
Consultation with American Indian Tribes: Resolving Ambiguity and Inconsistency in Government-to-Government Relations

Tarah Bailey*

As the salmon disappear, so do our tribal cultures and treaty rights. We are at a crossroads and we are running out of time.
– Billy Frank Jr.¹

Table of Contents

INTRODUCTION	196
I. THE DAKOTA ACCESS PIPELINE.....	197
II. THE TRIBAL TRUST DOCTRINE.....	202
III. TRIBAL LAWSUIT AND CONCERNS	203
IV. HISTORY OF THE GREAT SIOUX NATION.....	207
V. TRIBAL CONSULTATION	208
A. Clinton and Obama Memoranda and Executive Orders.....	209
B. Bush Administration Memo	211
C. U.S. Army Corps of Engineers Policy on Tribal Consultation.....	211
i. The Corps' Failure to Abide by Its Own Policy Throughout DAPL Process	212

* J.D. candidate, 2018, University of Colorado Law School. Special thanks to the supporters of Indian country and indigenous peoples' human rights. And thanks to Professors Charles Wilkinson and Richard Collins for their invaluable wisdom and courses on Indian law.

¹ Billy Frank Jr., We Need to Win the Battle for Salmon Recovery, NW. INDIAN FISHERIES COMM'N (Feb. 6, 2012), <https://nwifc.org/we-need-to-win-the-battle-for-salmon-recovery/>.

D. Free, Prior, and Informed Consent	214
E. Improving Consultation with Tribes.....	215
i. Report on Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions	215
ii. H.R. 5608: Consultation and Coordination with Indian Tribal Governments	217
iii. Current Effective Consultation Policies	217
VI. RESOLVING INADEQUATE TRIBAL CONSULTATION	218
A. Tribal Codes	218
B. Best Practices and Key Principles	219
C. Federal Legislation	220
i. Adoption of the FPIC Standard	220
ii. Designate a Point-of-Contact.....	220
D. Memorandum of Understanding	221
E. Secretarial Order.....	221
CONCLUSION.....	222

INTRODUCTION

Political protests at the Standing Rock Reservation in North Dakota symbolize the modern Indian movement demanding the federal government to recognize tribal sovereignty and treat American Indian tribes as respectable governments. The protests at Standing Rock serve as a catalyst for the tribes' call to be consulted, as required by federal laws, before major development projects requiring federal government approval are underway. The concept of consultation with Indian tribes is not new. Tribal demands to be treated as sovereign governments, and given an opportunity to participate in decision-making processes, has permeated throughout Indian country for years. The construction of the Dakota Access Pipeline ("DAPL") brought the movement for meaningful consultation to a head.

Tribes began camping out on land near Cannonball, North Dakota in April 2016 to protest the construction of DAPL.² Members of the

² Jack Healy, *North Dakota Oil Pipeline Battle: Who's Fighting and Why*, N.Y. TIMES (Aug. 26, 2016), <https://www.nytimes.com/2016/11/02/us/north-dakota-oil-pipeline-battle-whos-fighting-and-why.html>.

Standing Rock Sioux tribe, as well as indigenous peoples from all across the United States and foreign countries see the pipeline as a major environmental and cultural threat.³ Although the news media has labeled most protesters as “water protectors,” one of the greatest concerns is the federal government’s flagrant refusal to treat the Tribe as a sovereign government and to engage the Tribe in “meaningful consultation.” When evaluating major construction projects that could affect a tribe, the federal government is inconsistent in its consultation process and often ignores tribal interests and concerns. This is the subliminal cry that has brought tribes and indigenous peoples to the Standing Rock site in protest.

Tribes want to be, and should be, active participants in the decision-making and management of projects affecting their resources, interests, and rights. This Note evaluates, as a matter of policy, how the federal government should engage tribal participation at the earliest stage in the project planning process and seeks to resolve how federal agencies can consult meaningfully. Part I of this Note will provide background on DAPL, generally, and explain DAPL’s process in acquiring federally approved permits for construction of the pipeline across federal waters. Part II introduces the tribal trust doctrine and describes the unique relationship between American Indian tribes and the federal government. Part III addresses the tribes’ concerns and the Standing Rock Sioux’s claims against the federal government in a federal lawsuit. Part IV details the history of the Great Sioux Nation and its previous struggles with the federal government. Part V explains and analyzes the concepts surrounding tribal consultation. Part VI aims to resolve agency inconsistencies in tribal consultation practices and concludes that regardless of whether future federal legislation is passed, the federal government should work collaboratively with tribal nations throughout the project approval process. The Conclusion briefly summarizes this Note.

I. THE DAKOTA ACCESS PIPELINE

In 2012, Dakota Access, LLC applied to the United States Army Corps of Engineers (the “Corps”) for permits and permission to construct the Dakota Access Pipeline. DAPL is designed to carry up to 570,000 barrels of oil per day from the Bakken and Three Forks oil field in North Dakota to Pataoka, Illinois.⁴ The pipeline would then link with another pipeline that would transport the oil to terminals and refineries along the

³ Id.

⁴ Dakota Access Pipeline, U.S. ARMY CORPS OF ENGINEERS, <http://www.usace.army.mil/Dakota-Access-Pipeline/> (last visited Mar. 24, 2017).

Gulf of Mexico.⁵ Although the pipeline mostly extends across private land, it crosses Lake Oahe, a portion of the Missouri River, a navigable waterway and a primary water source for the Standing Rock reservation. Because Lake Oahe is also a federally-owned navigable waterway, DAPL needs a permit from the Corps under the Clean Water Act (“CWA”) and the Rivers and Harbors Act of 1899 (“RHA”) to construct the pipeline across this area.⁶

The Corps issued a Nationwide Permit 12 (“NWP 12”) in 2012, granting Dakota Access the necessary permit to construct the pipeline across Lake Oahe⁷ without consideration of the pipeline’s threat to the Tribe’s drinking water supply, its destruction of culturally significant sites, or its disruption to nearby wildlife habitats.⁸ NWP 12 “authorizes utility line construction that affects no more than 0.5 acres of jurisdictional waters at any single crossing, and which otherwise complies with the NW 12 general conditions.”⁹ Because the NWP 12 permit is not considered a “major federal action” that would trigger the National Environmental Protection Act (“NEPA”), DAPL and the Corps were not required to carry out the extensive environmental impact studies and other procedural processes that are required under NEPA.¹⁰

⁵ The Dakota Access Pipeline, EARTHJUSTICE, <http://earthjustice.org/cases/2016/the-dakota-access-pipeline> (last visited Mar. 24, 2017).

⁶ See Clean Water Act, 33 U.S.C. § 1344(e) (2006); see also EARTHJUSTICE, *supra* note 5 (explaining that USACE is responsible for evaluating and issuing permits for all navigable water crossings under section 404 of the Clean Water Act and Sections 10 and 14 of the Rivers and Harbors Act of 1899).

⁷ Updates and Frequently Asked Questions: The Standing Rock Sioux Tribe’s Litigation on the Dakota Access Pipeline, EARTHJUSTICE, <http://earthjustice.org/features/faq-standing-rock-litigation#> [hereinafter EARTHJUSTICE FCQ].

⁸ See *Sierra Club v. U.S. Army Corps of Eng’rs*, 64 F. Supp. 3d 128, 146 (D.D.C. 2014), *aff’d sub nom. Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31 (D.C. Cir. 2015) (holding that in granting a NW12 permit for the construction of a 589-mile pipeline that would cross waters did not trigger a NEPA analysis because if the federal agency itself is not undertaking or financing the project in question, the agency action qualifies as “major federal action” for NEPA purposes only if the agency’s act is tantamount to a permit that allows the project to proceed); see also *Ramsey v. Kantor*, 96 F.3d 434, 443 (9th Cir. 1996) (noting that “if a federal permit is a prerequisite for a project with adverse impact on the environment, issuance of that permit does constitute a major federal action.”).

