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## Indigenous People, Human Rights, and Consultation: The Dakota Access Pipeline

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## **INDIGENOUS PEOPLE, HUMAN RIGHTS, AND CONSULTATION: THE DAKOTA ACCESS PIPELINE**

*Walter H. Mengden IV\**

### *Abstract*

This Comment looks at the history of government-to-government relations between Native Americans and the United States. Using the Dakota Access Pipeline as a lens, this Comment proposes a step forward in advancing self-determination among Native Americans. Protecting Native American lands, the environment, and cultural history has been at the forefront of tribal politics. Currently, a consultation process to engage tribes is employed when their lands and resources are impacted. This process includes the affected tribe, but offers no mechanisms for tribes to oppose any substantive decisions that are made by the federal government. The international community's framework, The United Nations Declaration on the Rights of Indigenous Peoples (DRIP), takes consultation a step further by requiring Free, Prior, and Informed Consent (FPIC) before some actions are taken. The United States, while making an effort to support the self-determination of indigenous peoples, has yet to apply a similar standard to government-to-government relations. Noting U.S. progress toward adhering to this international standard, there is still further to go. In order to make the leap between mere consultation and FPIC, steps must be taken in between. This Comment will discuss the pros and cons of including Native Americans in decision making, instead of just having a seat at the table. Giving Native Americans an actual vote in the consultation process would demonstrate the commitment of the federal government to realizing self-determination and self-governance of indigenous peoples.

### *Introduction*

Since Europeans started colonizing the Americas, their relationship with the Native peoples has demonstrated the strength of each side's bargaining power. During the early republican era, agreements between the United

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\* Third-year student, University of Oklahoma College of Law. This piece was written and selected for publication prior to President Trump's decision to raise the stay on the construction of the Dakota Access Pipeline. The pipeline became operational on May 14, 2017. I would like to dedicate this Comment to my family, without whose support I would never have gotten this far.

States and tribes concerning trade, alliances, and land were effectuated through treaties.<sup>1</sup> The U.S. government entered into agreements with tribes, implicitly recognizing tribes as a self-governing people.<sup>2</sup> A burgeoning United States simply did not have the real power to impose their will on tribes and thus negotiated agreements with tribes on an equal footing.<sup>3</sup> As the new nation's power developed, both economically and militarily, Native Americans were forced to accept U.S. hegemony.<sup>4</sup> Native American dependence ushered in the removal era policy of Congress to forgo treaty making with tribes.<sup>5</sup> Even though treaty making with tribes ended, the federal government still negotiated with tribes before passing statutes that affected Native Americans.<sup>6</sup> This government-to-government relationship continues today, both formally and informally.<sup>7</sup> Since the end of the treaty era, Congress has passed several statutes outlining the relationship between the U.S. government and tribes concerning how much power tribes possess when Congress wants to enact a policy that affects Native Americans.<sup>8</sup>

The building of the Dakota Access Pipeline has highlighted the tumultuous relationship between the United States and Native American tribes. Dissatisfied with the consultation process, the Sioux Nation rallied tribes from across the world to address the problems that remain in government-tribal relationships.

There is no uniform policy on how the government must consult with tribes. The level of involvement tribes have with the government concerning statutes, policy, and regulations varies depending on the government entity involved. Former President Bill Clinton promulgated an executive order directing agencies to engage in a consultation process that remains in effect today; however, no "right, benefit, or trust responsibility, substantive or procedural" was created.<sup>9</sup>

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1. DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 74 (6th ed. 2011).

2. *Id.*

3. FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 6 (1994).

4. *Id.* at 7.

5. *Id.* at 17.

6. GETCHES ET AL., *supra* note 1, at 152.

7. Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37, 40 (2015).

8. *Id.* at 48.

9. Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000).

Due to the Dawes Act<sup>10</sup> and allotment, a checkerboard distribution of Native American owned land enables projects like the Dakota Access Pipeline to circumvent formal consultation procedures by never encroaching on Native American land, even though a site may still hold historical significance to a tribe.<sup>11</sup> In order for Native Americans to preserve their historical and cultural sites, they will need more power in their relations with the U.S. government.

The purpose of this Comment is to analyze the consultation process between the U.S. government and tribes, and show the benefits the United States could enjoy from mirroring the international community's position on relations with indigenous peoples. Part I of this Comment examines the consultation process and the history of the relationship between tribes and the federal government. Part II presents the current consultation procedures employed when granting permits to private companies to extract natural resources that affect tribal lands and resources. Part III examines the relationship between tribes and the government concerning the Dakota Access Pipeline. Part IV discusses the impact on Native Americans if the consultation policy adopted by the United Nations were mirrored by the United States.

### *I. The History of the Relationship Between Tribes and the U.S. Government*

Before the colonization of North America, Native American tribes were numerous and powerful; tribes governed themselves, traded amongst one another and with foreign nations, despite being viewed negatively by colonial newcomers.<sup>12</sup> Political relations within tribes were decentralized and locally orientated, allegiance usually falling to one's village or kinship group.<sup>13</sup> Tribes regularly entered into agreements with other tribes.<sup>14</sup> Some historians estimate Native American population numbers at "100 million or

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10. Ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.); see *Dawes Act (1887)*, WWW.OURDOCUMENTS.GOV, <https://www.ourdocuments.gov/doc.php?flash=false&doc=50> (last visited Aug. 17, 2017) ("Also known as the General Allotment Act, the law allowed for the President to break up reservation land, which was held in common by the members of a tribe, into small allotments to be parceled out to individuals.")

11. See GETCHES ET AL., *supra* note 1, at 172.

12. Miller, *supra* note 7, at 41.

13. DUANE CHAMPAGNE, SOCIAL ORDER AND POLITICAL CHANGE: CONSTITUTIONAL GOVERNMENTS AMONG THE CHEROKEE, THE CHOCTAW, THE CHICKASAW, AND THE CREEK 26-26 (1992).

14. Miller, *supra* note 7, at 43.

more” prior to colonization.<sup>15</sup> Native Americans had to engage and negotiate with each other to coexist. Additionally, England, France, Spain and other European nations entered into various treaties with Native Americans as the colonial era began. Because of the size and power of Native American tribes at this time, European settlers had no choice but to recognize tribes as sovereign powers with title to their lands.<sup>16</sup> After the Revolutionary War, the U.S. government began to consolidate political control over the newly liberated colonies.<sup>17</sup> Even though Native Americans had a thriving culture and social structure, Americans viewed them as heathens and infidels requiring economic and social change.<sup>18</sup>

#### A. *The Treaty Era*

The Revolutionary War left the United States in a vulnerable position as it began to expand across the continent.<sup>19</sup> However, the eastern tribes were forced to accept U.S. hegemony over their territory.<sup>20</sup> As the original colonies convened in the Continental Congress to create the federal government, the framers set the foundation for Native American relations.<sup>21</sup> In a 1783 letter to James Duane, George Washington advocated a slow and methodical expansion of U.S. territory that would push Native Americans back without the cost of another war.<sup>22</sup> When the United States adopted the Articles of Confederation in 1781, and the Constitution in 1787, it embraced a policy that the federal government had the sole right to manage all affairs with Native Americans.<sup>23</sup>

By 1871, the federal government had ratified 370 treaties with Native Americans,<sup>24</sup> but around that time a movement arose to end the treaty-

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15. ALAN TAYLOR, *AMERICAN COLONIES: THE SETTLING OF NORTH AMERICA* 40 (2002).

