Changing Consultation

Elizabeth Kronk Warner,[†*] *Kathy Lynn,*[**] *and Kyle Whyte*[***]

As climate change and fossil fuel extractive industries threaten Indian country and burden many Indigenous communities with risks, mitigating the negative impacts on tribal sovereignty, health, and cultural integrity demands consultation between tribes and the federal government. Yet, this is an area where the law fails to provide adequate guidance to parties who should be engaging or are already engaging in tribal consultations. The law, both domestic and international, may require that consultation occurs, but leaves parties to determine themselves what constitutes effective and efficient consultation. The legacy of the law's inability to provide effective guidance has generated numerous cases of litigation and mutual hard feelings, a glaring example being how the legitimacy of consultative activities was debated and misunderstood in the Standing Rock Tribe's resistance against the Dakota Access Pipeline. This Article hopes to fill the void by turning to other disciplines — ethics and Indigenous studies — for guidance on how effective consultation may be achieved.

To accomplish this, the Article begins with an examination of relevant domestic and international law. While true that claims exist under both domestic and possibly international law to require the federal government to engage in government-to-government consultation with tribes, very little guidance is given as to what that consultation should look like and which sovereign, whether the tribe or the federal government, gets to dictate the

* Elizabeth Kronk Warner is the Jefferson B. & Rita E. Fordham Presidential Dean at the S.J. Quinney College of Law at the University of Utah, as well as a Professor of Law. She is also an enrolled citizen of the Sault Ste. Marie Tribe of Chippewa Indians. We would like to thank Casey Bond, a third-year student at the S.J. Quinney College of Law at the University of Utah, for his excellent research assistance with this Article.

** Kathy Lynn is a faculty researcher in the University of Oregon's Environmental Studies Program and coordinator of the Pacific Northwest Tribal Climate Change Project.

*** Kyle Whyte is Professor of Environment and Sustainability and George Willis Pack Professor at the University of Michigan School for Environment and Sustainability. He is an enrolled member of the Citizen Potawatomi Nation.

process of consultation. Further, existing domestic and international law provides little as to the scope of such consultation or when it is triggered. Given the law's inability to fully answer the question of what effective consultation looks like, the Article suggests that ethics literature, especially the literature emerging from Indigenous studies, is helpful in framing normative judgments regarding effective consultation.

From a moral perspective, consultation can be linked to the norm that all parties should have a chance to give their free, prior, and informed consent to the actions of any other party whose actions may impact them in some way.[1] *Impacts include harms or opportunities to share in any future benefits. In the literature on ethics, "free," "prior," and "informed" consent are taken as being defined in certain ways. While there are a range of legal and other purposes for consultation, morally speaking, consultation can be understood as one process or strategy for fulfilling the general moral duty of consent. Further, emerging Indigenous studies literatures pertaining to ethics add additional moral requirements to these definitions.*

The idea of consent, as a moral norm, suggests a relationship between the U.S., tribes, and other parties that would flow much more like a partnership than a formal consultation, and where tribes would have veto rights (the right to say "no") to any actions that would impact them. To demonstrate this concept, the Article presents two examples: the Dakota Access pipeline controversy, an example of ineffective consultation, and the Northwest Forest Plan, an example of deliberate approaches to monitor the effectiveness of consultation. Based on these examples combined with the ethics literature, the Article concludes with specific strategies that parties might employ to ensure successful tribal consultations. Beyond filling the void created by current federal law, the Article therefore constitutes a valuable and unique addition to the existing scholarship in its interdisciplinary approach, and guidance to parties engaged in tribal consultations.

TABLE OF CONTENTS

[1] *See* ASIA PAC. FORUM OF NAT'L HUMAN RIGHTS INSTS. & OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A MANUAL FOR NATIONAL HUMAN RIGHTS INSTITUTIONS 20 (2013), https://www.ohchr.org/documents/issues/ipeoples/undripmanualfornhris.pdf [https://perma.cc/JX3N-DLQB] [hereinafter MANUAL FOR HUMAN RIGHTS].

INTRODUCTION

Climate change is an issue that is concerning to diverse persons globally in terms of the risks of the industrial technologies that drive greenhouse gas emissions and the environmental impacts associated with the rise in global average temperature. The drivers of anthropogenic climate change, such as the oil, gas, and coal industries, have negative impacts on and pose risks to communities everywhere.

