The state of consultation policies regarding government activities that affect Indigenous Americans, their lands and resources in the U.S.

This report reviews the state of consultation policies related to Indigenous Americans in the United States. It also outlines some of the requirements for consultation with indigenous communities that have developed under international law, especially ILO Convention 169, the Indigenous and Tribal Peoples Convention (1989), and will explain where our government's consultation policies fall short of international standards and fail to ensure Indigenous American's right to self-determination.

International

The current bedrock for international standards on the rights of Indigenous Peoples is the Indigenous and Tribal Peoples Convention of 1989 - also known as ILO Convention 169.[1] While it is hardly the only important provision of international law,[2] it is a treaty and binding on signatory states. ILO convention 169 defines the rights of Indigenous and Tribal Peoples in the

[1] Indigenous and Tribal Peoples Convention ILO, 1989 (ILO No. 169), https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C169

[2] See United Nations Declaration on the Rights of Indigenous Peoples, https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html

countries they occupy and the responsibilities of governments to ensure these rights. The convention also explicitly enumerates the right to participation, consultation, and self-management for Indigenous Peoples.

Article 6 of the convention requires the government to consult with Indigenous Peoples whenever legislative or administrative measures may affect them, their Lands, or their resources. These consultations are required to be formal, exercised in good faith, and involve genuine dialogue between governments and the affected peoples. The convention goes further than merely requiring consultation of Indigenous Peoples, but also requires that they actively "participate in the formulation, implementation and evaluation of plans and [programs] for national and regional development which may affect them directly" (Sec. 7(1)). And consultation must be entered into with the intention of reaching agreement.

If a country chooses to ratify the convention, supervisory and enforcement mechanisms are available to those affected via the ILO Constitution. After Germany ratifies the convention, scheduled to take effect on June 23rd, 2022, the convention will be officially ratified by 24 countries - the United States not being one.

In 2007, the United Nations promulgated the Declaration on the Rights of Indigenous Peoples.[3] While this declaration further emphasized the rights of indigenous communities, it also established the concept of free, prior, and informed consent (FPIC), which would require governments to acquire informed consent from Indigenous Peoples before taking actions that may impact their rights, lands or resources (Article 19). This declaration, though not legally binding, has been adopted by the U.S., and therefore must on some level state national policy.

United States

In the United States, federal-tribal relationships are defined by the federal trust responsibility. The genesis of this relationship is in *Cherokee Nation v. Georgia.*[4] In this case, Chief Justice John Marshall labeled the Cherokee Nation as a "domestic dependent nation,"[5]

[3] G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007).
[4] Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
[5] Id. at 8.

and further likened the relationship between the federal government and tribes to a "ward …. [and] his guardian."[6] Tribes, according to Marshall "look to our government for protection; rely upon its kindness and its power; appeal to it for reliefs to their wants; and address the president as their great father."[7] The meaning of this trust responsibility has evolved since its inception, but today, it is primarily seen as a doctrine that imposes various substantive and procedural requirements on the federal government.[8] Substantive duties include providing services, like healthcare and education, and also protection of tribal sovereignty and resources.[9] Included in the procedural duties is the duty to consult with Tribes.[10] While it was traditionally the responsibility of the Bureau of Indian Affairs (BIA) to carry out the trust responsibility, statutes and executive order promulgated over the last couple decades have given all government agencies responsibility to carry out this charge.[11]

Orders, Memoranda, and Agency Policy

Over the past twenty years, rights of indigenous Peoples and the importance of consultation has become increasingly talked about. During this period, the U.S. has taken strides to advance Indigenous Peoples' rights and ensure consultation takes place before actions that affect them are carried out. In 1994, President Clinton issued a memorandum on government-to-government relations with Native American Tribal governments, outlining principles to guide government agencies to ensure Indigenous rights.[12] These principles underscored that it is imperative for agencies to operate in a government-to-government relationship with federally recognized tribes, as well as to consult with Indigenous People to the fullest extent possible when agency actions could affect them. These principles have been reaffirmed through President Clinton's subsequent Executive Order 13175, and through

[6] Id. at 9.
[7] Id.
[8] Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. Mich. J. L. Reform 417 (2013).
[9] Id. at 419.
[10] Id.
[11] Matthew J. Rowe, Judson B. Finley & Elizabeth Baldwin, *Accountability or Merely "Good Words"? An Analysis of Tribal Consultation Under the National Environmental Policy Act and the National Historic Preservation Act*, 8 ARIZ. J. ENV'T. L. & POL'Y 1, 1– 2 (2018).
[12] See Appendix B.

memoranda from President Obama (2009) and President Biden (2021), all directing executive department and agency heads to engage in meaningful and regular consultation and collaboration with tribal officials in the development of federal policies and actions that have implications on Indigenous Peoples[13].