16. GETCHES ET AL., *supra* note 1, at 59.

17. CHAMPAGNE, *supra* note 13, at 87.

18. GETCHES ET AL., *supra* note 1, at 44.

19. *See id.* at 87-88.

20. CHAMPAGNE, *supra* note 13, at 88.

21. Robert J. Miller, *American Indian Influences on the United States Constitution and Its Framers*, 18 AM. INDIAN L. REV. 133, 143-46 (1993).

22. GETCHES ET AL., *supra* note 1, at 87-88. “[T]he gradual extensions of our Settlements will as certainly cause the Savage as the Wolf to retire . . .” *Id.* at 88 (quoting Letter from George Washington to James Duane (Sept. 7, 1783)).

23. *See* ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4; U.S. CONST. art. I, § 8, cl. 3.

24. Karla E. General, *Treaty Rights and the UN Declaration on the Rights of Indigenous Peoples*, INDIAN LAW RESOURCE CTR., <http://indianlaw.org/content/treaty-rights-and-un-declaration-rights-indigenous-peoples> (last visited Aug. 3, 2017).

making process. The U.S. Board of Indian Commissioners' first annual report in 1869 called for an end to treaty-making,<sup>25</sup> which the board's chairman, Felix R. Brunot, believed was a façade.<sup>26</sup> Brunot felt strongly that Native American tribes were not equal "in capacity, power, and right of negotiations with a civilized nation," like the one the founders had worked to build; nor did he believe that the United States should pretend that the tribes were equal to continue the cycle of creating agreements that were "impracticable" and that the federal government had no intention of honoring.<sup>27</sup>

The final blow to the treaty era was dissatisfaction in the U.S. House of Representatives with the process.<sup>28</sup> Specifically, the Constitution states that treaties between the United States and foreign nations are negotiated by the President and ratified by the Senate.<sup>29</sup> Not only was the House left out, but also treaties with various tribes sometimes conflicted with the goals of the House and committed funds not approved by the House.<sup>30</sup> The issue climaxed in 1869 when the House refused to pass the appropriations bill that would fund treaty stipulations.<sup>31</sup> Eventually, the House and Senate came to an agreement to ratify all current treaties.<sup>32</sup> After this agreement, the House passed a bill forbidding the tribes and the federal government from entering into any more treaties.<sup>33</sup> Although treaty making between the United States and tribes ceased, this did not solve what the colonists called the "Indian Problem."<sup>34</sup>

### *B. Post-treaty Era*

Since the end of the treaty era, the United States has negotiated with Indian tribes in three main ways: (1) agreements, (2) executive orders, and (3) statutes.<sup>35</sup> Because negotiations with Indian tribes were no longer a

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25. PRUCHA, *supra* note 3, at 290-91.

26. *Id.* at 291.

27. *Id.*

28. *Id.* at 292.

29. U.S. CONST. art. II, § 2, cl. 2.

30. PRUCHA, *supra* note 3, at 292-97.

31. *Id.* at 298.

32. *Id.* at 308.

33. *Id.* ("[N]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation . . . with whom the United States may contract by treaty . . . . That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified[.]").

34. *Id.* at 311.

35. *Id.* at 313-29.

necessity, consent and negotiation between tribes and the U.S. government became tenuous at best.<sup>36</sup> Major unilateral statutes such as the Dawes Act<sup>37</sup> and the laws passed during the Termination Era were actions devoid of any Native American input.<sup>38</sup>

### C. Current Federal-Tribal Relationship

The relationship between the federal government and Indian tribes is rooted in the words of U.S. Supreme Court Chief Justice John Marshall in *Cherokee Nation v. Georgia*.<sup>39</sup> Indian tribes are not foreign, he wrote, but “domestic dependent nations,” which are under the protection of the federal government and have unquestioned rights to their lands.<sup>40</sup> Courts have since broadened the understanding that Congress has “plenary and exclusive authority over Indian affairs.”<sup>41</sup> The federal-tribal relationship is described as a trust relationship, especially when considering tribal land holdings.<sup>42</sup> Currently, as Native Americans navigate their way through the Self-Determination Era, the plenary power of Congress is not as absolute as it once was, and new standards of control over tribes are yet to be seen.<sup>43</sup> Interactions between the United States and Native Americans have evolved drastically as the concept of sovereignty among Native Americans tribes

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36. *Id.* at 328.

37. *See supra* note 10.

38. FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 295, 346 (abridged ed. 1986) (noting that the Termination Era was a series of statutes that made Native Americans “subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States . . . end[ing] their status as wards” by eliminating their special relationship with the government and forcing their assimilation into mainstream society).

39. 30 U.S. (5 Pet.) 1 (1831).

40. *Id.* at 17.

41. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.02[1], at 398 (Nell Jessup Newton et al. eds., 2005 ed.).

42. Monte Mills, *What Should Tribes Expect from Federal Regulations? The Bureau of Land Management’s Fracking Rule and the Problems with Treating Indian and Federal Lands Identically*, 37 PUB. LAND & RESOURCES L. REV. 1 (2016); *see also* *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (“In carrying out its treaty obligations with the Indian tribes the Government . . . has charged itself with moral obligations of the highest responsibility and trust. Its conduct . . . should therefore be judged by the most exacting fiduciary standards.”).

43. David I. Gold, *I Know You’re the Government’s Lawyer, but Are You My Lawyer Too? An Exploration of the Federal-Native American Trust Relationship and Conflicts of Interest*, 19 BUFF. PUB. INT. L.J. 1 (2001).

has changed. It is a sovereignty once derived from real power, but now a convoluted legal fiction that gives the illusion of authority.

*II. The Current Consultation Procedures Employed When Granting Permits to Private Companies to Extract Natural Resources That Impact Tribal Lands and Resources*

There are myriad laws, regulations, and procedures that must be adhered to when private companies extract natural resources on federal lands that impact Native Americans. The nature of the natural resources being extracted will determine which regulation applies.

*A. Executive Orders*

Two executive orders direct agencies on how to interact with tribes in these situations: Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”) and Executive Order 13007 (“Indian Sacred Sites”).

*1. Executive Order 13175: Consultation*

Executive Order (EO) 13175 outlines several objectives agencies are supposed to accomplish in formulating or implementing policies that affect tribal life.<sup>44</sup> First, the order identifies the unique relationships tribes have with the United States as domestic dependent nations and recognizes the right of tribes to self-determination and self-government.<sup>45</sup> Tribes are to be afforded the maximum administrative discretion possible and meaningful, timely input into administrative decisions that have tribal implications.<sup>46</sup> The order, however, explicitly states that no “right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person” is created.<sup>47</sup> The sentiment towards Native American tribes is positive, but there is no obligation to act on their wishes. The only existing requirement expects agencies to listen to tribal representatives before they act.