Climate change impacts are occurring through the increase in severe weather-related events, the rise in water scarcity, prolonged droughts, and changes in animal migration patterns.[2] Communities around the world are already experiencing significant impacts from rising sea levels, permafrost melt, wildfires, drought, and many other climate-induced disasters.[3] The impacts to public health, economic livelihood, and cultural well-being extend the effects of climate change beyond just physical landscapes. Within the United States, heatwaves and insect outbreaks have led to increased tree diseases causing widespread tree die-off.[4] An increase in wildfires and drought coupled with reduced water availability has significantly impacted agricultural output, air and water quality, and the populace's general health. Local communities and various corporations are demanding greater responsibility to reduce the impacts of climate change.[5]

Indigenous peoples have their own relationships with the environment through their traditions, spiritual practices, and economic systems. Indigenous peoples have disproportionately experienced effects from extractive industries and climate change. The extraction, transport, and consumption of fossil fuels harms indigenous health and well-being, as well as the cultural and natural resources that sustain indigenous economies and traditional ways of life. Fossil fuel extraction, along with other types of mining, are associated with increased incidence of certain diseases, cancer, exploitative employment conditions, sexual violence and other crimes, cultural desecration, air and water pollution, and ecological degradation, including deforestation. The literature on the risks and harms focuses on governance issues that Indigenous peoples face that make it possible for them to be exposed.[6] Indigenous peoples face harmful climate

[2] *The Effects of Climate Change*, NASA, https://climate.nasa.gov/effects/ (last visited Feb. 7, 2020) [https://perma.cc/Y7WG-Q5J9].

[3] *Id.*

[4] *See id.*

[5] *See, e.g.*, BLACKROCK'S GLOB. EXEC. COMM., *Sustainability as BlackRock's New Standard for Investing*, BLACKROCK, https://www.blackrock.com/corporate/investor-relations/blackrock-client-letter (last visited Feb. 7, 2020) [https://perma.cc/FBQ9-2E6F] (noting the company's recommendations on sustainable investing).

[6] ELIZABETH HOOVER, THE RIVER IS IN US: FIGHTING TOXICS IN A MOHAWK COMMUNITY 4-6 (2017); UNIV. OF N.M. SCH. OF LAW NAT. RES. & ENVTL. LAW CLINIC, ENERGY DEVELOPMENT IMPACTS ON INDIGENOUS PEOPLES 2 (2017), https://lawschool.unm.edu/events/united-nations/docs/energy-development-impact-on-indigenous-peoples-final-report.pdf [https://perma.cc/AZ7V-5GQY]; Sarah Deer & Elizabeth Ann Kronk Warner, *Raping Indian Country*, 38 COLUM. J. GENDER & L. 31, 33 (2019); Sarah Deer & Mary Kathryn Nagle, *The Rapidly Increasing Extraction of Oil, and Native Women, in North Dakota*, FED. LAW., April 2017, at 35, 36; Elizabeth Hoover, Katsi Cook, Ron Plain,

change impacts and risks due to the U.S. having established a governance relationship with Indigenous peoples that has reduced the size of their territories, restricted their boundaries and jurisdictions, and constrained their capacities to steward resilient landscapes and invest in biodiversity conservation. While climate change and fossil fuel industries are having a disproportionate impact on indigenous communities, many tribes in the United States are leading efforts nationally to build adaptive capacity, resilience, and renewable energy, and suggesting governance pathways for transformation.[7]

Resource extraction and climate change preparedness are cross-boundary in nature. Many valuable aspects of Indigenous peoples' cultures and economies that are most at risk from fossil fuel industries and climate change are on ancestral and ceded territories — hence they are not in "Indian country." Indigenous peoples living in the U.S. are vulnerable to the impacts of climate change and extractive industries in numerous ways, from loss of access to species needed for subsistence and commercial economies, such as fishing and plant gathering, to coastal erosion that may force some communities to decide to relocate their places of permanent residence.[8] These vulnerabilities are

