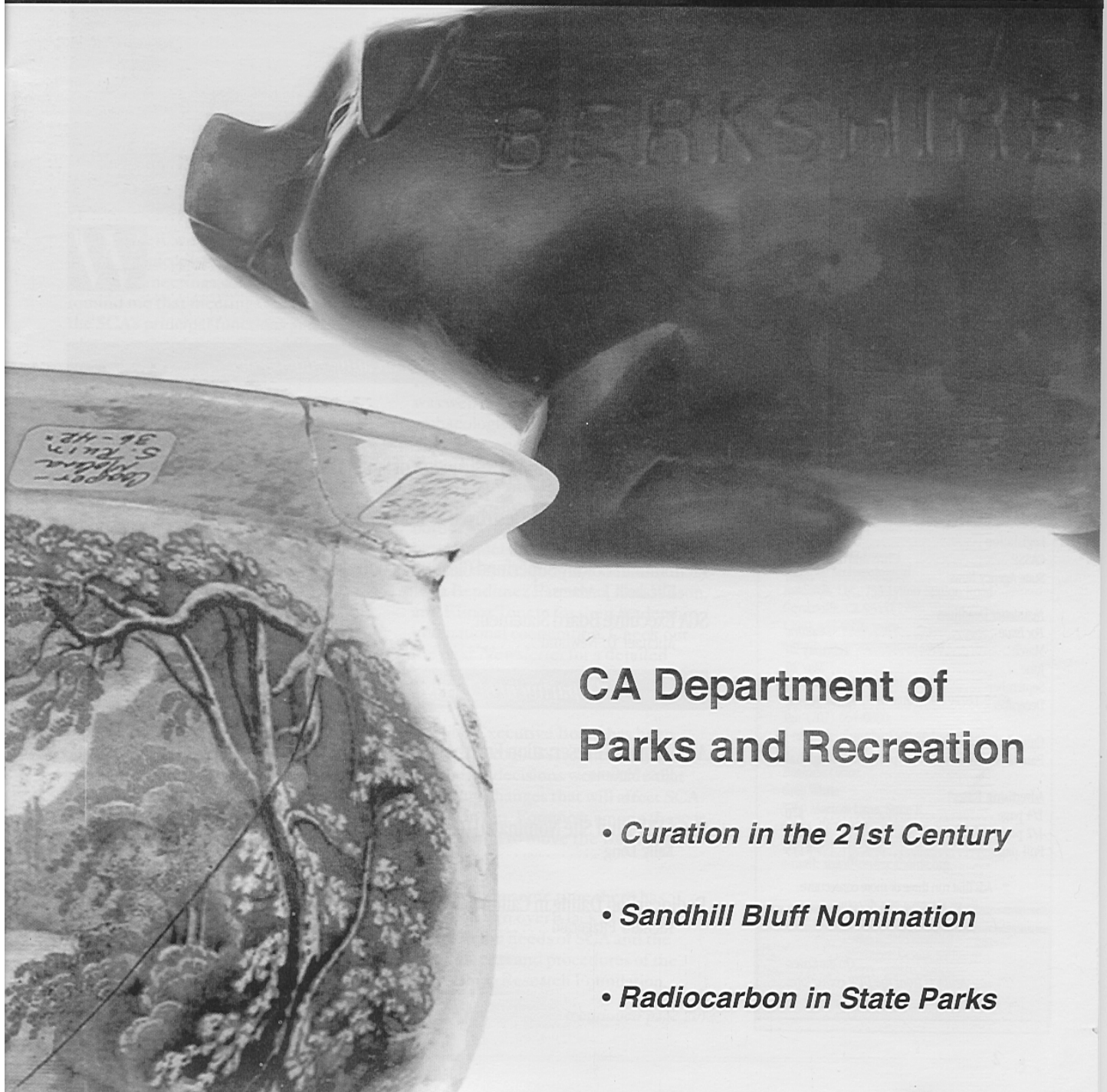


Society for
California Archaeology
Newsletter

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**CA Department of
Parks and Recreation**

- *Curation in the 21st Century*
- *Sandhill Bluff Nomination*
- *Radiocarbon in State Parks*

Environmental Protection Agency's Superfund Cleanup at Elem Indian Colony

Statements by:

- *Batsulwin (Eagle) Brown, Vice-Chairman Elem Indian Colony*
- *Dr. John Parker, Professional Archaeologist.*
- *Elizabeth J. Adams, Chief, Site Cleanup Branch Region 9, Superfund Division U.S. EPA.*

*With an introduction and SCA Executive Board statement
assembled by Michael D. Newland, Northern California Vice-President.*

Since the early 1990s, the United States Environmental Protection Agency (EPA) has planning the removal of mercury-laden soils from lands held by the Elem Indian Colony, located on the southeast shores of Clear Lake, in Lake County, California. The mining waste was deposited on tribal lands by the Bureau of Indian Affairs in the 1970s when they built housing pads and roadbeds for the tribe (United States Environmental Protection Agency [EPA] 2007). The waste was taken from the adjacent Sulphur Bank mining complex as well as other nearby locations. After tribal consultation, the EPA began earthmoving activities in June of 2006 with tribal monitors present. During excavation, a substantial midden component of CA-LAK-76/H was removed before any qualified cultural resource professional was hired to address regulatory requirements for the project (Holson 2006a:2-3, 2006b; Parker 2006 25-26). Pacific Legacy, Inc. was hired to provide an immediate assessment of the situation. Following their recommendations, and in consultation with the tribe, EPA hired an archaeologist to prepare a treatment plan and monitor alongside tribal representatives. The Elem chose Dr. John Parker, RPA, to conduct the study. Subsequent disagreement arose between Parker and the EPA, and several tribal members have voiced concern over the project's implementation by EPA.

At the 22 March 2007 SCA Executive Board Meeting in San Jose, the SCA Executive Board was asked by Dr. John Parker to make a statement regarding the EPA Superfund Cleanup Project. Dr. Parker brought photos taken of the project and artifacts recovered during ground disturbance. The SCA Board agreed to look into the matter further, and over the past six months, invitations to provide formal statements on the project were sent to the Elem Tribal Chairman, Ray Brown Sr., and Tribal Vice-Chairman, Batsulwin "Eagle" Brown; the EPA's Region 9 Superfund Division; and Dr. Parker. SCA Northern California Vice-President Michael Newland met with EPA representatives

John Kennedy and Richard Sugarek in June, at which time they presented their own set of photos and supporting documentation for Board review at the June Executive Meeting. The statements below represent the responses received from the different parties; no response has been received from Chairman Brown.

Review of EPA Superfund's Destruction of Southeastern Elem Pomo Cultural Sites

Batsulwin Brown

Tribal Vice-Chairman, Elem Indian Colony

When the EPA project started I was employed and appointed as the lead tribal monitor by our environmental department due to my background and training as a tribal monitor. This project was very important to me because I am also one of the traditional roundhouse leaders at Elem. From the first day on the job I encountered artifacts and it really alarmed me when none of the EPA officials or sub-contractors seem to care about these findings at the project site. Therefore I reported this to the tribal officials, environmental staff and the Tribal Administrator. The EPA staff seemed to be only concerned about completing the job ASAP. The only response and advice I received was from the Tribal Administrator who happens to be my father Jim Brown and who has had years of experience with this issue. Back in the 1970s, as tribal administrator, he helped with the nomination of the Mercury mine to the superfund, and as tribal Chairman from 1998-2000, sent legal notices to EPA managers including Keith Takata and Ellen Manges, former Superfund Project Manager, informing them of the existing historic and prehistoric cultural resources at the mine site and the Elem Tribal lands. This resulted in the tribe receiving a sub-contract to escort and monitor all EPA workers and their sub-contractors while they were on the Elem Tribal lands and the Superfund site.

Once the new Superfund Manager Rick Sugarek came on the job along with their new sub-contractor CH₂MHILL everything changed as they brought in with them a "Cowboy Mentality" that was only concerned about time and money, and our cultural prehistoric history was sacrificed, although this project was classified as a "Non-Time Critical Removal Project." At first it appeared that the EPA was going to adhere to our tribal concerns, but once the families were relocated off the reservation we witnessed a different attitude. I continued to complain about the artifacts without any resolution; then we encountered bone. We called the Native American Heritage Commission and the Sheriff Corner, and a local archeologist was called in to identify the bone which was animal; however, the tribe then demanded a tribally approved archeologist to be hired before the project continued. The tribal administrator called Dr. John Parker and then we found out that the EPA did not comply with Section 106. He also called the Advisory Council on Historic Preservation who sent a letter to Mr. Keith Takata, Director of the EPA.