There are no uniform consultation procedures across administrative agencies.<sup>48</sup> In addition, there is no guarantee that any meaningful

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44. Exec. Order No. 13175, § 2, 65 Fed. Reg. 67249, 67249 (Nov. 6, 2000).

45. *Id.*

46. *Id.* § 3, § 5, 65 Fed. Reg. at 67249-51.

47. *Id.* § 10, 65 Fed. Reg. at 67252.

48. Michael Eitner, *Meaningful Consultation with Tribal Governments: A Uniform Standard to Guarantee That Federal Agencies Properly Consider Their Concerns*, 85 U.



consultation will take place, only that an administrative agency will listen to representatives of the affected tribe.<sup>49</sup> The efficacy of consultation can vary depending on the administration in power and the agency involved.

Additionally, EO 13175 provides no cause of action to challenge inadequate consultation procedures in the courts.<sup>50</sup> Any challenges to the consultation process tend to focus on procedural aspects rather than substance.<sup>51</sup> The current process places all the power into one party's hands. The imbalance of power and inability of the tribes to seek remedy based on inadequate consultation procedures is insulting to the sovereign tribes that dwell within U.S. borders.

### *2. Executive Order 13007: Sacred Sites*

Executive Order 13007 regarding Indian Sacred Sites instructs administrative agencies to “(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.”<sup>52</sup> EO 13007 instructs agencies to engage in the consultation process, but again does not create any enforceable rights that Native Americans can use to protect their interests.<sup>53</sup> Similarly to EO 13175 regarding consultations, tribes must use procedural defaults to bring claims on the basis of inadequate consultation in courts of law.<sup>54</sup> And there is no guarantee that agencies have to act on tribal wishes, only that they listen to the tribes.<sup>55</sup> This EO is merely a document that is meant to improve the internal workings of executive agencies, and not actually benefit America's tribes.<sup>56</sup>

### *B. Statutes*

Statutes requiring consultation are no different from these executive orders. The most frequently applicable statutes that afford Native

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COLO. L. REV. 867, 868 (2014) (discussing the importance of a uniform standard for government-to-government relations with procedural and substantive judicial review).

49. *Id.*

50. *Id.*

51. *Id.*

52. Exec. Order No. 13007, 61 Fed. Reg. 26771 (May 24, 1996).

53. *Id.* § 4, 61 Fed. Reg. at 26772.

54. *Id.*

55. *Id.*

56. *Id.* (“This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies officers, or any person.”).

Americans some say in the preservation of their lands and resources are the National Historic Preservation Act of 1966 (NHPA) and the National Environmental Policy Act (NEPA).<sup>57</sup>

*1. National Historic Preservation Act of 1966*

The National Historic Preservation Act of 1966 (NHPA) is a statute intended to encourage states, local governments, Indian tribes, Native Hawaiian organizations, and private organizations and individuals to preserve historical sites.<sup>58</sup> Section 106 of the NHPA outlines the procedural requirements for how agency heads must consult a cultural group when a cultural site will be affected:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under title II of this Act a reasonable opportunity to comment with regard to such undertaking.<sup>59</sup>

The most common application of section 106 is to projects concerning the development of the natural resources of Native American tribes.<sup>60</sup> Judicial review of compliance with section 106 is decided on a case-by-case basis.<sup>61</sup> Courts are more likely to invalidate section 106 violations based on the adverse effects of the project in question.<sup>62</sup> Courts are unwilling to invalidate a project when an agency simply fails to comply with a technical

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57. Connie Rodgers, *Native American Consultation in Resource Development on Federal Lands*, COLO. LAW., Jan. 2002, at 113.

58. 54 U.S.C.A. § 300101 (West 2014).

59. Wesley Kobylak, Annotation, *Application and Construction of § 106 of the National Historic Preservation Act of 1966 (16 U.S.C.A. § 470f), Dealing with Federally Sponsored Projects Which Affect Historic Properties*, 68 A.L.R. Fed. 578 § 2(a) (1984).

60. Rodgers, *supra* note 57.

61. Kobylak, *supra* note 59, § 2(a).

62. *Id.*

aspect of section 106 procedure.<sup>63</sup> However, compliance with section 106 involves more than a rubber stamp of the action under review.<sup>64</sup>

In order to preserve historic resources under NHPA section 106, the requesting party must: (1) identify any cultural resources that may be affected by agency action; (2) determine whether agency action will actually affect tribal resources and if those affects are adverse; (3) meet and discuss with tribes ways to mitigate possible adverse effects; and (4) submit any agreements between tribes and agencies to the Advisory Council for comment.<sup>65</sup> The Advisory Council compiles the agreements and submits the comments to the agency planning the action.<sup>66</sup> The agency is under no obligation to adhere to the comments of the Advisory Council; however, there must be good reason to disregard them.<sup>67</sup>

## 2. *National Environmental Policy Act*

The National Environmental Policy Act (NEPA) is meant to accomplish two objectives: (1) declare national environmental policy; and (2) provide a council that can review the environmental consequences before “major” federal actions take place.<sup>68</sup> Both Congress and administrative agencies must legislate and promulgate regulations in accordance with NEPA.<sup>69</sup> However, when NEPA is in conflict with another statute, NEPA does not take precedent.<sup>70</sup> The statutory language only requires agencies to comply with the Act to the “fullest extent possible.”<sup>71</sup> NEPA applies primarily to the federal government,<sup>72</sup> but, if the federal government engages with state or local governments to the extent that the project is “federalized,” then NEPA applies.<sup>73</sup>

## C. *History of Tribal Consent*

Even with executive orders, promulgated agency rules, and legislation, tribes are still not involved in government actions that impact its people,

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63. *Id.*

64. *Id.*

65. Rodgers, *supra* note 57.

66. *Id.*

67. *Id.*

68. 42 U.S.C. §§ 4321-4370e (2012); see George Blum et al., *Pollution Control*, 61B AM. JUR. 2D § 82.

69. Blum et al., *supra* note 68, § 86.

70. *Id.* § 85.

71. *Id.*

72. *Id.* § 88.

73. *Id.*

lands, and way of life. There is a solution, however, available through the United Nations (UN). In 2007, after twenty-five years of contentious negotiations, the UN finally passed a declaration to protect the rights of indigenous peoples around the world with the concept of free, prior and informed consent (FPIC).<sup>74</sup>

There is a gap between the United States and the international community's engagement of Native Americans when governments infringe upon Native American rights. During his second term, President Obama reiterated the government's commitment to consultation with Native American tribes under EO 13175,<sup>75</sup> but this is not enough. Executive orders are temporary and can change from president to president. Although tribal consultation is codified in some statutes, orders, regulations, and policies, there remains no consistent consultation procedure or policy.<sup>76</sup> In order for tribal consultation procedures to be most effective, the federal government's policy should adhere to a unified approach, and should mandate real consequences for substantive violations of existing regulations. The current piecemeal approach only gives the façade of requiring tribal input. Existing policy is not only disheartening, but severely inadequate to protect the rights of Native Americans living within U.S. borders.