Kathy Sanchez, Vi Waghiyi, Pamela Miller, Renee Dufault, Caitlin Sislin & David O. Carpenter, *Indigenous Peoples of North America: Environmental Exposures and Reproductive Justice*, 120 ENVTL. HEALTH PERSP. 1645, 1645 (2012); Michael E. Jonasson, Samuel J. Spiegel, Sarah Thomas, Annalee Yassi, Hannah Wittman, Tim Takaro, Reza Afshari, Michael Marwick & Jerry M. Spiegel, *Oil Pipelines and Food Sovereignty: Threat to Health Equity for Indigenous Communities*, 40 J. PUB. HEALTH POL'Y 504, 505 (2019); David Rich Lewis, *Native Americans and the Environment: A Survey of Twentieth-Century Issues*, 19 AM. INDIAN Q. 423, 440 (1995); Johnnye Lewis, Joseph Hoover & Debra MacKenzie, *Mining and Environmental Health Disparities in Native American Communities*, 4 CURRENT ENVTL. HEALTH REP. 130, 130 (2017); Melanie K. Yazzie, *Decolonizing Development in Diné Bikeyah: Resource Extraction, Anti-Capitalism, and Relational Futures*, 9 ENV'T & SOC. 25, 25 (2018); Geneva E.B. Thompson, Comment, *The Double-Edged Sword of Sovereignty by the Barrel: How Native Nations Can Wield Environmental Justice in the Fight Against the Harms of Fracking*, 63 UCLA L. REV. 1818, 1820 (2016).

[7] Rachel Novak, Lesley Jantarasami, Roberto Delgado, Elizabeth Marino, Shannon McNeeley, Chris Narducci, Julie Raymond-Yakoubian, Loretta Singletary & Kyle Powys Whyte, *Tribes and Indigenous Peoples*, *in* 2 IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES: FOURTH NATIONAL CLIMATE ASSESSMENT 574, 576 (2018), https://nca2018.globalchange.gov/downloads/NCA4_Ch15_Tribes-and-Indigenous-Peoples_Full.pdf [https://perma.cc/YT8S-9E7N].

[8] *See* T.M. Bull Bennett, Nancy G. Maynard, Patricia Cochran, Robert Gough, Kathy Lynn, Julie Maldonado, Garrit Voggesser & Susan Wotkyns, *Indigenous Peoples, Lands, and Resources*, *in* CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT 297, 297-317 (Jerry M. Melillo, Terese Richmond, & Gary W. Yoke eds., 2014); CLIMATE CHANGE AND INDIGENOUS PEOPLES IN THE UNITED

motivated by more than just the fact that some Indigenous peoples have close local ties to landscapes, habitats, waters and natural resources. U.S. settler colonial[9] laws and policies are increasingly being shown to be factors that heighten climate risks for Indigenous peoples.[10] Climate change and the fossil fuel industries are merely some of the examples of myriad cross jurisdictional issues facing tribes, tribal citizens, and Indian country.[11] Given the breadth and importance of these issues, effective consultation between tribes and other sovereign governments is crucial.

As self-governing peoples, Indigenous peoples often have jurisdictions within or bordering nation states and have collective rights to engage in cultural and economic practices that neighboring governments must recognize (yet often do not). Key decisions about laws and policies that will affect tribal well-being are cross-boundary in nature. They require coordination across multiple governments, organizations, communities, and companies. Coordination is required for the support of law and policy development, but also for implementation. At the same time, coordination, if inclusive and respectful of all relevant parties, prevents harm, reduces risks, and ensures that everyone has a voice to ensure that they share equally or fairly in the benefits and burdens.[12]

STATES: IMPACTS, EXPERIENCES AND ACTIONS 509-682 (Julie Koppel Maldonado, Benedict Colombi & Rajul Pandya eds., 2013).

[9] We use the term "settler colonial" laws within the Article to refer to laws and regulations that promote the removal and erasure of Indigenous peoples in order to take the land for use by settlers in perpetuity.

[10] *See* KIRSTEN VINYETA, KYLE POWYS WHYTE & KATHY LYNN, U.S. DEP'T OF AGRIC., CLIMATE CHANGE THROUGH AN INTERSECTIONAL LENS: GENDERED VULNERABILITY AND RESILIENCE IN INDIGENOUS COMMUNITIES IN THE UNITED STATES 19-20 (2015), https://www.fs.fed.us/pnw/pubs/pnw_gtr923.pdf [https://perma.cc/5LRF-NKHX]; Emilie S. Cameron, *Securing Indigenous Politics: A Critique of the Vulnerability and Adaptation Approach to the Human Dimension of Climate Change in the Canadian Arctic*, 22 GLOBAL ENVTL. CHANGE 103, 104 (2012); Bethany Haalboom & David C. Natcher, *The Power and Peril of "Vulnerability": Approaching Community Labels with Caution in Climate Change Research*, 65 ARCTIC 319, 322-23 (2012); Kyle Powys Whyte, *Justice Forward: Tribes, Climate Adaption and Responsibility*, 120 CLIMATIC CHANGE 517, 522 (2013); Elizabeth K. Marino, Losing Ground: An Ethnography of Vulnerability and Climate Change in Shishmaref, Alaska 152-53 (Dec. 2012) (unpublished Ph.D. dissertation, University of Alaska, Fairbanks) (on file with author).