While these orders and memoranda may be well-intentioned and signal that the U.S. is moving in the right direction in ensuring and protecting indigenous rights, they are not legally enforceable and fail to create any right or benefits for Indigenous Americans. For example, E.O. 13175 states that the "order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person[14]." The memoranda issued by President Bush, Obama, and Biden contain nearly identical provisions. Consequently, federal courts are unwilling to consider lawsuits alleging violations of the consultation duty arising from these orders and memorandum[15]. More so, these orders and memoranda fail to define consultation, which gives agencies discretion to develop their own standards and processes. Hence, agencies have varying definitions on consultation and differ on what the consultation process should look like. Many agencies, such as the Army Corps of Engineers, vaguely declare that consultation must be "meaningful" instead of laying out a step-by-step process for how consultation must occur. The EPA explicitly states that there is "no single formula for what constitutes appropriate consultation," and even allows for informal consultation processes. These vague and varied definitions make it laborious to enforce meaningful consultation under a system of consultation that has no force of law.

Under international precedent and practice, the required consultation is not simply an opportunity to comment, and is not satisfied simply by the opportunity, to take one example, to participate in the public comment period on an Environmental Assessment or Environmental Impact Statement.

[13] See Appendix B.
[14] Exec. Order No. 13,175, 65 Fed. Reg. 67,252 (Nov. 9, 2000).
[15] See, e.g., George v. Comm'r of Internal Revenue, No. 19063-03, 2006 WL 1627980, at 3 (T.C. June 13, 2006) ("Executive Order 13175 lacks the force and effect of law because it is not grounded in a statutory mandate.").

The consultation must be undertaken with the representative institutions of the indigenous community, be undertaken in good faith, and with the intention of reaching agreement. The leading international case*, Sarayaku v. Ecuador*, elucidates these requirements further.[16] It also talks at length about a practice that is improper under international law, but is common in dealings between project proponents and indigenous communities in the United States: developers dividing the community by offering benefits to those who will support the project, financing opposition candidates for tribal councils, and otherwise trying to undermine tribal leadership.

When examining U.S. cases where Indigenous Peoples have challenged the adequacy of an agency's consultation, there have been varied results. In *Oglala Sioux Tribe of Indians v. Andrus*, the Tribe sought an injunction to prevent the BIA (Bureau of Indian Affairs) from reassigning an Indian officer to the BIA's office in Aberdeen.[17] The BIA failed to follow its own consultation policies and engage in any prior consultation with the tribe. Siding with the Tribe, the court held that the BIA failed to engage in meaningful consultation and reversed the district court's denial of the injunction. The court explained that "where the bureau has established a policy requiring prior consultation with a tribe, and has thereby created a justified expectation on the part of the Indian People that they will be given meaningful opportunity to express their views before Bureau policy is made, that opportunity must be afforded. Failure of the Bureau to make any real attempt to comply with its own policy of consultation not only violates those general principles which govern administrative decision making, but also violates the distinctive obligation of trust incumbent upon the Government in its dealing with these dependent and sometimes exploited people."[18]

Similarly, in *Lower Brule Sioux Tribe v. Deer*, the Tribe sought a writ of mandamus and injunctive relief against the BIA to enjoin them issuing reduction in force (RIF) notices to BIA employees on Indian reservation.[19] The court found that the BIA again failed to follow its own policy, which required the BIA to engage in meaningful consultation before issuing notices of

[16] Inter-American Court on Human Rights, Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, (2012), https://www.corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf
[17] Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 722 (1979).
[18] Id. at 721.
[19] Lower Brule Sioux Tribe v. Deer, 911 F.Supp. 395, 402 (D.S.D. 1995).

this kind.[20] The BIA failed to justify their disregard for their own policy. Relying in part on Oglala, the court issued the mandamus, requiring the BIA to engage in meaningful consultation before it may issue the notices. Although not extremely helpful in defining meaningful consultation, the court – after examining prior consultations conducted by the BIA – explained that meaningful consultation "means tribal consultation in advance with the decision maker or with intermediaries with clear authority to present tribal views to the BIA decision maker."[21]