Unfortunately, once Dr. Parker started work, the aggression by EPA to suppress our efforts to protect cultural sites advanced. For example I was moved to construction work and less qualified monitors were used, access to the site was restricted, and I along with many other cultural leaders were threatened with arrest if we would continue to request access to our roundhouse for ceremonial purposes. The most direct violation came when Dr. Parker requested the sub-contractor to stop work on the 1906 historic village site until he returned from the weekend. However, as soon as he departed the contractors completely graded the site out of existence. During the project I purchased a video camera and have a record of most of these activities including meetings held between the EPA, the Elem Tribal Chairman, and Dr. Parker that can verify these violations. In November of 2006 I was elected as tribal Vice-Chairman and started to address these concerns at the tribal council level. I felt very confident when the Elem Executive Council voted to pay a legal firm to review possible litigation on behalf of the tribe.

The Council started to get mixed statements from the Chairman about legal action and once again the Council voted to pursue legal action. I later received a disturbing e-mail with a copy of a letter that our Chairman sent to EPA giving them his support. I immediately submitted this on the agenda of the Executive Committee meeting, and the Chairman informed the Council that this was only his personal view and that he did not speak on behalf of the tribe; his statement is in our official tribal records. At the August 2007 Elem General Council Meeting this issue was brought before the Council including information that our Chairman was on the payroll of EPA as a site manager during this time and the General Council felt this was a direct conflict of interest and would not allow the Chairman to further negotiate with EPA on the Tribe's behalf, and voted to go forward on the lawsuit.



*Elem in 1906, from Grace Nicholson collection.
By permission of the Huntington Library.*

As a descendent of an 11,000 year old Southeastern Pomo tribe I now must have faith in the legal system and respectfully request all citizen's to support our legal effort to correct this unprofessional behavior that lead to the destruction of my tribe's prehistoric and historic past. Thank you.

Pomo Cultural Heritage Destroyed by the Environmental Protection Agency (EPA)

Dr. John Parker

The Government's premier environmental agency got away with destroying an archaeological site ½ the size of a football field, and continues to destroy sites throughout the U.S. by ignoring the National Historic Preservation Act (NHPA). Are you pissed enough to do something about it? If so, read on.

In 2006, the EPA removed toxic mine waste and underlying soils at the Elem Indian Reservation on the shores of Clear Lake. Immediately beneath the mine waste lay the remains of the ethnographic village of *Xunadai* (Barrett 1908). There was no pre-project archaeological survey, no cultural resource treatment plan, no project archaeologist, and

Elem in 1880, taken by R.E. Wood. By permission of the Bancroft Library.



no 106 compliance. After two months of excavation, bones were discovered. The Tribe called and asked what to do. I said, "Have the project archaeologist identify them." The response was, "What project archaeologist?" I immediately called SHPO and discovered there was no record of 106 consultation as required by the NHPA.

The Resource Destroyed

Archaeological research suggests the Elem community has lived on the shores of Clear Lake for 12,000 years (Parker 1994). Imagine the size and content of that cultural deposit. That was the site in the path of the EPA project. *Xunadai* was first recorded as CA-LAK-76/H by Pilling in 1946 and is the largest archaeological site on the reservation. Approximately 7,000 cubic meters of cultural soil had been destroyed prior to our arrival (Parker 2007).

The EPA Knew Better

Six years earlier, the Tribe asked the EPA for an archaeological study before the project started. The Tribal Chairman sent a letter to the EPA coordinator stating:

"Until this study is accomplished the entire area should be deemed an archaeological sensitivity zone and until a comprehensive and adequate cultural resources assessment has been completed no earthmoving activities should occur within this zone." (J. Brown 2000). "