#### *D. Tribal Response to Consultation*

Effective consultation strengthens the trust between the federal government and Native Americans. When consultation is not taken seriously, Native American's rights are not protected. Robert Miller

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74. Press Release, Gen. Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007), <http://www.un.org/press/en/2007/ga10612.doc.htm> [hereinafter DRIP Press Release].

75. President Barack Obama, Presidential Memorandum on Tribal Consultation (Nov. 5, 2009), <https://obamawhitehouse.archives.gov/the-press-office/memorandum-tribal-consultation-signed-president> ("My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175.").

76. White House – Indian Affairs Executive Working Group and Consultation and Coordination Advisory Group, List of Federal Tribal Consultation Statutes, Orders, Regulations, Rules, Policies, Manuals, Protocols, and Guidance (Jan. 2009), [http://www.achp.gov/docs/fed%20consultation%20authorities%202-09%20AHP%20version\\_6-09.pdf](http://www.achp.gov/docs/fed%20consultation%20authorities%202-09%20AHP%20version_6-09.pdf) ("This list . . . includes many of the laws, orders, regulations and policies requiring that government-to-government relationships with tribes be carried out however, [sic] it does not purport to be comprehensive or all encompassing.").

describes the tribal response to consultation as “too much and too little.”<sup>77</sup> Too much speaks to the frequency of consultations.<sup>78</sup> Too little is a reference to the absence of real power tribes have in the consultation process.<sup>79</sup> In practice, consultation becomes too much when any action, no matter how small, requires the tribe’s attention.<sup>80</sup> Even though federal agencies now must consult with the tribes, tribal input is often disregarded in a manner that discredits the overall efficacy of tribal consultation.<sup>81</sup> Tribes want the government’s time and effort put into studying a topic and taking a position has an effect on the actions it ultimately takes, instead of just becoming another procedural step before a federal agency can commence their action.<sup>82</sup> Consultation becomes even more important when tribal resources are in jeopardy. This aspect is highlighted with the following conflict between the Sioux Nation, the federal government, and an oil company clamoring to finish installing a pipeline.

### *III. The Dakota Access Pipeline*

The Dakota Access Pipeline (DAPL) is intended to carry oil 1172 miles from the Bakken oil field in North Dakota to existing pipeline infrastructure in Patoka, Illinois.<sup>83</sup> The DAPL is a \$3.7 billion investment, made by the oil company Energy Transfer Partners (ETP), meant to transport approximately 470,000 barrels of oil a day.<sup>84</sup> The DAPL will carry crude oil through North Dakota, South Dakota, Iowa, and Illinois where it will join extant pipelines and travel onward to refineries and markets in the Gulf and on the East Coast.<sup>85</sup> The DAPL’s projected completion date was the end of 2016, but protests on the Standing Rock Sioux Reservation delayed its completion.<sup>86</sup>

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77. Miller, *supra* note 7, at 64.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *About the Dakota Access Pipeline: Overview*, ENERGY TRANSFER, <http://landowners.daplpipelinefacts.com/about/overview.html> (last visited Apr. 2, 2017) (“Dakota Access, LLC, a subsidiary of Energy Transfer Crude Oil Company, LLC, is developing a new pipeline to transport crude oil . . . with additional potential points of destination along the pipeline route.”).

84. *Id.*

85. *Id.*

86. Aaron Sidder, *Understanding the Controversy Behind the Dakota Access Pipeline*, SMITHSONIAN (Sept. 14, 2016), <http://www.smithsonianmag.com/smart-news/understanding-controversy-behind-dakota-access-pipeline-180960450/?no-ist>.

### A. History of the Pipeline

Projects as large as the DAPL usually undergo an extensive federal permitting process. The Keystone XL Pipeline, in comparison, which is only seven miles shorter than the DAPL and carries approximately 830,000 barrels of oil per day, underwent a seven-year review process.<sup>87</sup> Unlike the Keystone XL, the DAPL did not have to go through a presidential permitting process or other, more stringent, permitting procedures because it is being built solely in the United States.<sup>88</sup> ETP began to seek permits for the DAPL's construction in the third quarter of 2014.<sup>89</sup> Construction began in early 2015 and was scheduled to end at the close of 2016.<sup>90</sup> The DAPL received its final approval from the Army Corps of Engineers in the summer of 2016 as opponents of the pipeline began to gain publicity.<sup>91</sup>

Construction of the pipeline was not dependent on the approval of building permits, “[a]s permits are filed, the route is still subject to change slightly in order to accommodate the individual needs and concerns of landowners along the route.”<sup>92</sup> The DAPL was able to circumvent more arduous permitting procedures because ETP owns ninety-nine percent of the lands the DAPL will traverse.<sup>93</sup>

### B. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*

The Standing Rock Sioux Tribe sued the U.S. Army Corps of Engineers (Corps) under the Administrative Procedures Act for violations of the NHPA in its permitting procedures.<sup>94</sup> The disputed pipeline route is approximately half a mile upstream on the Missouri River from the

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87. TransCanada, *About the Keystone XL Pipeline*, <http://www.keystone-xl.com/about/the-keystone-xl-oil-pipeline-project/> (last visited Oct. 23, 2016).

88. Devin Henry, *Five Things to Know About the Dakota Access Pipeline*, THE HILL (Aug. 27, 2016 10:51 AM), <http://thehill.com/policy/energy-environment/293535-five-things-to-know-about-the-dakota-access-pipeline-fight>.

89. Mills, *supra* note 42.

90. *Id.*

91. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534 (JEB), 2016 WL 4734356 (Sept. 9, 2016).

92. Mills, *supra* note 42.

93. Chester Dawson & Kris Maher, *Fight over Dakota Access Pipeline Intensifies: Company Behind the Project Expects Final Approval; Opponents Vow to Continue Effort*, WALL ST. J. (Oct. 11, 2016 9:00 PM), <http://www.wsj.com/articles/fight-over-dakota-access-pipeline-intensifies-1476234035>.

94. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 2016 WL 4734356, at \*15.

Standing Rock Reservation on Lake Oahe.<sup>95</sup> The projected pipeline route will cross the Missouri River under Lake Oahe.<sup>96</sup> Aside from concerns that the construction of the DAPL will disrupt Sioux sacred land, the Tribe is also concerned about the potential for the entire Tribe's water supply to be contaminated.<sup>97</sup> The Corps told the Tribe that the Corps only had jurisdiction over the section of pipeline that traversed over federal lands and waterways,<sup>98</sup> while the Tribe believed that the Corps had jurisdiction over the entire pipeline project.<sup>99</sup> The Advisory Council<sup>100</sup> submitted a comment to the Corps regarding the jurisdictional dispute.<sup>101</sup> Ultimately, the United States District Court for the District of Columbia found that the Corps followed the correct procedure and only had jurisdiction over the portions of the pipeline that crossed federal lands and waterways.<sup>102</sup> Even though the court ruled against the Sioux Tribe, it received a small victory from after heavy media coverage of its protest of the pipeline.<sup>103</sup> The Corps agreed to review the permitting process and look for alternative routes for the DAPL at the section that crosses under Lake Oahe.<sup>104</sup>

Energy Transfer Partners took several steps to find a route that would cause the least amount of controversy by participating in forty-three open houses, public meetings, and regulatory hearings throughout four states to allow for public input.<sup>105</sup> It also held 559 meetings with community leaders, tribes, businesses, agricultural and civic organizations, state and federal regulatory and permitting agencies over a two-and-a-half year period.<sup>106</sup>

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95. *Id.* at \*6.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *See id.* at \*23 (describing the Advisory Council as “the agency responsible for commenting on NHPA compliance for federal undertakings”).