Unfortunately, not all courts are willing to enforce agency policies as the two Eighth Circuit courts discussed above did. In *Hoopa Valley Tribe v. Christie*, the Tribe sought to enjoin the BIA from moving its offices off reservation because of the BIA's lack of consulting during the process.[22] The court, before even addressing the adequacy of the BIA's consultation, explained that BIA guidelines for consultation with tribal groups on personnel management in the BIA did not establish legal standards that could be enforced because they were in letter form and unpublished. The court reasons that the policies "call for consultation standards where major moves effect the Indians. They give discretion to the Bureau. They do not establish legal standards that can be enforced against the Bureau."[23] However, the court does go on to note that even if the policies were binding, the Bureau provided convincing evidence that adequate consultation did occur.[24] The court also notes that "consultation is not the same as obeying those who are consulted. The Hupas were heard, even though their advice was not accepted."[25]

Because there are no minimum requirements for agency consultation with Indigenous People and U.S. case law does little to shed light on what constitutes meaningful consultation, many Indigenous Americans are still being stripped of their right to self-determination. There is an absence of legal teeth to punish agencies for their disregard for tribal input/concern. Consequently, most consultation requirements in the U.S. are mere procedural hoops, or boxes to check. In many ways, consultation requirements are reminiscent of typical notice and comment procedures. So long as an agency has appeared to adequately "consider" the

[20] Id. at 402.
[21] Id. at 401.
[22] Hoopa Valley Tribe v. Christie, 812 F.2d 1097, 1103 (9th Cir. 1986).
[23] Id. at 1103.
[24] Id.
[25] Id.

concerns of citizens, they can often disregard those concerns and proceed as they originally intended.

Statute

Although executive orders, memoranda, and agency policies for consultation lack force of law, there are an array of statutes that require consultation with Indigenous People.[26] Consultation mandates of the National Historic Preservation Act[27](NHPA) and National Environmental Policy Act[28] (NEPA) have been most frequently used by Indigenous Peoples to challenge agency actions and enjoin federal infrastructure projects due to an agency's failure to adequately consult. Many of these statutes, including NEPA and the NHPA do not provide for a private right of action, meaning individuals attempting to bring claims for failure to consult under these statutes must bring such claims under the APA (courts are split as to whether the NHPA provides for a private right of action, but the Ninth Circuit and D.C. Circuits have held that it does not.[29] In addition to having to exhaust all available administrative remedies,[30] judicial review under the APA presents other roadblocks to Indigenous People. Under the APA, judicial review of agency action regarding consultation is limited to whether that agency's consultation was arbitrary and capricious[31], a standard of review that is highly deferential to an agency's interpretation of authorizing statutes and its own regulations.[32] Thus, agencies typically need only to notify affected Indigenous Peoples and listen to what they have to say. Agencies are under no obligation actually to implement a Tribe's recommendations, allowing agencies effectively to ignore Indigenous concerns, so long as they can show some form of consultation

[26] See Appendix B.
[27] 54 U.S.C. § 302706.
[28] 40 C.F.R. §1500-1508.
[29] *See* Shanks v. Dressel, 540 F.3d 1082, 1092 (9th Cir. 2008) ("Section 106 of the NHPA does not create a private right of action against the federal government."); Karst Env't. Educ. & Prot., Inc. v. EPA, 475 F.3d 1291, 1295 (D.C. Cir. 2007) ("NHPA, like NEPA, contains no private right of action, [so] we agree with the Ninth Circuit that NHPA actions must also be brought pursuant to the APA.")
[30] 5 U.S.C. § 704; See, e.g., Winnemem Wintu Tribe v. U.S. Dep't of the Interior, 725 F. Supp. 2d 1119, 1139 (E.D. Cal. 2010) ("[T]o bring a claim under the APA for a violation of the NEPA, plaintiffs must show that they have exhausted available administrative remedies prior to bringing an action in federal court.")
[31] 5 U.S.C. § 706.
[32] Alana K. Bevan, *The Fundamental Inadequacy of Tribe-Agency Consultation on Major Federal Infrastructure Projects*, 6 U. PA. J. L. & PUB. AFFAIRS (2021).

occurred. This issue makes it close to impossible to demonstrate that an agency acted arbitrarily, capriciously, and abused their discretion.