⁹ Frequently Asked Questions DAPL, U.S. ARMY CORPS OF ENGINEERS, <http://www.nwo.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/749823/frequently-asked-questions-dapl/> (last visited Mar. 24, 2017).

¹⁰ *Id.* (noting that a NW12 permit is not a “major federal action” for purposes of NEPA and that “the entire point of the general permitting system is to avoid the burden of having to conduct an environmental review under NEPA when a verification—as distinguished from an individual discharge permit—is sought.”).

Under NEPA, all federal agencies, such as the Corps, are required to take a “hard look” at the environmental impacts of any “major federal action significantly affecting quality of the human environment.”¹¹ NEPA regulations define “major federal actions” as “projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies.”¹² If an agency initially concludes that a project would or could cause adverse impacts to the environment, it is required to prepare an Environmental Assessment (“EA”). An EA must thoroughly identify the project’s environmental concerns, propose alternative solutions, and determine whether the environmental impacts would be so significant that a full Environmental Impact Statement (“EIS”)—which would look at the environmental impacts and alternate solutions in more detail—is necessary.

Although the Corps was not required to prepare an EA or EIS for approval of its NWP 12 permit, it did prepare an EA in accordance with section 408 of the Rivers and Harbors Act of 1899 for the Lake Oahe crossing because the project would alter the bed of the river.¹³ This EA, finalized in July of 2016, resulted in a “finding of no significant impact” (“FONSI”).¹⁴ Under NEPA, a FONSI means that the Corps decided that construction of the pipeline would cause no significant environmental impacts that would trigger a full EIS analysis.¹⁵ DAPL and its contractors conducted and prepared the EA, then the Corps approved it, granting DAPL a section 408 permit.¹⁶ The section 408 permit allows DAPL to horizontally directionally drill (“HDD”) under the Missouri River navigational channel to construct the pipeline.¹⁷

¹¹ National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (2012).

¹² 40 C.F.R. § 1508.18(a) (1975).

¹³ 33 U.S.C. § 408 (2012).

¹⁴ A FONSI is a “finding of no significant impact” that allows the agency to issue the permit without conducting an EIS analysis under NEPA. 42 U.S.C. §§ 4321–4333.

¹⁵ Dakota Access Pipeline final EA and FONSI released for ND Section 408 crossings, U.S. ARMY CORPS OF ENGINEERS (July 28, 2016), <http://www.nwo.usace.army.mil/Media/News-Releases/Article/878649/dakota-access-pipeline-final-ea-and-fonsi-released-for-nd-section-408-crossings/>. It is important to note that an EIS can take years to complete, is more expensive and much more detailed than an EA, and requires extensive surveying of the land and hiring of third party experts and consulting firms.

¹⁶ *Id.*

¹⁷ 33 U.S.C. § 408 (providing, in part, that “the Secretary may, on the recommendation of the Chief of Engineers, grant permission for the alteration or permanent occupation or use of any of the aforementioned public works when in the judgment of the Secretary such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work.”).

The risk of an oil spill in the Missouri River puts the Tribe's drinking water supply in grave danger. In 2010, a single pipeline spill poured 1,000,000 gallons of toxic bitumen crude oil into the Kalamazoo River in Michigan.¹⁸ It cost over one billion dollars for the cleanup, and significant contamination still remains.¹⁹ In its route to the Gulf, DAPL would also cut through wildlife habitat, environmentally sensitive areas, and sacred tribal burial grounds.²⁰ Although it is constructed mostly on private land, the pipeline's impacts on the environment and disturbance to tribal resources and sacred sites should warrant full NEPA review. The Corps should prepare an EIS to appropriately consider the pipeline's disruptions to the surrounding natural habitat, threats to water and wildlife, and destruction of tribal sacred sites and resources.

According to the DAPL website, there are seven other pipelines that cross near the Lake Oahe site and the pipeline is the safest and most environmentally sensitive way to transport crude oil from domestic wells within the Bakkan oil field.²¹ However, this assertion does not address why DAPL or the Corps failed to engage the Tribe in consultation. Failure to treat the Tribe as a government, and engage in discussions early on in the planning stages of infrastructure projects violates and undermines the Tribe's sovereignty.

Moreover, Lake Oahe is culturally significant to the Tribe.²² Section 106 of the National Historic Preservation Act ("NHPA") requires federal agencies to consult with Indian tribes whenever a federally proposed or assisted undertaking may affect a historic property to which a tribe

¹⁸ Chip Colwell, *The Misguided Archeological View Behind the Dakota Access Pipeline*, HIGH COUNTRY NEWS (Nov. 22, 2016), http://www.hcn.org/articles/how-the-archaeological-review-behind-the-dakota-access-pipeline-went-wrong/print_view.

¹⁹ *Id.*

²⁰ Tell President Obama: Stop the Dakota Access oil pipeline, CREDO ACTION, https://act.credoaction.com/sign/NoDAPL?sp_ref=228050786.4.174904.f.553322.2&referrer_akid=.4033027.Civ46W&source=fb_share_sp (last visited Oct. 28, 2017).

²¹ Dakota Access Pipeline Facts, <https://daplpipelinefacts.com/> (last visited Mar. 24, 2017).

²² Complaint at 16, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 1:16-cv-01534 [hereinafter *Complaint*] ("There is a direct relationship between the environment, traditional worship practices, and the continued survival of diverse indigenous groups.... For indigenous Tribal Peoples, the Missouri River is characterized as 'The Water of Life' and the very water that created the corridor is considered sacred. When the Army Corps of Engineers built the six mainstream dams on the Missouri River, life for the Indigenous Peoples who called the River home changed immediately and dramatically."); see also Memorandum in Support of Motion for Preliminary Injunction at 10, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 1:16-cv-01534.

attaches religious and cultural significance.²³ In addition to failing to fully consider environmental impacts, the Corps also failed to consider Lake Oahe's significance to the Tribe, as well as the cultural significance of nearby ancestral burial grounds under the NHPA. Furthermore, the Corps violated the NHPA's section 106 consultation requirements by failing to engage in adequate consultation with the Tribe before constructing the pipeline.²⁴

On November 14, the Corps halted the DAPL's construction of the pipeline, issued a letter to Tribal Chairman Dave Archambault II, and invited the tribe to engage in consultation with the federal government in determining whether to grant DAPL a permit for construction of the pipeline across Lake Oahe.²⁵ On December 4, 2016, after discussion with tribal leaders, the Corps denied the section 408 permit and stated that it would require a full EIS under NEPA.²⁶ The Corps, in accordance with 5 U.S.C. § 553(c), then opened a notice-and-comment period in the Federal Register.²⁷ This period was set to end on February 20, 2017, and was intended to allow the public to voice concerns and participate in the decision-making process.²⁸ However, after President Donald Trump took office on January 20, 2017, he issued a Presidential Memorandum directing the Corps to approve the section 408 permit and allow DAPL to begin construction across Lake Oahe.²⁹ Thereafter, the Corps closed the notice-and-comment period, almost a month early and granted DAPL the permit.³⁰ The Corps declined to prepare an EIS, and construction of the

²³ COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 20.02[3][b] (Nell Jessup Newton et al. eds., 2012) [hereinafter, COHEN'S HANDBOOK]; see also National Environmental Policy Act, 42 U.S.C. §§ 4321–4370 (2012).

²⁴ Complaint, *supra* note 22, at 23.