101. *Id.* at \*15.

102. *Id.* at \*32.

103. Meenal Vamburkar, *Dakota Pipeline's Fate May Hinge on Next President After Setback*, BLOOMBERG (Sept. 9, 2016, 1:47 PM), <http://www.bloomberg.com/news/articles/2016-09-09/judge-gives-go-ahead-on-energy-transfer-n-dakota-oil-pipeline>.

104. Gregor Aisch & K.K. Rebecca Lai, *The Conflicts Along 1,172 Miles of the Dakota Access Pipeline*, N.Y. TIMES (Dec. 5, 2016), [http://www.nytimes.com/interactive/2016/11/23/us/dakota-access-pipeline-protest-map.html?\\_r=0](http://www.nytimes.com/interactive/2016/11/23/us/dakota-access-pipeline-protest-map.html?_r=0).

105. *The Dakota Access Pipeline Route Was Created Through a Careful and Collaborative Process*, DAKOTA ACCESS PIPELINE FACTS (Dec. 27, 2016), <http://dapipelinefacts.com/route/>.

106. *Id.*

The result was 140 route adjustments to the DAPL.<sup>107</sup> Of these adjustments, seventeen were the result of concerns from interested parties.<sup>108</sup> But it is not clear how many of those concerns were actually expressed during consultations. This uncertainty makes it difficult to determine whether Energy Transfer Partners disregarded the concerns of Sioux Tribe, disregarded most concerns received, or tried to accommodate all concerns to the best of its ability. Ultimately, the DAPL crossing in the Standing Rock Reservation follows a route already occupied by eight other pipelines.<sup>109</sup> In addition, there is a new water supply inlet seventy miles away from where the DAPL will cross the Missouri River, so the Tribe would retain access to clean water.<sup>110</sup>

The Standing Rock Sioux received a lot of outside support to help protest the DAPL's construction under Lake Oahe.<sup>111</sup> In recent years, environmentalists have collaborated with Native American tribes to protest the construction of oil pipelines.<sup>112</sup> In an effort to combat global warming, environmental groups have used tribes and tribal issues to advance their agendas.<sup>113</sup> This type of targeted collaboration is not limited to oil pipelines.<sup>114</sup> When engaging in this type of collaboration, tribal issues are frequently pushed aside as secondary to environmental concerns. Environmental groups perpetuate exploitation of tribes when they engage them simply to further the environmental agenda without giving due attention to relevant tribal issues.

The biggest challenge energy transportation companies face when building an oil pipeline is securing the land that the pipeline will lay. This is often accomplished through eminent domain statutes in the state that the oil

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Aseem Prakash, Maggie Allen & Nives Dolšak, *The Big Fight over the Dakota Access Pipeline, Explained*, WASH. POST (Sept. 20, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/20/this-is-why-environmentalists-are-targeting-energy-pipelines-like-the-north-dakota-project/?utm\\_term=.bfcfeb651889](https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/20/this-is-why-environmentalists-are-targeting-energy-pipelines-like-the-north-dakota-project/?utm_term=.bfcfeb651889) (“Now, activists are trying something new — disrupting how the fossil fuel industry transports its products. Their objective is to prevent the fossil fuel industry from accessing the pipelines and railroad networks they need to move their products. The logic is simple; if products cannot be moved, they cannot be sold and will not contribute to global warming.”).

112. *Id.*

113. *Id.*

114. *Id.* (noting other examples of crude oil and natural gas protests including tribes and environmental groups). Environmentalists also teamed with The Lummi Nation to protest the Gateway Pacific Terminal, the largest coal exporting facility on the West Coast. *Id.*



pipeline lays or private transactions.<sup>115</sup> The combination of oil pipelines providing a public good and the lack of oversight over oil pipeline construction provide an easy path for energy transfer companies to install oil pipelines. The problem with the DAPL is the proximity to the Standing Rock Sioux Reservation. The DAPL has the potential to have an enormous impact on the people living on the Standing Rock Reservation, however, there is nothing the Tribe can do to within its own power to alter the DAPL's fate. Unless some sort of private or government action occurs on tribal lands, there is no unilateral action the Tribe can take to prevent the construction of the pipeline. Proximity plays no factor in determining whether there is any tribal authority.

It took months of heavy media coverage and outside support to pressure the Departments of the Army, Justice, and Interior to review the approval of the DAPL's crossing of Lake Oahe.<sup>116</sup> Unfortunately, the second look at the pipeline crossing may only have been for the excessive media attention. Nevertheless, it brought to light not only the Standing Rock Sioux concerns about the potential infringement on its resources, but the environment as a whole. Surprisingly, there is not a greater focus by environmentalist on creating regulation of the construction of oil pipelines that are wholly domestic. Unfortunately, looking at the turn of events, there is a greater likelihood that domestic oil pipeline construction will see more regulation rather than an increase in tribal authority regarding the consultation process.

### *C. Government Agencies React to the DAPL Case*

Even though the district court ruled against the Sioux Tribe, the Department of Justice (DOJ), Department of the Army (DOA), and the Department of the Interior (DOI) released a joint statement just days after the verdict was announced that said the DAPL would not continue construction until it is determined that the permitting process was correctly followed. These agencies temporarily halted the construction of DAPL on Army Corps land until it was able to determine if it needed to "reconsider any of its previous decisions regarding the Lake Oahe site under the National Environmental Policy Act (NEPA) or other federal laws."<sup>117</sup> The

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115. *What If Pipelines Cross Private Land?*, PIPELINE 101, <http://www.pipeline101.com/Where-Are-Pipelines-Located/What-If-Pipelines-Cross-Private-Land> (last visited July 12, 2017).

116. Press Release, U.S. Dep't of the Interior, 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), 2016 WL 4709097.

117. *Id.*

three agencies invited tribes to engage in formal government-to-government consultations to discuss two questions:

- (1) within the existing statutory framework, what should the federal government do to better ensure meaningful tribal input into infrastructure-related reviews and decisions and the protection of tribal lands, resources, and treaty rights; and (2)
- should new legislation be proposed to Congress to alter that statutory framework and promote those goals.<sup>118</sup>

However, the DOA only said it would look for an alternative route, not that the DAPL must take an alternative route.<sup>119</sup>

#### *IV. International Human Rights and Native American Tribes*

Native American tribes have few domestic options when they seek to exercise the broader range of rights that most sovereigns enjoy. Tribes are still dependent on the U.S. federal government in most regards when any action by them is not contained to their reservations amongst their people. However, internationally, there is growing support to expand the rights of indigenous people around the world. In far too many places, indigenous peoples are still marginalized. To combat this, the UN General Assembly passed the Declaration on the Rights of Indigenous Peoples (DRIP), which outlines the basic rights indigenous people should enjoy.