The construction of the Dakota Access Pipeline (DAPL) is a prominent example of the difficulties Indigenous People face when bringing claims against agencies for failure to comply with statutory consultation requirements. Tribes filed for an emergency injunction to halt the pipeline's construction, arguing in part that the Army Corps of Engineers failed to participate in effective consultation (when blatantly disregarding the Tribe's concerns for spiritual sites and graves the pipeline would pass through) as required under the National Historic Preservation Act, Sec 106. When seeking an injunction, a plaintiff must establish; 1) that he is likely to succeed on the merits, 2) that he is likely to suffer irreparable harm in the absence of preliminary relief, 3) that the balance of equities tips in his favors, and 4) that an injunction is in the public's favor.[33] The District Court for D.C. held that the Tribes' claim of inadequate consultation would not succeed on the merit, explaining that the Corps sufficiently complied with the NHPA's consultation requirement.[34] The court notes the APA's standard to defer to an agency's interpretation of its requirements, and explains that the Tribe failed to meet its burden of demonstrating how the agency's lack of consultation was unlawful, arbitrary or capricious, or not in accordance with the law.[35] Furthermore, the court denied the request for an injunction because the Tribe could not meet the second requirement due to the fact that harms (to burial and religious sites) were destined to occur even in the absence of an injunction because most of the pipeline was constructed on private land.[36]

Likewise, in *Narragansett Indian Tribe v. Warwick Sewer Authority*, the Tribe sought an injunction to prevent the Warwick Sewer Authority from proceeding with a sewer project that risked desecration to burial sites.[37] The Tribe claims that the Authority failed to adequately consult with the tribe, as required by section 106 of the NHPA. Like the DAPL case, the court ruled that the Tribe failed to meet the standards to obtain a preliminary injunction. The court explains that the Tribe's claim of inadequate consultation fails on the merit (and even if it did

[33] Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 205 F.Supp.3d 4 (D.D.C. 2016) at 5.
[34] Id. at 32.
[35] Id. at 30.
[36] Id. at 34.
[37] Narragansett Indian Tribe v. Warwick Sewer Authority, 334 F.3d 161, 169 (1st Cir. 2003).

not, the Tribe failed to show that irreparable injury would have occurred in the absence of an injunction).[38] The court's record indicates that the Authority had consulted with the Tribe early in the consultation process (a meeting with the executive director of the Authority and daily cell phone communication).[39] Furthermore, the Authority had sent out two technical archaeological reports to the Tribe, which were apparently ignored.[40]

From these cases, it seems that courts are generally unwilling to find that a Tribe's claim is likely to succeed on the merits (as required for an injunction) if there is at least some form of communication. However, as we see in *Pueblo of Sandia v. United States*, some courts may be willing to find that a Tribe's claim is likely to succeed on the merits when the putative consultation is minimal or non-existent.[41] Here, the court ruled that the Forest Service failed to engage in reasonable or good faith efforts to determine if the agency's undertaking would affect cultural properties, as required by section 106 of the NHPA.[42] The Forest Service sent form letters to tribes asking for detailed information on cultural Native American activities conducted in the area, but provided no information in return.[43] Additionally, the Forest Service withheld relevant information from the state historic preservation officer until after the consultation process had concluded.[44] In sum, the court concluded that "a mere request for information is not necessarily sufficient to constitute the 'reasonable effort' section 106 requires."[45]

It is worth noting that Tribes are at times hesitant to comment on government proposals, participate in EIS processes, respond to correspondence, or perhaps even answer the telephone for fear that some agency will call whatever results an adequate form of "consultation." Tribes are fully aware of the rights courts are establishing for Indigenous Peoples in the hemisphere, and want the same things that other Tribes in other countries are establishing.

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[38] Id. at 169.
[39] Id. at 164.
[40] Id. at 163-4.
[41] Pueblo of Sandia v. United States, 50 F.3d 856, 863 (10thCir.1995).
[42] Id. at 863.
[43] Id. at 857.
[44] Id.
[45] Id. at 860.

Solutions

The United States has taken steps to bolster consultation with Indigenous Americans, particularly since President Obama reaffirmed the messages of E.O. 13175 in 2009. Since then, many agencies have revised their consultation policies, while others have laid out action plans for how they will achieve meaningful consultation. However, Indigenous Americans maintain that "even the best-written agency Tribal consultation policies are often poorly implemented," and that "agencies neither treat Tribes as sovereigns nor afford Tribes the respect they would any other governmental entity – let alone treat Tribes as those to whom the Unites States maintains a trust responsibility or as those who hold reserved rights through treaties that granted the United States vast amounts of territory."[46] The inadequacy of consultation policies, agencies' failure to implement the policies they have, and the lack of agency accountability may be further damaging the U.S.' relationships with Indigenous Americans. Some scholars note that even though Indigenous People realize the benefits of consultation, the ability of agencies to ignore their own policies may reduce the willingness of a Tribe to engage in consultation at all – regardless of enforceability[47]. For a variety of reasons, it is crucial that the U.S. act to mend its relationship with Indigenous Americans. For one, Indigenous Americans have already suffered from centuries of irreparable harms and injustices at the hands of government. Improving consultation can prevent further injustice and the destruction of historical and spiritual sites, as well as protecting natural resources which may be important to tribal subsistence. Second, improving the consultation process and creating consistency amongst agencies will help both agencies and tribes understand what is required during consultation and reduce disputes and litigation. And finally, Indigenous American communities hold a wealth of knowledge about their lands and resources. As a result, consultation with Indigenous Americans can ultimately lead to better agency decision making and ensure the preservation of resources that all Americans rely on.