[11] *See, e.g.*, 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.05 (Nell Jessup Newton ed., 2017) [hereinafter 1 COHEN'S HANDBOOK] (discussing tribal-state cooperative agreements that have been entered into in order to address cross-jurisdictional issues).

[12] *See* Dominique M. David-Chavez & Michael C. Gavin, *A Global Assessment of Indigenous Community Engagement in Climate Research*, 13 ENVTL. RES. LETTERS 1, 2-3 (2018) (noting widespread efforts by Indigenous communities to "reclaim authority

The U.S. federal trust responsibility requires that federal agencies be more responsive to federally recognized tribes in the United States that are threatened by climate change. Effective consultation can be met through strong government-to-government relationships between Indian tribes and federal agencies, and should be based on respect, mutual understanding, and common goals. This can be accomplished through interactions that will enhance consultation and provide other pathways to achieving a strong government-to-government relationship.[13] Whether held in trust or otherwise managed by the federal government, effective government-to-government consultation between tribes and the federal government should address the cultural, economic, and ecological impacts of climate change and extractive industries on tribal resources. It should recognize that the preservation of culturally important species and resources are tied to the cultural identity and values of tribes. To date, however, many within Indian country[14] would argue that effective consultation is not occurring.[15]

over their knowledge systems, languages and practices" and by researchers to "develop[] . . . relevant framework[s] grounded in Indigenous and community-based participatory research guidelines and ethical standards").

[13] Although this Article largely examines the benefits of effective consultation from a tribal perspective, consultation makes good business sense in most instances and will benefit non-tribal parties engaged in consultation. "The failure of corporations to respect indigenous peoples' right to access, use and protect their sacred sites may result in legal liability, a lengthy lawsuit, loss of permits, licenses or concessions, or a harmed reputation." Stuart R. Butzier & Sarah M. Stevenson, *Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent*, 32 J. ENERGY & NAT. RESOURCES L. 297, 333 (2014); *see* NAT'L CONG. OF AM. INDIANS, WHITE HOUSE MEETING WITH TRIBAL LEADERS: BACKGROUND PAPER ON TRIBAL CONSULTATION AND TRIBAL SOVEREIGNTY 2-3 (2009), http://www.ncai.org/attachments/Consultation_WGKjwfnREGrEXaaxDYQlEUJvmUkRZviFQZnkppvWzAPHlzwuXYC_Meeting%20Notice%20and%20Background%20Paper%20on%20Tribal%20Consultation%20and%20Tribal%20Sovereignty.pdf [https://perma.cc/PG8J-VQ7E] [hereinafter NAT'L CONG. OF AM. INDIANS].

[14] "Indian country" is both a colloquial term and a legal term of art. 18 U.S.C. § 1151 (2018) (defining "Indian country" as: "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same").

[15] *See, e.g.*, Michael Eitner, *Meaningful Consultation with Tribal Governments: A Uniform Standard to Guarantee that Federal Agencies Properly Consider Their Concerns*, 85 U. COLO. L. REV. 867, 872-73 (2014) (calling the current framework for consultation "inadequate"); Derek C. Haskew, *Federal Consultation with Indian Tribes: The*

This may be due in part to a lack of effective guidance on what federal-tribal consultation should look like.

In addition to consultation, government-to-government relationships can be greatly enhanced by collaboration, which is particularly important because climate change is a cross-boundary issue for tribes. Many tribes hold the right to utilize natural resources located outside the boundaries of their reservations, on lands owned by the federal government or private individuals. These natural resources include sacred sites, and culturally important plant and animal species. Many tribes need access to sacred sites located on federal land to conduct ritual activities.[16] Some tribes in the Pacific Northwest have a treaty right to hunt and fish at their usual and accustomed places, including federally and privately owned lands.[17] Other tribes hold treaty rights to gather plants for food and other culturally important practices.[18] Some of the most significant climate change impacts to tribes may be the shift in the habitat range for these species and the impacts to tribal treaty rights related to hunting, gathering, and other tribal traditions.