²⁵ Statement Regarding the Dakota Access Pipeline, U.S. ARMY CORPS OF ENGINEERS, (Nov. 14, 2016), <http://www.usace.army.mil/Media/News-Releases/News-Release-Article-View/Article/1003593/statement-regarding-the-dakota-access-pipeline/>.

²⁶ Statement of Intent, U.S. ARMY CORPS OF ENGINEERS, https://www.army.mil/article/180820/dakota_access_pipeline_notice_of_intent (last visited Dec. 10, 2016) (The Corps has since removed this page.).

²⁷ See Notice of Intent to Prepare an Environmental Impact Statement in Connection With Dakota Access, LLC's Request For An Easement to Cross Lake Oahe, North Dakota, 82 Fed. Reg. 5543 (Jan. 18, 2017).

²⁸ See *id.*

²⁹ Presidential Memorandum Regarding Construction of the Dakota Access Pipeline to the Secretary of the Army, (Jan. 24, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-dakota-access-pipeline>.

³⁰ See Standing Rock Will Challenge Any Suspension of Pipeline's Environmental Review, STAND WITH STANDING ROCK (Jan. 31, 2017) [hereinafter Standing Rock Press

pipeline proceeded.³¹ In subsequent litigation, the D.C. Circuit ordered the Corps to prepare a full EIS.³²

II. THE TRIBAL TRUST DOCTRINE

Tribes have a special relationship with the federal government. They are sovereign self-governing nations, and as such, they have a special “trust” relationship with the federal government. This means that the federal government acts as a fiduciary and has a duty to protect tribal rights.³³ Federally recognized tribes are those recognized by treaty, statute, administrative process, or other intercourse with the federal government.³⁴

They are formal political societies and thus demand a “government-to-government relationship between the tribe and the federal government.”³⁵

The Standing Rock Sioux is a federally recognized tribe. Under the trust doctrine, the federal government has a duty to protect the Sioux’s tribal interests. As Felix Cohen explains, “[p]erhaps the most basic principle of Indian law, supported by a host of decisions, is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather ‘inherent powers of a limited sovereignty which has never been extinguished.’”³⁶ This means that tribes reserve all of their traditional rights—like reservation access to water and the right to hunt and fish—that they do not expressly give away by treaty.³⁷ This trust relationship necessitates that the federal government must properly consult with tribes to ensure that tribal interests are adequately protected.

Release], <http://standwithstandingrock.net/standing-rock-will-challenge-suspension-pipelines-environmental-review/>.

³¹ Earthjustice FCQ, *supra* note 7.

³² *Id.*

³³ See *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831); *Johnson v. M’Intosh*, 21 U.S. 543, 573-74 (1823); *Worcester v. Georgia*, 31 U.S. 515, 556-57 (1832).

³⁴ COHEN’S HANDBOOK, *supra* note 23, § 3.02[3].

³⁵ *Id.*

³⁶ COHEN’S HANDBOOK, *supra* note 23, §4.01[1][a]; see also *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

³⁷ See *Winters v. United States*, 207 U.S. 564, 577 (1908) (holding that when a reservation is set aside for a tribe to engage in agriculture, there is, by implication, a right to the water to irrigate since the land would be valueless without the water); *United States v. Washington*, 157 F.3d 630 (W.D. Wash. 1998) (holding that the tribes had a reserved treaty right to take fifty percent of the fish in the river at their usual and accustomed hunting and fishing grounds), *aff’d*, *United States v. Washington*, 827 F.3d 836 (9th Cir. 2016).

III. TRIBAL LAWSUIT AND CONCERNS

Prior to gaining permit approval, Energy Transfer Partners had already constructed approximately ninety percent of the pipeline across private lands.³⁸ As a result, consultation with the Tribe did not occur until most of the pipeline construction was already complete. Due to these concerns, on January 27, 2016, the Tribe filed a lawsuit in federal district court in Washington D.C. requesting an injunction to halt the pipeline's construction.³⁹ The Tribe's complaint rested on two essential legal assertions. First, the federal government violated section 106 of the NHPA by not consulting the Tribe.⁴⁰ Second, the federal government violated NEPA and the CWA by not properly taking a "hard look" at the environmental impacts of the pipeline's construction, and by failing to prepare an EIS that would address the adverse environmental effects of the pipeline's construction and contemplate alternatives.⁴¹

The tribe argues that the area that lay in the path of the pipeline corridor holds eighty-two cultural features and twenty-seven graves.⁴² Tim Menz, a former Tribal Historic Preservation officer of the Standing Rock Sioux, explained that the archeological survey conducted by the Corps glossed over important cultural sites on the land.⁴³ One of the tribe's main concerns is that when archeologists for the federal government fail to work directly with tribes when conducting surveys of the land, they do not take tribal expertise and knowledge into consideration when identifying traditional cultural properties.⁴⁴ As Chip Colwell explains, "[f]or DAPL, a tribal survey was not undertaken. In North Dakota, the Corps tried to engage in consultation dozens of times, but the Standing Rock Sioux largely refused because the federal agency only wanted to consult a narrow corridor at water crossings instead of the entire pipeline."⁴⁵ During one consultation on March 8, 2016, the Tribe showed the Corps staff some important cultural resources: a cemetery, ancient

³⁸ Colwell, *supra* note 18.

³⁹ EARTHJUSTICE FCQ, *supra* note 7.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Colwell, *supra* note 18.

⁴³ Robinson Meyer, The Legal Case for Blocking the Dakota Access Pipeline, THE ATLANTIC (Sept. 9 2016), <https://www.theatlantic.com/technology/archive/2016/09/dapl-dakota-sitting-rock-sioux/499178/>.

⁴⁴ Colwell, *supra* note 18.

⁴⁵ Complaint, *supra* note 22, at 2.

village, and sacred sites. The Corps admitted that they were previously unaware of these sites.⁴⁶

On November 3, 2016, an independent expert hired by the Standing Rock Sioux Tribe (Richard Kuprewicz of Accufacts, Inc., a consulting firm that advises government agencies and industries about pipelines) found that the government's EA of the DAPL's environmental impacts was inadequate.⁴⁷ In light of Kuprewicz's report and the deficiencies contained in the EA, Tribal Chairman Archambault II asked for the government to reconsider its earlier decision and refuse to grant an easement for the pipeline crossing.⁴⁸

On June 30, 2016, the Standing Rock Tribal Historic Preservation Officer, Jon Eagle Sr., wrote to the Corps District Commander regarding the continued construction of DAPL without any section 106 consultation.⁴⁹ The letter requested that the Corps declare that construction of the pipeline would have potential historic impacts, and also asked the Corps to require Dakota Access to submit pre-construction notifications ("PCNs").⁵⁰ The PCNs would require Corps verification that discharges into the river are consistent with the terms of the permit from all of the water crossings so that full section 106 consultation could occur.⁵¹ However, on July 25, 2016, the Corps issued authorization pursuant to section 408 of the RHA allowing Dakota Access to construct the pipeline across the Missouri River in two places, Lake Sakakawea and Lake Oahe.⁵² This nationwide permit ("NWPS") also authorizes Dakota Access to discharge into the river without any additional approval or notification to the Corps.⁵³ Instead of preparing a full EIS, the Corps granted the permit under an EA prepared by Dakota Access that found the pipeline's construction would have "no significant" environmental impact.

As noted above, an EA is the preliminary assessment, required by NEPA, that determines whether a project on federal land would have an adverse impact on the surrounding environment and would therefore require a complete scientific study and analysis.⁵⁴ If a complete study is

⁴⁶ *Id.*

⁴⁷ EARTHJUSTICE FCQ, *supra* note 7.