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[46] U.S. Dept. of Interior Et Al., Final Report, *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions* (2017).

[47] Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 Am. Indian L. Rev. 21 (1999), https://digitalcommons.law.ou.edu/ailr/vol24/iss1/14

Policy Revisions to Address Primary Tribal Concerns

Fortunately, the perspectives and recommendations of Tribes, as well as examples from positive consultation experiences, can help guide the formation of meaningful consultation processes and identify where improved legislation is required. After consulting Tribes on the consultation process, the Department of the Interior released a report in 2017 that outlines key principles for agencies to incorporate when revising their consultation policies.

First, Tribes have expressed concern about inconsistencies in the consultation process among agencies.[48] Indeed, it seems that the same agency may well follow different paths on different occasions in the absence of an established standard. As discussed earlier, presidential orders and memoranda have not specified what consultation must look like, leaving agencies with broad discretion on how to design their consultation processes. Establishing clear-cut, step-by-step consultation processes that are consistent among agencies is one step that could be taken to improve tribal consultation, even if the U.S. continues to be unwilling to meet international standards.

Second, Tribes have maintained that timing is key.[49] For Tribes, it is crucial that the consultation process is initiated as early as possible. Initiating the process early ensures that a Tribe's concerns are considered and addressed.[50] Often, agencies interpret a lack of response from a Tribe as a lack of interest in the project and thus disengage in any further consultation.[51] In reality, a lack of response is typically the result of the agencies' "failure to contact the appropriate person in the Tribe, … the tribe has been deluged with similar inquiries from Federal agencies, or … the Tribal official in question is traveling, on sick leave, or otherwise out of the office."[52] Other times, Tribes may be taking longer to respond due to a lack of capacity and resources. "Tribes regularly cite capacity restraints as a factor in their ability to process and respond to infrastructure-related requirements and requests."[53] Ultimately, ensuring that

[48] DOI Final Report., Supra note 46.
[49] Id. at 13.
[50] Id.
[51] Id. at 17.
[52] Id.
[53] Id. at 13.

Tribes are consulted at the earliest possible point will ensure under resourced Tribes have sufficient time to conduct their own research on the effects of an infrastructure project and provide agencies with a complete list of concerns.

Third, Tribes have stressed the importance of implementing agency provisions that require good-faith negotiations with the aim of reaching an agreement. This principle, which is outlined in article 6 of ILO Convention No. 169,[54] is currently absent in many agency policies. Good-faith negotiations should entail some important provisions such as clear time-frames for responses and full information requirements.[55] Tribes must be fully informed on the entire scope of infrastructure projects and all related details. Understanding the full scope of projects can help Tribes identify concerns for historical sites or burial grounds that are outside of reservation boundaries (information a Tribe may not be able to provide if they are only informed on activities that may affect land within reservation boundaries) and provide a more complete list of concerns, considerations, and alternative proposals. Another essential component of good-faith negotiations is open and continuous dialogue between Federal agencies and Tribes.[56] This means that agencies must go beyond simply providing and collecting information. It also means that trying to confine the consultation process within a 30-day comment period will for the most part simply not work.

Agencies should disclose their intentions and goals, respond to Tribe concerns and inquiries for more information, and re-consult when plans change. Maintaining an open dialogue from the time a project is considered to its completion can help alleviate Tribe concerns that consultation is merely a box-checking procedural exercise.

Other Ways Agencies Can Improve Tribal Consultation

Discussed thus far are the chief concerns Tribes have about current consultation policies and how agencies can adjust their policies to reduce those concerns. But there are other

[54] ILO No. 169., Supra note 1.
[55] *Indigenous Sovereignty - Consent for Mining on Indigenous Lands*, (2022), http://fnemc.ca/wp-content/uploads/2022/01/FNEMC_mining_consent_FinalReport.pdf (last visited Jun 5, 2022).
[56] DOI Final Report., Supra note 46, at 12.

strategies and Tribe recommended mechanisms that can bolster consultation by improving tribe-government relations and understanding.