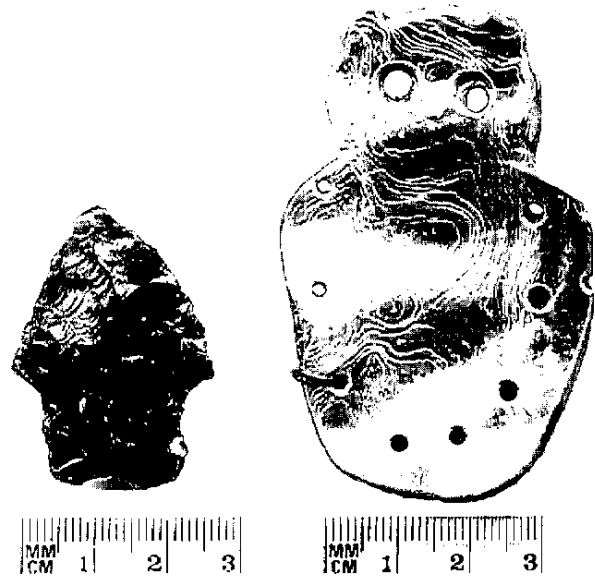
Before construction, the Tribal Administrator gave the EPA a tour, showing the artifacts existing within the project area (J. Brown 2007). Yet, 5 months after the destruction, EPA Superfund Director Keith Takata responded to an inquiry from the Advisory Council on Historic Preservation, by saying:

"EPA had no expectation that cultural resources would be encountered"

Takata stated that the EPA had an agreement with the Tribe to stop work and:

"bring in an archaeologist if significant artifacts or remains were inadvertently discovered." (Takata 2007)

Significant artifacts and cultural soils were unearthed the first day, yet 2 months of excavation took place before a work stoppage and archaeological evaluation occurred (B. Brown 2007). When called by the Tribe to assist, we discovered there had been no Section 106 compliance. The EPA made it clear they had no intention of complying. Our recommendations to protect resources were either ignored, or only grudgingly followed. We were "allowed" to do data recovery only if it was "convenient" to the EPA. Our excavation protocol to preserve sites, was violated an average of once every 3 days. EPA contractors reassigned Tribal cultural monitors to safety crew, road crew, and gate security jobs. The EPA project director said they were "exempt" from the NHPA because this was a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) project. The EPA General Council told him not to comply with Section 106 because "it would set a precedent requiring



Artifacts found on during monitoring of earthmoving activities at Ca-Lak-76/H. (Left) Borax Lake widestem point; (Right) abalone pendant found beneath mine waste.

compliance on all such projects in the future." On returning to our office, we reviewed CERCLA law and discovered the EPA was NOT exempt and *must* comply with the NHPA and consult with the Tribe, BIA, SHPO, and the Advisory Council before initiating such projects (See 40 CFR 300.5 and 40 CFR 300.310).

So how does the EPA get away with it? Superfund cleanup sites are locked off to the public. Because few archaeologists ever see the damage being done, no reports of atrocities ever reach the public. The EPA is involved in hundreds of toxic waste cleanup projects throughout the U.S. As you read this, there are likely thousands of historic and prehistoric sites being destroyed illegally with no 106 compliance.

If you would like to join me in taking action, please contact me at crm@tcsn.net or visit my website at www.tcsn.net/sloarchaeology/political.html.

Thank you for your time and consideration.

Elem Indian Colony Superfund Cleanup Action

*Elizabeth J. Adams
Chief, Site Cleanup Branch, Region 9, Superfund Division
United States Environmental Protection Agency*

Thank you for the opportunity to provide project information to address the concerns of the Society for California Archaeology (SCA) membership regarding the Environmental Protection Agency (EPA) 2006 Mine Waste Removal Action at the Elem Indian Colony.

The Elem Indian Colony Mine Waste Removal Action is a very important cleanup project for the Elem Pomo Tribe.

The Elem Pomo leadership has long demanded that EPA completely remove the contaminated mine wastes from their residential area in order that their children would be protected from the mercury, arsenic and antimony contamination. The high levels of mercury in these mine wastes are particularly harmful to young children and women of child bearing age. The Elem Pomo leadership was concerned that cleanup approaches that would cap and leave the contaminated mine wastes in place could pose a problem to future generations should the capping materials erode or not be maintained. In developing the final removal action, the Elem Pomo leadership preferred the full removal of the contaminated mine wastes.

Throughout the planning and implementation of this project, EPA was very aware of the importance that the Elem Pomo Tribe places on its cultural heritage and religious practices. EPA worked closely with the Elem Pomo leadership to develop an appropriate plan to identify, recover and protect Elem cultural resources that may inadvertently be discovered during necessary mine waste excavation activities, while balancing the need to protect human health from the effects of contaminated mine wastes that underlay the homes of many tribal members and the roads that provide tribal members access to their homes. During the construction phase, EPA coordinated closely with the Elem Pomo leadership and Elem Pomo cultural leaders to assure safe access to their tribal land for cultural dances, funerals and other religious practices.