⁴⁸ *Id.*

⁴⁹ Complaint, *supra* note 22, at 17.

⁵⁰ *Id.* at 17.

⁵¹ *Id.*

⁵² *Id.* at 19.

⁵³ See 33 C.F.R. § 330.1(e)(1) (2016).

⁵⁴ See National Environmental Policy Act Review Process, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> (last visited Jan 9, 2018).

required, an Environmental Impact Statement (“EIS”) must be prepared.⁵⁵ If it is unclear whether an environmental impact would be significant enough to require an EIS, the agency should prepare an EA to help make the decision.⁵⁶ Dakota Access prepared the EA for the Corps and, as stated earlier, the Corps issued a FONSI, granting Dakota Access the permit to construct the DAPL and determining that an EIS was not required.⁵⁷ The problem with this finding is that it allowed the government to skirt the EIS process and deny adequate tribal consultation that would address tribal needs, concerns, rights, resources, and traditional cultural expressions.

In response to the construction approval, the Tribe filed numerous formal technical comments regarding the Lake Oahe crossing, met with the Corps, and communicated with elected representatives to express their concerns over construction of the pipeline across the tribe’s water source.⁵⁸ In June 2016, the Tribe’s concerns about the effects of the construction on its culturally significant sites near Lake Oahe were confirmed when archeologists for the tribe discovered a site of great religious and cultural significance that was overlooked by Dakota Access during its culture resource surveys in preparation of its EA.⁵⁹ This error exemplifies why tribal consultation is so important. When private interests oversee cultural surveys and research, important sites are often overlooked. Tribal experts are in the best position to identify sites of cultural significance, and federal agencies should consult them whenever a project might threaten these sites.

Tribes are not opposed to the development of natural resources. Instead, tribes oppose processes which leave them out of the decision-making process, violate their treaty rights, and ignore their sovereign status. As Standing Rock Sioux Tribal Chairman Dave Archambault II explains, “we are not opposed to energy independence. We are opposed to reckless and politically motivated development projects, like DAPL, that ignore our treaty rights and risk our water.”⁶⁰ Many tribes with natural resources within the bounds of their reservations are, in fact, supportive of

⁵⁵ *Id.*

⁵⁶ 40 C.F.R. § 1501.4(b) (2012).

⁵⁷ Final Environmental Assessment, Dakota Access, LLC, Dakota Access Pipeline Project Section 408 Consent for Crossing Federally Authorized Projects and Federal Flowage Easements (Aug. 2016) [hereinafter, DAPL EA], <https://assets.documentcloud.org/documents/3036302/DAPLSTLFINALEAandSIGNEDFONSI-3Aug2016.pdf>.

⁵⁸ Complaint, *supra* note 22, at 17.

⁵⁹ *Id.*

⁶⁰ Trump Executive Memorandum on DAPL Violates Law and Tribal Treaties, STAND WITH STANDING ROCK (Jan. 24, 2017), <http://standwithstandingrock.net/trump-executive-order-dapl-violates-law-tribal-treaties/>.

development. For example, the Warm Springs Tribe in Oregon is involved extensively in timber production.⁶¹ Other tribes, such as the Southern Ute Tribe of southwestern Colorado, are heavily involved in oil and natural gas production, and are developing those resources for profit.⁶²

James Anaya, dean of the University of Colorado Law School and an expert in international and indigenous peoples law, noted the following regarding the concept of consultation within the international law context:

[i]ndigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their . . . control [ownership, use] and enjoyment of territories and properties. Indigenous peoples [have the right] to [the] recognition of their property and ownership rights with respect to lands, territories, and resources they have historically [occupied, as well as] to the use of those to which they have historically had access for their traditional activities and livelihood.⁶³

In the Standing Rock Sioux's lawsuit against DAPL, Federal District Court Judge James Boasberg denied the Tribe's request for an injunction for construction of the pipeline, explaining, in a fifty-eight page opinion, that DAPL covered all its bases in their environmental assessment of the pipeline's impact on cultural sites.⁶⁴ But almost immediately after the release of the decision, on September 9, 2016, in response to the massive amount of public protest at the Standing Rock Reservation and the denial of the injunction, the Obama administration temporarily blocked the construction of the pipeline.⁶⁵

Prior to his presidency, President Trump was an investor in both Energy Transfers and Phillips 66, the financial backers of the Dakota

⁶¹ See Forestry, CONFEDERATE TRIBES OF WARM SPRINGS, <https://warmsprings-nsn.gov/program/department-of-forestry/> (last visited Nov. 21, 2017).

⁶² See SOUTHERN UTE INDIAN TRIBE DEPARTMENT OF ENERGY, <http://www.suitdoe.com/> (last visited Mar. 24, 2017).

⁶³ James Anaya, Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of what Rights Indigenous Peoples Have in Lands and Resources, 22 *Ariz. U. L. Rev.* 7, 8 (2005).

⁶⁴ David Henry, Judge Rejects Tribe's Request to Block ND Pipeline Construction, THE HILL, (Sept. 9, 2016, 02:57 PM), <http://thehill.com/policy/energy-environment/295208-judge-rejects-tribes-request-to-block-nd-pipeline-construction>.

⁶⁵ Press Release, Dept. of Justice, Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Sept. 9, 2016), <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing>.

Access Pipeline.⁶⁶ Per one of his spokeswomen, President Trump sold off his shares before taking office.⁶⁷ Regardless of the conflict of interest concerns raised by President Trump's investment in DAPL, the approval process has once again gone forward without thorough consultation with the tribe or consideration of all the pipeline's environmental effects and destruction of sacred sites. The notice-and-comment period ended a month early; had it lasted as previously planned, the government could have received diverse input concerning construction of the pipeline as an important part of public participation in approving projects that affect the environment and tribes. At the end of the notice-and-comment period, there were approximately 75,000 comments.⁶⁸ Early closure of the notice-and-comment period effectively silenced the tribes and the public, and deprived the Standing Rock Sioux of their ability to participate in the political process.

IV. HISTORY OF THE GREAT SIOUX NATION

The construction of the Dakota Access Pipeline is not the first time the Sioux fought against a violation of their treaty rights. In 1868, the Great Sioux Nation and the federal government executed the Fort Laramie Treaty, which established the Black Hills as part of the Sioux reservation.⁶⁹ When the federal government discovered gold in the Black Hills, Congress moved the Sioux Nation from their sacred Black Hills, and abrogated the 1868 treaty. It then replaced the 1868 treaty with a new treaty in 1887 that deprived the Nation of its ancestral lands in the Black Hills.⁷⁰ In 1980, the Sioux finally brought suit, arguing that the federal government unlawfully abrogated the 1868 Fort Laramie Treaty.⁷¹ The Supreme Court held that Congress cannot act both as trustee for the Tribe and exercise its sovereign power of eminent domain.⁷² It ordered Congress

⁶⁶ Matthew Daley, Oil Pipeline: Trump's Stock in Company Raises Concerns, *THE BIG STORY*, (Nov. 25, 2016), <http://bigstory.ap.org/article/a6c6591086f24d45a3f0b5d48f2a8271/trumps-stock-oil-pipeline-company-raises-concern>.

⁶⁷ *Id.*

⁶⁸ Notice of Intent to Prepare an Environmental Impact Statement in Connection with Dakota Access, LLC's Request For An Easement to Cross Lake Oahe, North Dakota, 82 Fed. Reg. 5543 (Jan. 18, 2017).

⁶⁹ See Sioux Treaty of 1868, NATIONAL ARCHIVES, <https://www.archives.gov/education/lessons/sioux-treaty> (last visited Mar. 24, 2017).