When it comes to working effectively with Tribes, it is crucial to understand that Tribe's history and culture. One problem that many Tribes pointed out was that "Federal leaders and staff dealing with infrastructure matters lack an understanding of … trust and treaty responsibilities, how to work with Tribes effectively, Tribal histories and cultures, and Federal agency policies." Hence, it would be wise for agencies to incorporate training and educational programs for staff that deal with Tribes, to increase employees' knowledge on those topics. An educated staff is a "starting point … to better understand Tribal input," and "be better positioned to understand whether projects … may be impacting Tribes' ancestral lands that may hold human remains, cultural items, and sacred sites, or ceded lands in which Tribes have hunting, fishing, gathering, or other rights."[57] The importance of educational programs was understood by the Inter-American Court of Human Rights. In the case of the *Indigenous People of Sarayaku v. Ecuador*, the court acknowledged that many of the violations of Sarayaku rights emerged from local officials' lack of understanding of the People.[58] After the court held that the government did in fact fail adequately to consult with the Sarayaku, the court also ordered Ecuador to implement an educational program to inform officials of Indigenous People's rights.[59]

Coupled with educating agency staff on Tribal rights and histories, it may also be useful if all agencies employed tribal liaisons. Tribes, in recounting positive consultation experiences noted that an agency's use of a tribal liaison, particularly where agency districts overlap with reservations, improved the consultation process.[60] This Tribe's experience is corroborated by a study of consultation processes conducted under the NHPA, which found that "having a Tribal Liaison is a positive factor in an efficient and successful consultation."[61]

Tribe-government relationships can also be strengthened regionally with a Memorandum of Understanding (MOU). Many Ojibwe tribes in the Great Lakes region

[57] Id. at 13.
[58] John Kelly, *Kichwa Indigenous People of Sarayaku v. Ecuador*, 40 Loy. L.A. Int'l & Comp. L. Rev. (2017).
[59] Id. at 1487.
[60] DOI Final Report., Supra note 46, at 67.
[61] Routel & Holth., Supra note 7, at 472.

suggested that the establishment of a MOU between the local Tribes and USDA Forest Service helped establish a cooperative and understanding relationship.[62] This MOU, ratified by the Forest Service "articulate[d] the Forest Service's recognition of Tribal treaty rights, Tribal sovereignty and the capacity to self-regulate Tribal resources and their use. … It also provides a broad framework for a consensus-based consultation process where Tribes have input into decisions affecting the abundance, distribution of, and access to National Forest resources."[63] Agencies that deal frequently with certain Tribes could implement a similar MOU to foster long-term cooperative relationships between Tribes and agencies.

Needed Legislation.

Simply revising agency policies or incorporating some of the suggested strategies above will not ensure meaningful consultation with Tribes. If the United States is serious about protecting Indigenous rights and ensuring meaningful consultation in infrastructure projects, Congressional action is necessary. The primary need for Congressional action stems from the unenforceability of presidential orders, memoranda, and agency policies. To hold agencies accountable, Congress must establish clear requirements to the consultation process and mechanisms for enforcement.

When consulted, Tribes were asked for their feedback on how to improve the consultation process, there were various calls for new legislation. For one, Tribes expressed the need to codify Indigenous Americans' legal right to federal-tribal consultation.[64] To fully ensure Tribes' right to consultation, such legislation should create uniform rules that apply to any agency taking action affecting Tribes and explicitly provide for judicial review through a private cause of action for Tribes.[65] However, because Tribes also raise the point that all Tribes are different and have individual needs, Congress could allow for flexibility to the consultation process by incorporating a provision that allows agencies and Tribes to negotiate customized consultation compacts.[66] Such compacts could afford Tribes the ability to implement

[62] DOI Final Report., Supra note 46, at 68.
[63] Id.
[64] Routel & Holth., Supra note 7, at 467.
[65] Id.
[66] Id. at 473.

ceremonies, spirituality, and custom into the consultation process, which some Tribes of British Columbia consider important in their consent process.[67] Of course, to ensure agencies are held accountable, such legislation must also provide for penalties and other consequences for failure to engage in required consultation with Tribes.

In the interim, scholar, attorney, law professor, tribal court judge, and recently appointed judge to the Hennepin County, Minnesota bench - Colette Routel - suggests the use of an "executive order to direct agencies to use notice and comment rulemaking to turn their policies and handbooks into mandates enforceable through judicial review."[68] Of course, to avoid a problem we already deal with, this order would need to contain provisions for enforceability.