##### *A. United Nations Declaration on the Rights of Indigenous Peoples*

###### *1. Declaration Provisions*

The DRIP is a “non-binding text . . . [that] sets out the individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, employment, health, [and] education.”<sup>120</sup> The DRIP is composed of forty-six articles that empower indigenous peoples to pursue

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118. *Id.*

119. Caroline Kenny, Gregory Krieg, Sara Sidner & Max Blau, *Dakota Access Pipeline To Be Rerouted*, CNN (Dec. 5, 2016, 1:08 AM), <http://www.cnn.com/2016/12/04/politics/dakota-access-pipeline/> [hereinafter *DAPL Reroute*] (“We are asking our supporters to keep up the pressure, because while President Obama has granted us a victory today, that victory isn’t guaranteed in the next administration . . . More threats are likely in the year to come, and we cannot stop until this pipeline is completely and utterly defeated, and our water and climate are safe.”).

120. *United Nations Adopts Declaration on Rights of Indigenous Peoples*, UN NEWS CTR. (Sept. 13, 2007), <http://www.un.org/apps/news/story.asp?NewsID=23794&Cr=indigenous&Cr1=#.WA1mpPldU2Q>.

self-determination and redress for past wrongs.<sup>121</sup> The Declaration was adopted in 2007 by a majority of the states in the UN General Assembly—with Australia, Canada, New Zealand, and the United States initially voting against the resolution.<sup>122</sup>

Discussions on the DRIP have been occurring for decades. Twenty-five years of negotiations regarding the Declaration's content were finally rewarded at the adoption of the agreement. One of the most contentious provisions of the DRIP was the language about FPIC, which can be interpreted for use as a veto from indigenous groups when tribes believe their rights are at risk of infringement.<sup>123</sup>

In the DRIP, FPIC stems from indigenous peoples' right to self-determination.<sup>124</sup> In addition, self-determination is inherently intertwined with all the articles in the DRIP. In order for indigenous peoples to control their own destinies, they have to be part of decisions that affect them.

FPIC is the cornerstone and most contentious part of the DRIP. The phrase "free, prior and informed consent" is used six times in the DRIP, in articles 10, 11, 19, 28, 29, and 32.<sup>125</sup> These articles address issues that arise

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121. See G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) [hereinafter DRIP Text]; see also *Declaration on the Rights of Indigenous Peoples*, OFFICE OF THE HIGH COMM'R, U.N. HUM. RIGHTS, <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (last visited Apr. 1, 2017).

122. DRIP Press Release, *supra* note 74.

123. *Id.*

124. OFFICE OF THE HIGH COMM'R, U.N. HUMAN RIGHTS, INDIGENOUS PEOPLES AND THE UNITED NATIONS HUMAN RIGHTS SYSTEM 5 (Fact Sheet No. 9/Rev. 2, 2013), <http://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf> [hereinafter INDIGENOUS PEOPLES AND THE UNITED NATIONS HUMAN RIGHTS SYSTEM]; see DRIP Text, *supra* note 121, art. 3 ("Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

125. See DRIP Text, *supra* note 121, art. 10 ("Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."); *id.* art. 11, ¶ 2 ("States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."); *id.* art. 19 ("States 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."); *id.* art. 28, ¶ 1 ("Indigenous peoples have the right to redress, by means that can include

when indigenous people's land, resources, culture, political system, spiritual systems, or pollution become involved.<sup>126</sup> The inclusion of FPIC in the Declaration is contentious because it stems from rights traditionally held by indigenous sovereigns, but reflects the lack of power that indigenous peoples tend to have, regardless of where they reside. Article 10 of the DRIP states that indigenous lands cannot be taken without FPIC.<sup>127</sup> If the federal government adopted and applied this article it would be in direct contradiction to the Fifth Amendment of the Constitution takings clause because the government would be precluded from taking tribal lands.<sup>128</sup> Conflicts between provisions of the Declaration and U.S. laws, such as these, are the reason the United States delayed its endorsement of the DRIP.

## 2. U.S. Application of DRIP

Even though the United States did not originally vote in favor of the DRIP, pressure from Native American tribes and special interest groups led the United States to "lend its support" for the Declaration at the end of 2010, three years after its adoption.<sup>129</sup> The U.S. Department of State announcement, while in support of tribal self-determination, addresses FPIC in relation to Executive Order 13175.<sup>130</sup> The United States interprets FPIC as synonymous with the government-to-government consultation relationship spelled out in the executive order.<sup>131</sup> This relationship does not

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restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent."); *id.* art. 29, ¶ 2 ("States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent."); *id.* art. 32, ¶ 2 ("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.").

126. *See id.* arts. 6, 8, 10-12.

127. *Id.* art. 10.

128. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

129. *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. DEP'T OF STATE (Dec. 30, 2016), <http://www.achp.gov/docs/US%20Support%20for%20Declaration%2012-10.pdf> [hereinafter DRIP Announcement].

130. *Id.* at 5.

131. *Id.* ("[T]he United States recognizes the significance of the Declaration's provisions on free, prior and informed consent, which the United States understands to call for a

require the approval by a tribe, only a good faith effort on the part of the government to consult with the tribe on matters that will have an impact on tribal life or resources.<sup>132</sup>

Even if the federal government accepted and applied the DRIP in its entirety, there is a chance the DRIP would not even apply to the DAPL because the pipeline does not affect tribal land, only federal land.<sup>133</sup> However, the DAPL does cross under the primary water source for the Standing Rock Reservation, which may trigger the need for FPIC.<sup>134</sup> Article 32 of the DRIP, which requires FPIC before the approval of any project that affects their resources, may apply to the situation.<sup>135</sup>

Discussion of FPIC's application to the DAPL is hardly necessary, as governments across the globe—including the United States—hold such a narrow view of FPIC.<sup>136</sup> After all, it took the U.S. executive branch three years to endorse the DRIP after its passing in the UN General Assembly.<sup>137</sup> While this is a step in the right direction, it is only a step. The federal government aspires to integrate DRIP policies into law,<sup>138</sup> as long as these policies do not interfere with U.S. sovereignty.

#### *B. UN Committee on the Elimination of Racial Discrimination*

In addition to the UN General Assembly, the UN Committee on the Elimination of Racial Discrimination (CERD) has issued statements regarding the protection of indigenous peoples' rights. The mission of the CERD is to monitor the implementation of the International Convention on

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process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.”).

132. *Id.*

133. *The Dakota Access Pipeline Route Was Created Through a Careful and Collaborative Process*, *supra* note 105.

134. *Id.*

135. DRIP Text, *supra* note 121, art. 32.

136. *See* DRIP Announcement, *supra* note 129.

137. Krissah Thompson, *U.S. Will Sign U.N. Declaration on Rights of Native People, Obama Tells Tribes*, WASH. POST (Dec. 16, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/16/AR2010121603136.html> (“The United States is the last major country to sign on to the U.N. declaration, which was endorsed by 145 countries in 2007.”).