⁷⁰ EDWARD LAZARDUS, *BLACK HILLS/WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT* 71 (1991).

⁷¹ See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 371 (1980).

⁷² *Id.* at 372–73.

to pay the Tribe just compensation for the lands that the government took.⁷³ The Court awarded the Sioux \$17 million in compensation for the Black Hills, plus the interest that would have accrued since 1877, for a total of \$106 million.⁷⁴

The Sioux refused to accept the money because they only wanted their land back. The money continues to linger in trust accounts accumulating interest.⁷⁵ About \$1 billion dollars remains untouched in accounts at the U.S. Department of Treasury.⁷⁶ The Tribe's refusal to accept money for the taking of the Black Hills is yet another example of the Great Sioux Nation's peaceful protest and commitment to preservation of their religion and culture. DAPL is the modern-day version of the Black Hills taking. The Sioux once again refuse to be ignored as the federal government undertakes ventures that affect the tribe. It is time to establish a policy that ensures tribes are treated like governments, are consulted before a project is undertaken, and are active participants in the development approval process.

V. TRIBAL CONSULTATION

The government-to-government relationship between the Tribe and the federal government is expressly recognized in the United States Constitution and is a crucial aspect of the doctrine of tribal sovereignty.⁷⁷ Additionally, there is a rich history of government-to-government relations with tribes—these include treaty negotiations and diplomatic efforts to resolve disputes over land, fishing, and hunting rights. Just as the federal government seeks to enhance its relationships with the states

⁷³ *Id.* at 423. Interestingly, part of the land unlawfully taken from the Sioux is the site of their sacred ancestral burial grounds that the pipeline will destroy.

⁷⁴ LAZARUS, *supra* note 70, at 74.

⁷⁵ *Id.*

⁷⁶ Maria Streshinsky, *Saying No to \$1 Billion: Why the Impoverished Sioux Nation Won't Take Federal Money*, THE ATLANTIC (Mar. 2011), <http://www.theatlantic.com/magazine/archive/2011/03/saying-no-to-1-billion/308380/>.

⁷⁷ U.S. CONST. art I, § 8, cl. 3 (“[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”). See also *id.* art. I, § 2, cl. 3; *id.* art. VI, cl. 2 (“[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *id.* amend. 14, § 2.

through constant communication,⁷⁸ it should develop a respectful relationship with tribes that provides a platform for communication and consideration of tribal interests.

A. Clinton and Obama Memoranda and Executive Orders

On April 29, 1994, President Bill Clinton issued his “Memorandum on Government-to-Government Relations with Native American Tribal Governments” to the heads of federal agencies. This memorandum required the executive departments and agencies to consult with the Indian tribes.⁷⁹ In his memorandum, President Clinton: (1) delegated agency heads with the responsibility of ensuring that agencies operate under a government-to-government relationship with tribes; (2) directed agencies to conduct consultations openly and candidly; (3) directed agencies to assess the impact of federal government plans, projects, programs, and activities on tribal trust resources, and assure that tribal rights and interests are considered during the development of such plans and activities; and (4) directed agencies to work cooperatively with tribes, and to apply the requirements of Executive Orders Nos. 12875 (“Enhancing the Intergovernmental Partnership”) and 12866 (“Regulatory Planning and Review”) to design solutions and tailor federal programs to address specific or unique needs of tribal communities.⁸⁰

President Clinton reaffirmed the consultation requirement through Executive Orders 13084 and 13175.⁸¹ President Clinton’s Executive Order 13175 describes the federal government’s unique trust relationship with the tribes, and discusses the tribal right to self-governance.⁸² Section 5 of the order directs the executive departments and agencies to develop a process for meaningful and timely consultation with tribes, and directs agencies to consult with tribes prior to promulgation of a regulation that would affect tribal interests and rights.⁸³

⁷⁸ The House and Senate represent state interests and are tasked with ensuring that the concerns of their constituents are heard. See, e.g., Proportional Representation, UNITED STATES HOUSE OF REPRESENTATIVES: HISTORY ART & ARCHIVES, <http://history.house.gov/Institution/Origins-Development/Proportional-Representation/> (last visited Dec. 8, 2017).

⁷⁹ Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

⁸⁰ *Id.*

⁸¹ Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998); Exec. Order No. 13,175.

⁸² Exec. Order No. 13,175.

⁸³ *Id.* § 5.

On November 5, 2009 President Obama issued his “Memorandum on Tribal Consultation.”⁸⁴ This memorandum directed the heads of executive departments and agencies “to engage in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.”⁸⁵ The memorandum also stated that executive departments and agencies “are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.”⁸⁶ President Obama recognized the historic failure to include voices of tribal officials in formulating policies affecting tribal communities, noting that consultation is a critical component of the government-to-government relationship with tribes.⁸⁷ Consequently, President Obama directed each agency to submit a detailed plan of action that the agency will take to implement the policies and directives set forth by President Clinton in Executive Order 13175 within ninety days of issuing his memorandum.⁸⁸ President Obama also required the agencies to submit, within one year, a report on how the agencies have implemented Executive Order 13175.⁸⁹

Unfortunately, these Executive Orders and memoranda state that they are not legally enforceable and do not create any rights, benefits, or new trust responsibilities for Indian tribes.⁹⁰ Moreover, later presidents can withdraw them. The Trump administration seems unlikely to enforce the previous administration’s memoranda and Executive Orders, and appears likely to repeal them altogether. And, although these orders and memoranda demonstrate the need for tribal consultation and direct agencies to develop a process for consulting with Indian tribes, they fall short of defining consultation and, instead, give the agencies full discretion in developing their own processes. Without an agency-wide definition, consultation with tribes is inconsistent at best and nearly nonexistent at worst. The current policy gives unqualified agency heads the discretion to implement consultation policies that are not in accord with a meaningful government-to-government relationship and are not adequately tailored to

⁸⁴ See Memorandum of November 5, 2009—Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 9, 2009).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See Exec. Order 13,084, 63 Fed. Reg. 27,655 (May 14, 1998); Exec. Order 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000), Memorandum of November 5, 2009—Tribal Consultation, 74 Fed. Reg. 57,879.

tribal interests. The varying definitions and processes for consultation means that tribes are often not engaged in federal projects that affect their interests, rights, resources, and traditional cultural expressions.

B. Bush Administration Memo

In 2004, President George W. Bush issued the “Memorandum on Government-to-Government Relationship with Tribal Governments,” declaring his commitment to continue working with federally recognized tribal governments on a government-to-government basis.⁹¹ President Bush’s memo supported President Clinton’s previous memoranda and Executive Order by directing the heads of the executive departments and agencies to continue to foster diplomatic relations with tribes.

C. U.S. Army Corps of Engineers Policy on Tribal Consultation

The Corps’ Tribal Nations Program implements the Clinton Memorandum and Executive Orders, as well as the Obama Memorandum.⁹² According to the Corps’ website, the policy goals of the program are (1) to consult with tribes that may be affected by the Corps’ projects and policies, and (2) to reach out and partner with tribes on water resources projects.⁹³ The Program policy states that the Corps “will ensure that Corps leaders and Tribal leaders meet as governments and recognize that Tribes have the right to be treated in accordance with principles of self-determination.”⁹⁴ The Corps also states that it will “involve Tribes collaboratively, before and throughout decision-making, to ensure the timely exchange of information, the consideration of disparate viewpoints, and the utilization of fair and impartial dispute resolution processes.”⁹⁵ Finally, the program purports to “search for ways to involve Tribes in programs, projects, and other activities that build economic capacity and manage Tribal resources while preserving cultural identities,” and to “search for ways to preserve and protect trust resources and to consider

⁹¹ Memorandum on Government-to-Government Relationship with Tribal Governments, 2 PUB. PAPERS 2106, 2106-07 (Sept. 23, 2004), <https://www.usbr.gov/nativediv/policy/bush.pdf>.