While it is questionable that Congress would seriously consider enacting such a high bar for consultation, Tribes have repeatedly expressed the desire for the U.S. to recognize and implement the UN's concept of free, prior, and informed consent. Under FPIC framework, Indigenous People would have the right to give or withhold their consent for any action that would affect their lands, territories, or rights.[69] Free - meaning that consent cannot be coerced, prior – meaning the Indigenous must receive information on the activity with ample time to review the action before the activity begins, informed – meaning that IP are provided with full information, and consent – referring to the right to agree or not agree.[70] Too much of the discussion has been bogged down in unproductive debate over whether the Tribes have a "right of veto." The UN Special Rapporteur on Indigenous Communities has analyzed this question, emphasizing that to reduce the principles of consultation and consent to a debate over the existence of a veto loses the vision, spirit and character of these international principles. The principles of consultation and consent seek to create a good faith dialogue between states and indigenous communities. Consent more so refers to mutual agreements between the parties, and the ability of Tribes to negotiate the terms of a project from the initiation of a project to its completion. Many critics of this concept are concerned that FPIC could seriously delay projects

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[67] *Indigenous Sovereignty - Consent for Mining on Indigenous Lands.,* Supra note 45, at 23.
[68] Routel & Holth., Supra note 7, at 467.
[69] *Free, Prior and Informed Consent in Context*, CONSERVATION INTERNATIONAL, https://www.conservation.org/projects/free-prior-and-informed-consent-in-context.
[70] Id.

or even stop them completely. But, Tribes have made clear that "they are not universally opposed to infrastructure investment."[71] The development of roads, broadband, transmission, and energy resources is understood by Tribes to be vital to their economies and economic development. Those initiating projects potentially effecting Tribes should not be worried about Tribes stopping their projects. Tribes simply "want to be part of the process from the start, rather than being included only after relevant determinations have already been made."[72]

Conclusion

For centuries, Indigenous Americans have suffered from oppression and a disregard of their human rights. For many Tribes, a major turning point in their histories occurred when some federal project was approved in the absence of consultation.[73] Infrastructure projects destroying valuable resources, dams flooding ancestral lands, and mining activities polluting water sources are all examples of how a lack Tribal consultation on infrastructure projects can devastate an Indigenous community. Unfortunately, so long as lackluster consultation policies and enforcement mechanism are in place, the rights, resources, and livelihood of Indigenous Americans are still under threat. Fortunately, if we implement uniform consultation policies amongst agencies and hold agencies accountable, all parties can benefit. Indigenous Americans will be able to protect valuable resources and fully exercise their right to self-determination. On the other hand, clear consultation guidelines and the involvement of Tribes at the inception of projects will help reduce litigation and ultimately the timeframe under which projects can be completed.

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[71] DOI Final Report., Supra note 46, at 3.
[72] Id.
[73] Id. at 12.

Appendix A - Agency Policies:

* For a more detailed list, see Item 7 of Appendix B – "Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions". (Detailed list of Agency Policies can be found in Appendix 4 of this Government Report).

Environmental Protection Agency:

- https://www.epa.gov/tribal/forms/consultation-and-coordination-tribes

Department of Energy:

- [https://perma.cc/2RUH-RG5S]

Department of Homeland Security:

- https://www.dhs.gov/sites/default/files/publications/DHS%20Tribal%20Consulation%20Policy%20Final%20PDF_0.pdf

Department of the Interior:

- [https://perma.cc/ZAN9-CSY4]

Department of Housing and Urban Development:

- https://www.hud.gov/program_offices/public_indian_housing/ih/regs/govtogov_tcp

Department of Agriculture:

- https://www.usda.gov/directives/dr-1350-001

Forest Service:

- https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd517821.pdf

National Resources Conservation Service:

- https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_021894.pdf

Department of Defense:

- https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/471002p.pdf?ver=2018-11-28-143903-320

Department of Commerce:

- https://www.commerce.gov/sites/default/files/media/files/2013/tribal-consultation-final.pdf

Department of Health and Human Services:

- https://www.hhs.gov/sites/default/files/iea/tribal/tribalconsultation/hhs-consultation-policy.pdf

Department of Justice:

- https://www.justice.gov/sites/default/files/otj/docs/doj-memorandum-tibal-consultation.pdf

Department of Labor:

- https://www.federalregister.gov/documents/2012/12/04/2012-29246/tribal-consultation-policy

Department of Treasury: (Action Plan)

- https://home.treasury.gov/system/files/226/Treasury-Action-Plan-Tribal-Consultation.pdf

Department of Transportation: (Action Plan)

- https://www.transportation.gov/sites/dot.gov/files/docs/DOT_Tribal_Consultation_Plan.pdf

Department of State: (Action Plan)

- https://www.state.gov/wp-content/uploads/2021/10/DoS-Tribal-Consultation-Plan-2021-1.pdf

Appendix B - Relevant Statutes, Orders, and Memorandum:

1. National Environmental Policy Act (NEPA)
    1. 40 C.F.R. §1500 – 1508.

2. National Historic Preservation Act (NHPA)
    1. 54 U.S.C. § 302706.

3. President Clinton Executive Order No. 13,175.
    1. https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-tribal-governments

4. President George W. Bush Memorandum on Tribal Consultation.
    1. https://georgewbush-whitehouse.archives.gov/news/releases/2004/09/20040923-4.html

5. President Obama Memorandum on Tribal Consultation.
    1. https://obamawhitehouse.archives.gov/the-press-office/memorandum-tribal-consultation-signed-president

6. President Biden Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships.
    1. https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/

7. U.S. DEPT. OF INTERIOR ET AL., FINAL REPORT, *IMPROVING TRIBAL CONSULTATION AND TRIBAL INVOLVEMENT IN FEDERAL INFRASTRUCTURE DECISIONS* (2017).
   Available at: https://www.bia.gov/sites/default/files/dup/assets/as-ia/pdf/idc2-060030.pdf

Appendix C - Relevant Literature:

1) Alana K. Bevan, *The Fundamental Inadequacy of Tribe-Agency Consultation on Major Federal Infrastructure Projects*, 6 U. PA. J. L. & PUB. AFFAIRS (2021).
Available at: https://scholarship.law.upenn.edu/jlpa/vol6/iss3/4

- Most recent L.Rev. article. Provides an overview of the state of consultation requirements in the U.S. and why they fail to protect IP' interests.

2) Christy McCann, *Dammed if You Do, Damned if You Don't: FERC's Tribal Consultation Requirement and the Hydropower Re-Licensing at Post Falls Dam*, 41 Gonz. L. Rev. 411, 454 (2006). Available at: https://blogs.gonzaga.edu/gulawreview/files/2011/02/McCann.pdf

- Reviews some cases that attempt to define consultation, although some are outdated at this point).

3) Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. Mich. J. L. Reform 417 (2013). Available at: https://repository.law.umich.edu/mjlr/vol46/iss2/2

- Explains how the duty of tribal consultation arises out of common law trust responsibilities to Indian Tribes. Reviews the Limitations of existing consultation policies, and why we need more robust, judicially enforceable consultation requirements.

4) Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 Am. Indian L. Rev. 21 (1999).
Available at: https://digitalcommons.law.ou.edu/ailr/vol24/iss1/14

- Reviews why varied and undefined agency consultation requirements fail to protect tribe interests. Also explores a useful definition of "meaningful consultation" found in *Lower Brule Sioux.*

5) Matthew J. Rowe, Judson B. Finley & Elizabeth Baldwin, *Accountability or Merely "Good Words"? An Analysis of Tribal Consultation Under the National Environmental Policy Act and the National Historic Preservation Act*, 8 ARIZ. J. ENV'T. L. & POL'Y 1, 1– 2 (2018).
Available at: https://www.ajelp.com/articles-spring-2018

- Provides three case studies - displaying different consultation procedures

6) S. Rheagan Alexander, *Tribal Consultation for Large-Scale Projects: The National Historic Preservation Act and Regulatory Review*, 32 PACE L. REV. 895 (2012).
Available at: https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1817&context=plr

- Providing a complete overview on consultation under the NHPA.

7) Tarah Bailey, *Consultation with American Indian Tribes: Resolving Ambiguity and Inconsistency in Government-to-Government Relations*, 29 Colo. Nat. Resources, Energy & Envtl. L. Rev. (2018). Available at: https://www.colorado.edu/law/sites/default/files/attached-files/bailey_final_1_web_1.pdf

- Explains that agency policies fail to ensure meaningful consultation because they lack force of law.

8) Troy A. Eid, *Beyond Dakota Access Pipeline: Energy Development and the Imperative for Meaningful Tribal Consultation*, 95 Denv. L. Rev. 593 (2018).
Available at:https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1021&context=dlr

- How embracing consultation can help avoid repeats of situations like the DAPL

9) U.S. Dept. of Interior Et Al., Final Report, *Improving Tribal Consultation and Tribal Involvement In Federal Infrastructure Decisions* (2017).
Available at: https://www.bia.gov/sites/default/files/dup/assets/as-ia/pdf/idc2-060030.pdf

- Provides information about the existing federal statutory, regulatory, and police framework governing tribal consultation; serves as a record of tribal input on the consultation process; recommends that agencies undertake a thorough review of their consultation policies and practices, and that policies be made available to the public; and highlights best practices gleaned from tribal input and makes recommendations for further research, administrative, regulatory, or legislative action.