EPA's removal action was designed to carefully remove contaminated mine wastes from the residential yards and the roadbeds of the Elem Indian Colony residential area. Moreover, the underlying areas were highly impacted by the earlier Bureau of Indian Affairs heavy construction efforts. Therefore, it was unlikely that intact cultural resources would be encountered during the project. Because there were no records of the earlier construction activities to guide EPA's design efforts, EPA proposed to the Elem Pomo leadership that the project include construction monitoring to be performed by a trained Elem cultural monitor to identify and protect any artifacts that might inadvertently be discovered during mine waste excavation activities. EPA agreed to bring in an archaeologist if significant artifacts or remains were discovered. This cultural resource monitoring approach was accepted by the Elem Pomo leadership.

During the course of the first phase of excavation activities a number of obsidian artifacts and three bone fragments (later identified as animal in origin) were identified and recovered by Elem cultural monitors. At the recommendation of the Elem Pomo leadership, EPA's contractor brought in an archaeologist, Dr. John Parker, who the Elem Leadership felt confident would be able to guide the remaining excavation activities. At this time EPA also consulted with the State Office of Historic Preservation regarding the inadvertent discovery of artifacts and our efforts to identify and protect Elem Pomo cultural resources.

Dr. Parker developed a Cultural Resource Monitoring and Mitigation Plan and provided oversight of EPA's excavation and backfill activities for the remainder of the project. Dr.

Parker developed and implemented two data recovery and mitigation plans for excavation activities that were necessary to construct the storm water drainage pipeline, the new water supply system, and the excavation of mine wastes from an old gravel roadbed. The artifacts that have been identified and recovered are currently in the possession of Dr. Parker for study and reporting. Once this work is completed, the artifacts are to be returned to the custody of the Elem Pomo Tribe. Dr. Parker will assist the Elem Pomo Tribe to set up a curation facility.

SCA Executive Board Statement

Michael D. Newland

SCA Northern California Vice-President

While no one disagrees that the removal of mercury-laden soils from tribal lands is an important and necessary task, as can be seen from the three statements above, there is considerable disagreement between how the EPA, different Elem tribal council members, and John Parker see the Elem EPA Superfund Cleanup Project. The EPA believes that they have coordinated closely with the tribe, hired tribal monitors early in the project, and, at the tribe's request, hired Dr. Parker in an effort to assess the significance of cultural resources that were turning up as a result of construction. Vice-Chairman Brown states that the concerns of tribal monitors were ignored during construction activities and that internal tribal issues complicated the sending of a clear message between the tribe and EPA; the tribe has recently voted to take legal action on the project. Dr. Parker points out that there does not appear to be any attempt to follow Section 106 of the National Historic Preservation Act of 1960, as amended, or the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA); that his efforts to protect exposed cultural resources were either blocked or only grudgingly accepted, and that the overarching EPA bureaucratic culture is one that ignores compliance with cultural resource laws.

Despite these differences, several concerns are immediately clear to the Board:

1. In the first two months of the project, no attempt was made to comply with Section 106 regulations. There was no pre-construction archaeological survey, no sensitivity study, no attempt to identify resources that were eligible or potentially eligible for the National Register of Historic Places, and no effort to have in place some sort of formal treatment plan to address potentially significant resources that could be uncovered during construction. After two months of earth-moving activities had taken place, the EPA discussed the project with OHP, who, though indicating that "prior consultation between EPA and the State Office of Historic preservation would have been preferable," tentatively agreed that the project could proceed once the EPA received formal approval from the Elem Tribe (EPA 2007);
2. While the EPA and Dr. Parker may differ about the size of the disturbance to the site, judging by the photographic

evidence submitted by both parties and archaeological reports from both Dr. Parker and John Holson of Pacific Legacy (Holson 2006), a substantial portion of what appears to be an intact deposit was mechanically excavated and removed prior to the hiring of a qualified archaeologist;

3. In the EPA's own statement, they acknowledge that while they believed that the "underlying areas were highly impacted by the earlier Bureau of Indian Affairs heavy construction efforts" there were "no records of the earlier construction activities to guide EPA's design efforts" — EPA's own understanding of previous construction work in the area was incomplete;
4. EPA did not begin consultation with the State Office of Historic Preservation until the OHP received a complaint from Tribal Administrator Jim Brown III in July of 2006, a month after earth moving activities had started.