⁹² See Tribal Nations Overview, U.S. ARMY CORPS OF ENGINEERS, <http://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/> (last visited Mar. 24, 2017).

⁹³ Id.

⁹⁴ Id.

⁹⁵ Id.

the potential effects of the Corps programs on natural and cultural resources.”⁹⁶

In its handbook on tribal consultation, the Corps notes that each tribe may require a unique consultation process, and that the Corps should tailor to each tribes’ needs in conducting consultations.⁹⁷ The Corps’ policy also purports to establish an honest consultation process by involving tribes in a collaborative process and exchange of information before and during decision making.⁹⁸ Additionally, the Corps’ policy declares that it will treat tribes as governments with respect and dignity.⁹⁹ It also requires the Corps to practice and engage in meaningful consultation and communication with tribes and to provide tribes with an opportunity to participate in the decision-making process to ensure tribal interests are given due consideration.¹⁰⁰ Although the Corps’ policy seems to require meaningful consultation, its handbook is twenty-eight pages long, and is composed mostly of memoranda from its lieutenant general and the president.¹⁰¹ Instead of laying out a step-by-step process, the policy merely, and vaguely, declares that consultation should be meaningful. It is difficult, and almost impossible, to enforce a vague agency policy under the current system of consultation which has no force of law.

i. The Corps’ Failure to Abide by Its Own Policy Throughout DAPL Process

The Corps violated its own consultation policy in granting the NWP 12 permit and an easement for the pipeline crossing across the Tribe’s water source without adequate consultation with the Tribe. The Tribe’s first record of correspondence from the Corps related to the DAPL

⁹⁶ *Id.*; see also Cultural Resource Documents, U.S. ARMY CORPS OF ENGINEERS, http://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/tribal_culturalres/ (last visited Nov. 20, 2017) (In relation to tribal cultural resources protection, the Corps describes its duties under section 106 of the National Historic Preservation Act to “take into account the effect of the [an] undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register” and “afford the Advisory Council on Historic Preservation ... a reasonable opportunity to comment...” and to consult with State, tribal, local governments, and the public to identify and mitigate adverse effects to historic properties.).

⁹⁷ U.S. ARMY CORPS OF ENGINEERS, USACE TRIBAL CONSULTATION POLICY (2012), reprinted in TRIBAL CONSULTATION POLICY AND RELATED DOCUMENTS, http://www.spk.usace.army.mil/portals/12/documents/tribal_program/usace%20native%20american%20policy%20brochure%202013.pdf.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See *id.*

construction was on February 12, 2015, when a Corps representative emailed the Tribal Historic Preservation Officer (“THPO”) asking whether the Tribe had concerns about the preliminary bore hole testing to be conducted at the HDD site.¹⁰² DAPL hired its own non-tribal consultants to conduct cultural surveys and to prepare the EA that the Corps later approved, which also led to the FONSI.¹⁰³ The Tribe immediately sent a letter to the Corps stating its concerns and notifying the Corps that the drilling could affect historic and culturally significant sites that had not yet been identified under the NHPA.¹⁰⁴ Despite several follow-ups from the THPO, the Corps never responded. Several months later, the Corps stated that the section 106 consultation process had ended.¹⁰⁵ The Corps then issued their EA, which failed to mention the potential impacts to the areas of cultural and historic significance that the Tribe had identified and “incorrectly stated that the THP had indicated to DAPL that the Lake Oahe site avoided impacts to tribally significant sites.”¹⁰⁶ The Tribe submitted extensive comments to the EA, pointing out both the flaws in the section 106 consultation process as well as the significant sites that the EA failed to consider.¹⁰⁷ Additionally, the Corps received letters from the Environmental Protection Agency, the U.S. Department of Interior, and the Advisory Council on Historic Preservation (“ACHP”), all of whom questioned the Corps’ approach to consultation with the Tribe.¹⁰⁸

The Corps’ failure to engage the Tribe in meaningful consultation prior to issuing the EA and granting the NW12 permit is a cry for legislative action that defines consultation, lays out a process, is binding upon the federal agencies, and has the force of law beyond the discretionary approach taken by the previous presidential memoranda and executive orders. Although NEPA, the CWA, and the NHPA all mandate tribal consultation, they do not explicitly define consultation, nor do they describe a consistent process to which the agencies must adhere. A clear statutory process for consultation would help resolve such inconsistencies.

¹⁰² Complaint, *supra* note 22, at 24.

¹⁰³ See DAPL EA, *supra* note 57, at EA-7, 110

¹⁰⁴ Complaint, *supra* note 22, at 24.

¹⁰⁵ *Id.* at 23.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

D. Free, Prior, and Informed Consent

The United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples (“the Declaration”) in September 2007. The Declaration establishes the concept of free, prior, and informed consent (“FPIC”) that requires government entities to acquire informed consent from indigenous peoples before undertaking actions that might impact their rights and resources.¹⁰⁹ Article 19 declares that “[s]tates shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”¹¹⁰ Article 32 requires that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.¹¹¹

These pertinent provisions require states (and federal governments) to gain consent from indigenous peoples before making any decision that would affect them. Although this is a good practice in theory, imposing the requirement on federal agencies could be difficult. One glaring issue is the question of who the agencies would get consent from. The tribal leaders? The elders? The tribal council? It would be difficult, and at times impossible, to secure consent. One proposal is that the consent required should come from the tribal leaders, who are the main decision-makers for tribes.¹¹² However, it seems unlikely that any federal agency would adopt consultation requirements at such a high bar. This would subject a great deal of infrastructure projects to tribal approval. Additionally, some projects may require approval from several tribes, which could create a whole other slew of issues.

However, we can give the FPIC concept the force of law and tailor it with a more suitable legislation that would require communication and

¹⁰⁹ G.A. Res. 61/295, art. 10, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter United Nations Declaration].

¹¹⁰ *Id.* art. 19.

¹¹¹ *Id.* art. 32.

¹¹² Charles F. Wilkinson, *ADVANCED AMERICAN INDIAN LAW COURSE*, U. COLO. LAW SCHOOL, *Lecture on Bears Ears National Monument and Consultation with Indian Tribes* (Jan. 24, 2017) (course notes on file with author).

diplomatic conversation in the place of consent to give tribes meaningful input, decision-making, and involvement in projects. Adopting a modified version of the FPIC standard through federal legislation would establish a practice of negotiation with tribes that would give tribes a voice. It would dictate consultation and prescribe a step-by-step process that each agency would follow every time the agency undertakes or approves a project that would affect Indian nations. Working Group on the Draft Declaration (“WGDD”) Chairman Luis-Enrique Chávez interprets FPIC as requiring states to use a mandatory procedure—consultation and cooperation to gain consent—but not as a requirement to gain consent.¹¹³

E. Improving Consultation with Tribes

i. Report on Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions

In January 2017, the U.S. Department of the Interior, U.S. Department of the Army, and the U.S. Department of Justice released the “Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions” report (“the Report”) as a direct result of DAPL and the Standing Rock protests.¹¹⁴ The Report declares that it serves several functions: (1) to provide information about the existing federal statutory, regulatory, and policy framework governing tribal consultation; (2) to serve as a record of tribal input on the consultation process; (3) to recommend that agencies undertake a thorough review of their consultation policies and practices, and that policies be made available to the public; and (4) to highlight best practices gleaned from tribal input and to make recommendations for further research, administrative, regulatory, or legislative action.¹¹⁵

Tribal leaders believe that their input is minimally considered when federal agencies make decisions and often, that agencies are already committed to a decision or project before they consult with tribes.¹¹⁶ In this sense, consultation has become more of what Robert Miller calls a “procedural hoop” rather than a meaningful government-to-government

¹¹³ Roger J. Miller, *Consultation or Consent: The United States’ Duty to Confer with American Indian Government*, 91 N.D. L. REV. 37, 85 (2015).