138. DRIP Announcement, *supra* note 129, at 1 (“Most importantly, it expresses aspirations of the United States, aspirations that this country seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.”).

the Elimination of All Forms of Racial Discrimination (Convention).<sup>139</sup> In 1997, the CERD issued and adopted General Recommendation No. 23 (General Recommendation),<sup>140</sup> which was the UN's first attempt to identify and promote indigenous rights and autonomy around the world. The General Recommendation advances indigenous rights by mandating member states to "[e]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent."<sup>141</sup> This language was the precursor to the provisions stated in the DRIP, language debated for more than two decades.<sup>142</sup>

After the DRIP was adopted, the CERD recommended that the DRIP be used to interpret CERD treaty obligations.<sup>143</sup> Despite U.S. support of the DRIP, it does not feel that the Declaration should be used as a statement of international law, but "has moral and political force."<sup>144</sup> The United States' 2013 Periodic Report to the CERD points to a report from the 2012 Tribal conference to highlight its efforts at improving indigenous rights in the United States.<sup>145</sup> The 2012 Tribal Conference Report highlights the federal government's "support[] of tribal self-determination and self-governance."<sup>146</sup> The report discusses several steps the federal government has taken to improve indigenous rights through executive action and legislation. But these steps fall short of the FPIC powers granted in the articles in the DRIP.<sup>147</sup> In order to avoid an impasse between the federal

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139. *Committee on the Elimination of Racial Discrimination*, OFFICE OF THE HIGH COMM'R, U.N. HUM. RIGHTS, <http://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIntro.aspx> (last visited July 12, 2017).

140. Human Rights Council General Recommendation 23: Indigenous Peoples, U.N. Doc A/52/18, Annex V, 4(d) (1997) [hereinafter General Recommendation 23].

141. *Id.* art. 4(d).

142. See DRIP Press Release, *supra* note 74.

143. *Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination*, U.S. DEP'T OF STATE (June 2013) [https://www.state.gov/j/drl/rls/cerd\\_report/210605.htm](https://www.state.gov/j/drl/rls/cerd_report/210605.htm) [hereinafter *Periodic Report*].

144. DRIP Announcement, *supra* note 129.

145. *Periodic Report*, *supra* note 143.

146. WHITE HOUSE, CONTINUING THE PROGRESS IN TRIBAL COMMUNITIES (Dec. 2012), <https://obamawhitehouse.archives.gov/blog/2012/12/05/continuing-progress-tribal-communities> [hereinafter TRIBAL REPORT]

147. *Id.* The report from the tribal conference highlights some major steps the federal government has taken to promote tribal self-determination including among other things: (1) a presidential memorandum directing every federal agency to engage in consultation, (2) passing of the HEARTH Act giving tribes the regulate the leasing of their own lands

government and Native Americans, the trend of tribal self-determination progress has to continue. One way to continue this trend is to let Native American tribes have an actual say in actions that impact their land, resources and way of life.

### *C. Moving Towards FPIC*

Finding a middle ground between the United States' current consultation policy and FPIC is no easy task. The federal government views any move toward FPIC as a relinquishing of power to the tribes, rather than a compromise. Native American tribes can only gain greater protection of their rights under DRIP-like policies and statutes. If the federal government adopted such policies, tribes could reclaim some tribal autonomy and power. However, how much power would the government lose is a question that scares the government.

Furthermore, the United States cannot ignore the international trend towards further protection of indigenous rights and self-determination.<sup>148</sup> Michael Eitner proposed a uniform consultation standard for government-to-government relations that allows for procedural and substantive judicial review of agency actions.<sup>149</sup> Greater access by the tribes to substantive judicial review would force agencies to offer evidence to support their findings.<sup>150</sup> Agencies would have to overcome a burden of proof in order to take action against tribal wishes.<sup>151</sup> This type of consultation policy resembles FPIC and would bring the federal government in line with the DRIP and CERD recommendations.<sup>152</sup> However, attempts by members of Congress to make this change, by passing legislation that would revise the consultation process in a way more favorable to tribes, have stagnated.<sup>153</sup> Systemic changes in these procedures are badly needed. A possible change could be letting Native Americans in on decision making by not just seeking their opinion, but letting Native Americans vote on the decision.

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supplanting DOI leasing regulations, (3) the Cobell settlements, and (4) expanding tribal criminal jurisdiction with Violence Against Woman's Act. *Id.*

148. See INDIGENOUS PEOPLES AND THE UNITED NATIONS HUMAN RIGHTS SYSTEM, *supra* note 124; see also *Indigenous Peoples*, OAS, [http://www.oas.org/en/topics/indigenous\\_peoples.asp](http://www.oas.org/en/topics/indigenous_peoples.asp) (last visited Dec. 11, 2016) (containing discussion of the drafting of the American Declaration on the Rights of Indigenous Peoples).

149. Eitner, *supra* note 48, at 868.

150. *Id.*

151. *Id.* at 896.

152. See DRIP Text, *supra* note 121; see General Recommendation 23, *supra* note 140.

153. Eitner, *supra* note 48, at 881-85.

One goal of Congress's efforts to reform government consultation procedures should be to create a more uniform procedure.<sup>154</sup> There already exists a presidential memorandum that requires all agencies to consult with tribes before action is taken that impacts their interests.<sup>155</sup> If all agencies conduct consultation, they need not all have unique consultation procedures. Instead of Congress passing something similar to the RESPECT Act,<sup>156</sup> which offers vague direction on consultation procedures, Congress should go one step further and establish a permanent consultation board within the Department of the Interior. This board should be composed of at least three members, all neutral in disposition. This board should do nothing but review decisions up for consultation. The agency and tribe in contention should be required to submit a joint report. If both sides cannot come to an agreement, then each side would present evidence to the board. A review board of this nature would be possible if a uniform—government wide—consultation procedure was in place.<sup>157</sup>

#### *1. Pros of Tribal Inclusion in Consultation Review*

First, and foremost, a consultation system that would allow for greater tribal input would start to shift power back to Native American tribes. A review board of this nature would give tribes a voice in the decisions that often greatly affect their lives. The establishment of a consultation review board could push the federal government to adopt more policies and statutes that reflect FPIC.<sup>158</sup> Every time consultation is employed, Native American tribes have a stake in the decision. This would show that the

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154. *See id.* at 868.

155. TRIBAL REPORT, *supra* note 146, at 3 (“At the first White House Tribal Nations Conference held in November 2009, the President signed a memorandum, ‘Consultation and Coordination with Tribal Governments,’ directing every federal agency to develop a plan to fully implement Executive Order 13175 (E.O. 13175).”).

156. *Summary H.R. 5379 – RESPECT Act*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/5379> (last visited Dec. 11, 2016). (“This bill requires federal agencies to: (1) have an accountable process to ensure meaningful and timely input by Indian tribes before undertaking any activity that may have substantial direct impacts on the lands or interests of such tribes, on the relationship between the federal government and such tribes, or on the distribution of power and responsibilities between the government and such tribes; and (2) consult with Indian tribes concerning all activities that would affect any federal land that shares a border with Indian country. An Indian tribe may seek judicial review of a determination of an agency under this bill in accordance with the Administrative Procedure Act if the tribe has exhausted all other administrative remedies available to it.”).