As no one from the SCA Executive Board was present during the time of construction, we are unable to address the treatment of tribal monitors or the attitudes of construction crews and EPA representatives towards monitors or cultural resources. Photos from Dr. Parker, the Elem Colony Environmental Department (2006), and the EPA indicate that tribal monitors were present during at least some phases of construction. Chairman Brown's letter of 4 August 2006 states that he "authorizes EPA to perform all activities necessary...provided that the EPA follows the Earth Moving Protocols for the Elem Soil Remediation Project developed by Dr. John Parker for the protection of our important cultural and historic resources." Dr. Parker's statement indicates that these protocols may not have been followed.

The SCA Board typically does not get involved in site-specific local archaeological issues. However, the Board has decided to make a public statement on this project and to pursue the matter further with EPA because this has wider implications regarding agency policy and protocol. Given the way that the project had proceeded, it does not appear likely that EPA would have consulted with OHP had the office not been notified of problems with the project by Jim Brown III—by the EPA's own accounting, no effort to contact OHP prior to this had been made.

At issue here are three main concerns that the Board believes has implications beyond the Elem project:

1. The lack of an EPA Cultural Resource Manager anywhere within Region 9, which covers Arizona, California, Nevada, Hawaii, and the Pacific Islands, clearly has resulted in the lack of oversight on this and presumably other EPA projects;
2. The lack of an internal process for complying with Section 106, CERCLA, and other federal laws and regulations that apply to cultural resources has resulted directly in the destruction of at least a portion of what appears to be an important archaeological resource;
3. The growing trend in the cultural resources management field that tribal consultation is the only component of

Section 106 that needs to be followed, that tribal monitoring is the equivalent of or can be conducted in lieu of archaeological study, and that values attributed to cultural resources by tribal groups are the only values those resources have, is clearly resulting in the loss of cultural resources.

Had a professional cultural resource manager been on part of the project planning team in the beginning, they could have overseen a proper records search, sensitivity study, and archaeological survey that would likely have identified the area as archaeologically sensitive. While trained tribal monitors are key to any successful earth-moving project in an archaeologically sensitive area, they do not take the place of a professional archaeologist, who may place research value on artifact fragments that tribal monitors may overlook or do not consider culturally important. Had the EPA followed Section 106 regulations, damage to this site could have been avoided, resources important both to the tribe and for archaeological research could have been protected, and both the EPA and the Elem could have avoided a lawsuit.

The Board hopes that these sorts of problems can be avoided in the future. To this end, we have sent a letter to the EPA Region 9 Superfund Division Director in October 2007 requesting a meeting to discuss the hiring of a regional Cultural Resources Manager. The Board has received a reply and a meeting was held in January, 2008. The results of this meeting will appear in future issues of the *Newsletter*. The EPA has stated to the Board that a Section 106 training seminar will be held for regional managers in December 2007 as a response to the issues that arose during the Elem project. While we believe that this is a good start, it doesn't begin to address the concerns that this project illustrates. The EPA may not be a major landholding federal agency like the Bureau of Land Management or United States Forest Service, they are, however, a major earthmoving agency. Undoubtedly many of the toxic waste sites they clean up, such as mines and industrial complexes, have substantial historic-era components in addition to potential prehistoric resources. The lack of oversight and a formal process for complying with the law that this project illustrates is glaring, completely avoidable, and needs to be addressed immediately by the EPA.

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United States Environmental Protection Agency [EPA]

2007 Attachment 3: Summary of EPA Actions to Comply with the Requirements of Section 106 of the National Historic Preservation Act and its Implementing Regulations (36 C.F.R. Part 800) to Assure the Protection of Elem Cultural Resources While Carrying Out the Contaminated Mine Waste Removal Action. Document submitted to the Society for California Archaeology Executive Board by John Kennedy and Richard Sugarek of EPA in June 2007.

Society for California Archaeology Annual Meetings, 2008-2010

April 17-20, 2008: Marriott Burbank Airport and Convention Center.

March 12-15, 2009: Doubletree Hotel, Modesto.

March 17-20, 2010: Riverside Convention Center, Marriott and Mission Inn Hotel

Watch www.SCAHome.org for details.