¹¹⁴ See U.S. DEPT. OF INTERIOR ET AL., FINAL REPORT, IMPROVING TRIBAL CONSULTATION AND TRIBAL INVOLVEMENT IN FEDERAL INFRASTRUCTURE DECISIONS (2017) [hereinafter FINAL REPORT], <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc2-060030.pdf>.

¹¹⁵ Id.

¹¹⁶ Miller, *supra* 113, at 65.

communication and collaboration.¹¹⁷ Tribes also complain that they are not allowed to consult with the real decision-makers and that their requests to meet with agency officials are often denied.¹¹⁸

Tribes described their experience with the federal agencies in government-to-government consultation as a “box-checking” procedural exercise rather than an opportunity to substantially address tribal concerns and obtain tribal consent.¹¹⁹ Tribes repeatedly urge that the federal government adopt the Declaration’s concept of free, prior, and informed consent for any infrastructure-related project that may affect tribes or tribal treaty rights.¹²⁰ Tribes remain concerned about the inconsistency in the consultation process between agencies, and are dissatisfied with agency failure to consult tribes at the earliest point in the development process.¹²¹

The Corps promulgated its own regulation for the protection of historic properties under the NHPA, known as Appendix C.¹²² The Corps published Appendix C before the ACHP amended NHPA in 1992 to include the requirement of tribal consultation when historic properties of religious or cultural significance could be affected.¹²³ In the Report, the tribes argued that the Corps should revise or repeal Appendix C.¹²⁴ Although the Corps did release its consultation policies, those policies failed to address the NHPA consultation requirements.¹²⁵ Appendix C itself should include specific provisions describing the NHPA section 106 consultation requirements.

The Report also details key principles, as expressed by the tribes themselves, for effective communication and consultation.¹²⁶ The tribes suggest that agencies should: (1) act consistently with tribes in their consultation process; (2) establish staff-level and leadership-level relationships with tribes; (3) initiate consultation at the earliest possible time; (4) make good faith efforts to communicate with tribe and gain

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 66.

¹¹⁹ FINAL REPORT, *supra* note 114, at 12.

¹²⁰ *Id.*

¹²¹ *See id.*

¹²² *Id.* at 8.

¹²³ *Id.*

¹²⁴ *Id.* at 14.

¹²⁵ *See generally* Appendix C – Procedures for the Protection of Historic Properties, 33 C.F.R. 325 (2017).

¹²⁶ *See* FINAL REPORT, *supra* note 114, at 16–18.

a response; (5) exchange information with tribe; (6) seek to fully understand tribal concerns; and (7) customize the consultation.¹²⁷

By following these key principles during consultations, federal agencies will strengthen the trust relationships with tribes, establish an open line of communication with tribes, and turn federal projects affecting tribes into a more collaborative management regime that reflects and considers tribal interest.¹²⁸

ii. H.R. 5608: Consultation and Coordination with Indian Tribal Governments

In 2008, the House introduced H.R. 5608 a new policy “to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies.”¹²⁹ The bill defined an “accountable consultation process” and would have created a legal right to consultations that tribes could enforce in court.¹³⁰ However, the resolution never passed the committee stage.¹³¹

iii. Current Effective Consultation Policies

The ACHP guidelines for tribal consultation—the organization that implements and oversees section 106 consultation under the NHPA—provides a possible starting point for developing federal legislation on tribal consultation and defines a clear process for consulting with tribes. Under the guidelines, agencies must: (1) identify when agency actions might impact tribal interest; (2) confer with the relevant tribal nation early in the agency’s planning process; (3) provide tribes reasonable opportunities to identify their concerns about potential agency actions and to identify and evaluate tribal interests; and (4) allow tribes to participate in the resolution of potential adverse effects.¹³²

The ACHP also requires that consultation include the State Historical Preservation Officers and the Tribal Historic Preservation Officer, along

¹²⁷ Id.

¹²⁸ See id. at 22–23.

¹²⁹ H.R. 5608, 110th Cong. (2d Sess. 2008).

¹³⁰ NATIONAL CONGRESS OF AMERICAN INDIANS, CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS 5 (2008), http://www.ncai.org/attachments/Consultation_qikBfAqyWILGSqdNYagbaMeCHbArgkPhBppxNXdDeYhNXMPCu_2%20NCAITestimony-HR5608.pdf (stating that tribal leaders are being “consulted to death” and noting over thirty consultations in the past year alone).

¹³¹ Miller, *supra* note 113, at 67.

¹³² ADVISORY COUNCIL ON HISTORIC PRESERVATION, CONSULTATION WITH INDIAN TRIBES IN THE SECTION 106 REVIEW PROCESS: A HANDBOOK 3, 5–8, 11, 14–16 (2008).

with participation from the tribe and the public in the review process.¹³³ Incorporating these requirements into any legislation would be conducive to better consultation methods, but may fail to encompass the entirety of a proper and tribe-approved consultation process unless it included tribal input.

In 1998, the Secretary of the Interior defined consultations regarding historic properties as “seeking agreement” with tribes and as an exchange of ideas, not simply providing information.¹³⁴ Several federal agencies, including the Corps, issue handbooks on tribal consultation. The Forest Service sets deadlines and defines a step-by-step process for tribal consultation, mandating that the agency does the following: (1) contact the tribal government to advise the tribe of the proposed policy or project; (2) provide tribes with an appropriate period for response; (3) allow tribes to request meetings with federal technical experts; (4) discuss issues so that the agency understands tribal concerns; (5) attempt to achieve an agreement with the tribe; (6) issue a final decision in consultation with the tribe.¹³⁵

Although this process is surely well-intentioned, it falls short by failing to consider customs unique to each tribe, and lacks an approach that would best serve each tribe on a case-by-case basis.

VI. RESOLVING INADEQUATE TRIBAL CONSULTATION

An effective and workable solution to the inconsistency, and at times complete lack, of tribal consultation seems elusive. However, there are several ways that agencies, industries, and the legislature can improve their practices to better accommodate tribal interests and ensure meaningful consultation is conducted.

A. Tribal Codes

To better establish consultation guidelines that comport with each tribe’s interests, tribes can develop a tribal code that lays out their standards for the consultation process. Agencies can defer to the tribal code in conducting consultations. In these circumstances, the agency can

¹³³ See *id.* at 6.

¹³⁴ The Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, 63 Fed. Reg. 20,504 (Apr. 24, 1998).

¹³⁵ See U.S. FOREST SERV., AMERICAN INDIAN AND ALASKA NATIVE RELATIONS HANDBOOK (1998), https://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsh?1509.13.

look directly to the tribe to dictate the consultation process. Following a tribe's process will minimize ambiguities and ensure agencies consider unique tribal interests on a case-by-case basis.

The Rincon Band of Luiseño Indians Mission Indians in California established their own tribal code on consultation procedure.¹³⁶ The code requires that “an agency, government, department, or corporation wishing to participate in government-to-government consultation with the Tribe must adhere to the [code's] procedure unless an alternative process is approved, in writing, by the Tribal Council.”¹³⁷ The code establishes that notice of any project affecting the tribe must be given to the tribe early in the planning process, requires a pre-consultation meeting with the Tribal Council, a consultation meeting with Tribal Council, ongoing coordination meetings if necessary, a final report detailing what the parties agreed to, and a certificate of consultation completion that ensures meaningful consultations occurred and dictates that the consultation process ended.¹³⁸

Tribal codes are an effective means for tribes to establish their own consultation standard, further their interests, and encourage government agencies to abide by their code. It makes for a more efficient interaction if government agencies dealing with a tribe know exactly what the tribe expects.