157. *See Eitner, supra* note 48, at 896 (arguing for a uniform tribal consultation system).

158. *See DRIP Text, supra* note 121, art. 19 (declaring the right of indigenous peoples to have FPIC before several types of actions are taken that effect its interests).



federal government wants to empower tribes and continue the policy of strengthening self-determination.<sup>159</sup> This type of relationship between the federal government and the tribes would resemble a partnership, rather than the imposition of power from the government on the tribes.

Greater inclusion of the tribes in the consultation process gives Native American tribes power on the front end, instead of having to go through the judicial system to reclaim power after rights have already been infringed upon. Native American tribes have not always been successful when appealing to the court system.<sup>160</sup> By affording tribes the opportunity to resolve their disputes with an agency during decision making may result in fewer lawsuits and a feeling of equality.

By instituting greater inclusion of the tribes in the consultation process, relations between the Native American tribes and the U.S. government can begin to conform to the evolving international standard and the DRIP.<sup>161</sup> By working to conform to the standard, the United States will have a louder voice when advocating for equal rights throughout the world for other oppressed groups, such as women in the Middle East.<sup>162</sup> By endorsing the DRIP and participating in international organizations, such as the UN, the federal government has made a commitment to support the human rights of indigenous people.<sup>163</sup> “Great nations, like great men, should keep their word.”<sup>164</sup>

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159. TRIBAL REPORT, *supra* note 146, at 3.

160. *See Nevada v. Hicks*, 533 U.S. 353, 367-69 (2001) (holding tribal courts lack jurisdiction to hear cases filed by tribal members against non-Indians for harms done on trust land within the reservation); *see also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that tribes lack inherent jurisdiction to try and punish non-Indians); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (holding that private citizens could not purchase land from Native American tribes).

161. DRIP Text, *supra* note 121.

162. *See generally The U.S.-Middle East Partnership Initiative: Supporting Women*, U.S. DEP’T OF STATE, [http://photos.state.gov/libraries/tunis/5/PDFs/Women\\_FACT\\_Sheet\\_FINAL0513.pdf](http://photos.state.gov/libraries/tunis/5/PDFs/Women_FACT_Sheet_FINAL0513.pdf) (last visited July 12, 2017) (“MEPI’s projects empower women to help them strengthen democratic institutions in the MENA region. MEPI works in partnership with local leaders and indigenous organizations to increase women’s political and economic participation, support women visionaries, provide training to enhance women’s capabilities to contribute to [its] countries’ development, and build the capacity of civil society to secure equal rights and economic prosperity for women and [its] families.”).

163. DRIP Announcement, *supra* note 129, at 1 (“The United States supports the Declaration, which—while not legally binding or a statement of current international law—has both moral and political force.”).

164. *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960).

## *2. Cons of Greater Inclusion of the Tribes in the Consultation Process*

If the federal government were to allow the tribes and the agency under consultation review to vote with a consultation board, the votes of the tribe and the agency would simply cancel each other out, rendering this type of inclusion mute. With the inclusion of a vote from each side of the controversy, change to federal consultation procedures would be more symbolic. A tribal consultation vote does not give Native American tribes any more power than they already have. This may be viewed as another attempt by the federal government to appeal to Native American political pressure without having to actually give up any power.

## *V. Conclusion*

In order for the U.S. government to avoid more debacles like the DAPL, there needs to be a change in the way it consults with tribes. Since the Marshall trilogy, there has been ambiguity regarding the power dynamics between the United States and Native American tribes. Even though tribes are partially sovereign entities, the antiquated idea of a guardian protecting its ward still permeates throughout U.S. government policy.<sup>165</sup> Ultimately, there needs to be a more democratic relationship between Native American tribes and the government. This idea of tribes as domestic dependent nations, that tribes are so alien that they do not have a more defined place in the eyes of the U.S. government, are beliefs of the past.<sup>166</sup> Chief Justice Marshall was correct when he said that tribes and their lands are not foreign nations.<sup>167</sup> Affording tribes more power in some respects does not imply that the relationship between the United States and tribes must remain unchanged. There is an inherent give and take when the power dynamics between two sovereigns occurs. By giving tribes broader power under the DRIP's idea of free, prior, and informed consent, the government is not removing all federal oversight. Even states are subordinate to the federal government and they, too, are sovereigns. The level of respect, however, between the states and the federal government is different than that between

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165. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (“[M]eanwhile [Native American tribes] are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.”).

166. *Id.*

167. *Id.* at 13.

Native American tribes and the federal government. Dual sovereignty has worked quite well since the nation's founding.<sup>168</sup>

A change in the federal government consultation policy does not have to be the most drastic approach in the shortest amount of time. It has taken decades to reach the era of self-determination. As long change continues to empower Native American tribes, tribes, one day, might have the human rights outlined in the DRIP and set by CERD. Unfortunately, the UN and its organizations, such as CERD, do not carry any legally binding power to enforce their policies on the United States.<sup>169</sup> While continued pressure by international bodies and the media may result in broader attention certain events,<sup>170</sup> Native Americans should have the tools to control their own destiny. Greater tribal inclusion in the consultation process, including the potential for them to vote, may provide a symbolic path to real substantive change as described by Eitner.<sup>171</sup> The ideal goal is for Native Americans to give FPIC before action is taken that affects their land, resources, or culture. It appears that the federal government will not take that leap in the near future. It is important to continue the trend of self-determination, even if a real change of power comes later.

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168. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); see also Robert A. Levy, *Rights, Powers, Dual Sovereignty, and Federalism*, CATO INST. (Sept./Oct. 2011) <https://www.cato.org/policy-report/septemberoctober-2011/rights-powers-dual-sovereignty-federalism> (quoting Justice Kennedy) ("Federalism 'protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control its actions. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.'").

169. *Functions and Powers of the General Assembly*, GEN. ASSEMBLY OF THE UNITED NATIONS, <http://www.un.org/en/ga/about/background.shtml> (last visited Dec. 14, 2016) ("The Assembly is empowered to make recommendations to States on international issues within its competence."); see *Iraq War Illegal, Says Annan*, BBC NEWS (Sept. 16, 2004 9:21 GMT), [http://news.bbc.co.uk/2/hi/middle\\_east/3661134.stm](http://news.bbc.co.uk/2/hi/middle_east/3661134.stm) ("When pressed on whether [Annan] viewed the invasion of Iraq as illegal, he said: 'Yes, if you wish. I have indicated it was not in conformity with the UN charter from our point of view, from the charter point of view, it was illegal.'").

170. *DAPL Reroute*, *supra* note 119 (noting that pressure by protesters and media coverage pushed the federal government to look at the DAPL route again, but did not guarantee an alternate route).

171. Eitner, *supra* note 48, at 868 (advocating for a uniform consultation procedure that has judicial review of substantive issues).