B. Best Practices and Key Principles

In addition to federal policies, best practices can also help define effective consultation and communication with Indian tribes. Some notable best practices include: (1) treating tribes as governments on an equal footing; (2) consulting with tribes early in the planning process; (3) listening to tribal concerns carefully; (4) providing honest and candid project information to the tribe; (5) conducting effective meetings; and (6) providing funding for tribes to consult.¹³⁹

Best practices can be integrated into tribal consultation either in comprehensive new federal legislation or through integrated customs in government dealings with Indian tribes. Private industry can also take corporate responsibility and integrate best practices into their dealings with tribes. In doing so, industry could consult with tribes on their own before undertaking a project that would affect a tribe. Private industry and

¹³⁶ See Rincon Tribe, Tribal Code § 2.800 (2015), https://www.narf.org/niil/codes/rincon_luiseno/.

¹³⁷ Id. § 2.812(a).

¹³⁸ Id. § 1.812(a)(2)–(6).

¹³⁹ Miller, *supra* note 113, at 62–63.

federal agencies should aim to cultivate collaborative engagement with tribes prior to and throughout a project's approval.

C. Federal Legislation

i. Adoption of the FPIC Standard

Legislation dictating the process for consultation with Indian tribes should encompass an adaptation of FPIC, best practices, and key principles identified by tribes. It should also lay out an express and straightforward step-by-step process that agencies must follow.

Additionally, legislation should identify all possible triggers for consultation. Consultation would be triggered during any EA or EIS analysis under NEPA, NHPA section 106 consultation procedure, or CWA permitting. Legislation should also address section 408 of the Rivers and Harbors Act of 1899 NWP 12 loophole to ensure that the federal government's grant of any kind of permit would trigger consultation with tribes in determining whether a NWP 12 should be granted.

Tribes, not politicians or lobbyists, should draft the new legislation, and the description of the consultation process should include a step-by-step process.¹⁴⁰ For instance, tribes may adopt some form of the ACHP guidelines for tribal consultation,¹⁴¹ or they may want to create new guidelines. Regardless of what process the tribes adopt, legislation should set forth a foundational standard that mandates compliance from all federal agencies. Congress may also want to address and consider unique tribal interests, and when reasonable, require federal officials to abide by individual tribal codes instead.

ii. Designate a Point-of-Contact

Each agency should designate a senior career staff representative to be the primary point-of-contact for coordinating consultations with tribes.¹⁴² Similarly, tribes should also have a point-of-contact so that communication with a tribe is unambiguous and effective. Tribal point-of-contacts should also be responsible for coordinating with the Tribal

¹⁴⁰ See, e.g., Proclamation No. 9558, 82 Fed. Reg. 1139, (Dec. 28, 2016) (discussing step-by-step process to be employed in the consultation process for management of Bears Ears, which includes consulting with tribes); see also Proposal to President Barak Obama for the Creation of Bears Ears National Monument, THE BEARS EARS INTER-TRIBAL COALITION, <http://www.bearscoalition.org/wp-content/uploads/2015/10/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf> (last visited Nov. 21, 2017).

¹⁴¹ See *supra* text accompanying note 123.

¹⁴² FINAL REPORT, *supra* note 114, at 25.

Historic Preservation Officers. During agency visits, Tribal Historic Preservation Officers should always be in attendance to ensure that any sacred remains and historical and culturally significant sites are revealed and noted during the consultation process.

D. Memorandum of Understanding

Federal agencies could use a Memorandum of Understanding (“MOU”) to pledge a preferred consultation practice and the MOU would provide agencies with specific guidelines for consultation. Although a MOU is non-binding, it seeks to ensure cooperation among agencies and would implement a formal practice that agency officials can adhere to in their consultations with tribes.¹⁴³

E. Secretarial Order

The Secretary of the Interior could also issue a Secretarial Order that would set out a policy on consultation. Unlike an agency regulation, a Secretarial Order does not require a rulemaking and a notice-and-comment period.¹⁴⁴ On October 21, 2016, Sally Jewell, the Secretary of the Interior issued Secretarial Order 3342 that encourages cooperative management opportunities between the Department’s land and water managers and federally-recognized tribes.¹⁴⁵ The order seeks to ensure that tribes are engaged in decision-making and in managing public lands that have special geographical, historical and cultural connections to their tribe.¹⁴⁶ Similarly, the Secretary could issue an order outlining a consultation process. However, this order would only be binding upon the Department of the Interior and would subsequently fail to address the tribes’ concern of consultation inconsistency among federal agencies. Other agencies would need to issue similar orders to institute an agency-wide practice.

¹⁴³ See Memorandum of Understanding, BLACK’S LAW DICTIONARY (2d ed. 1910) (defining a Memorandum of Understanding as “two or more parties expressing mutual accord on an issue.”).

¹⁴⁴ See U.S. DEP’T OF THE INTERIOR, OFFICE OF THE SPECIAL TRUSTEE FOR AMERICAN INDIANS, DEPARTMENT MANUAL (2009), https://www.doi.gov/ost/trust_documents/Secretarial-Orders-Departmental-Manual.

¹⁴⁵ DEP’T OF THE INTERIOR, ORDER NO. 3342, IDENTIFYING OPPORTUNITIES FOR COOPERATIVE AND COLLABORATIVE PARTNERSHIPS WITH FEDERALLY RECOGNIZED INDIAN TRIBES IN THE MANAGEMENT OF FEDERAL LANDS AND RESOURCES (2016), https://www.doi.gov/sites/doi.gov/files/uploads/so3342_partnerships.pdf.

¹⁴⁶ Id.

CONCLUSION

Consultation with Indian tribes is a national concern because of the historic, special government-to-government relationship with tribes and because including tribes when their interests are at stake will lead to better decisions. While there is no easy or clear solution to ensure agency consistency and satisfy each tribe, the modern Indian movement—by protest, lawsuit, and assertion of tribal sovereignty—will continue to pursue all avenues to compel the federal government to guarantee tribes a seat at the decision-making table.

This Note proposes that implementing the concept of full, fair, and informed consent (“FPIC”) as the domestic standard for consultation is an important first step in resolving the national issues surrounding consultation with Indian tribes.¹⁴⁷ Whether FPIC is accorded the force of law through legislation, courts adopting FPIC in their decisions, or companies and agencies implementing it as policy, FPIC is the most effective means for ensuring that Indian tribes are part of the decision-making process and treated like sovereign governments. Anything less than FPIC undermines tribal sovereignty and means that public decision-making will be deprived of the valuable expertise and experience that modern tribal governments can contribute.

I believe in the sun and the stars, the water, the tides,
the floods, the owls, the hawks flying, the river running,
the wind talking. They’re measurements. They tell us
how healthy things are. How healthy we are. Because
we and they are the same.

– Billy Frank Jr.¹⁴⁸

¹⁴⁷ See 33 U.S.C. § 408 (2012); United Nations Declaration, *supra* note 108.

¹⁴⁸ The Life and Legacy of Billy Frank Jr., <http://billyfrankjr.org/> (last visited Dec. 29, 2017). Billy Frank Jr. was a tireless advocate for American Indian rights and was the leader of the civil rights movement during the tribal “fish wars” of the 1960’s and 1970’s. *Id.*