Foundation of Enlightened Policy Decisions, or Another Badge of Shame?, 24 AM. INDIAN L. REV. 21, 25-26 (1999) (describing the differing interpretations of "successful consultation"); Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 448-49 (2013) (noting courts' "reluctance to recognize a private cause of action for violations of the common law consultation right"); Letter from Jefferson Keel, President, Nat'l Cong. of Am. Indians, to Tom Vilsack, U.S. Sec'y of Agric., (Dec. 14, 2009), http://www.ncai.org/attachments/Consultation_ustVpCDczCqwJLHCixLQIraeUjlUzDypiZusMhFQGeuEMPMMjRA_USDA.pdf [https://perma.cc/529U-FXHX] ("In general, tribal leaders have strongly supported E.O. 13175, but have significant concerns about the way it has been implemented. Tribal concerns boil down to two points: 1) The Executive Order is viewed by federal agencies as merely a procedural requirement with no focus on the substantive goals of tribal self-government and fulfillment of the federal trust responsibility. Tribal leaders spend a great deal of time and resources engaging with a federal agency only to receive little response directed toward tribal recommendations. 2) Sometimes federal agencies ignore or refuse to carry out their responsibilities under the Executive Order, and there are no mechanisms for accountability.").

[16] *See* U.S. DEP'T OF THE INTERIOR, *Chapter 3: Departmental Responsibilities for Protecting/Accommodating Access to Indian Sacred Sites*, *in* DEPARTMENTAL MANUAL (1998), https://www.usbr.gov/native/policy/DM-FInal_512%20DM%203.pdf [https://perma.cc/9N7Y-9FU5]; U.S. DEP'T OF AGRIC., DRAFT REPORT TO THE SECRETARY, USDA'S OFFICE OF TRIBAL RELATIONS AND FOREST SERVICE POLICY AND PROCEDURES REVIEW: INDIAN SACRED SITES 2 (2011), https://www.usda.gov/sites/default/files/documents/OTR-Report-Sacred-Sites.pdf [https://perma.cc/29GN-PKYL].

[17] *E.g.*, United States v. Winans, 198 U.S. 371, 384 (1905) (upholding an 1859 treaty that preserved Indigenous fishing rights).

[18] *E.g.*, Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight, 700 F.2d 341, 365 (7th Cir. 1983) (upholding an 1854 treaty that preserved Indigenous usufructuary rights).

Climate change impacts that affect tribal cultural resources call for strategies that address issues beyond reservation boundaries and create mechanisms for data sharing and culturally appropriate, cross-boundary climate assessments and adaptation solutions. Cultural self-determination is closely coupled with political self-determination.[19] A failure by the federal government to uphold the trust responsibility will impact the ability of tribes to assert their sovereignty in land and resource management, economic development, and cultural and traditional practices.

One pathway for ensuring that tribal sovereignty and culture are respected in agency policies and management is through cooperative management of resources that are off reservation (or that shift off tribal lands because of climate change). Legal authority for off-reservation resource management is derived from federal law.[20] Some laws, including the Indian Self-Determination and Education Assistance Act, allow for certain federal agencies to delegate management responsibilities to a tribe.[21] A treaty that reserves to a tribe the right to manage or control access to natural resources would similarly give a tribe legal authority, allowing co-management. Ed Goodman goes further to argue that all treaties reserving off-reservation hunting and fishing rights include the legal authority to co-manage.[22]

On a tribal reservation that has not been diminished,[23] legal authority for the management of natural resources may rest with the tribe. A tribe's inherent sovereignty over reservation lands, including the authority to manage natural resources, persists if not altered by federal law or treaty.[24] Some federal laws act to affirm tribal authority to regulate on-reservation resources, including the tribal management of

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[19] *See* Kyle Powys Whyte, *Indigenous Environmental Movements and the Function of Governance Institutions*, *in* THE OXFORD HANDBOOK OF ENVIRONMENTAL POLITICAL THEORY 2 (Teena Gabrielson, Cheryl Hall, John M. Meyer & David Schlosberg eds., 2016).

[20] THE HARVARD PROJECT ON AM. INDIAN ECON. DEV., ON IMPROVING TRIBAL-CORPORATE RELATIONS IN THE MINING SECTOR 33 (2014), https://hpaied.org/sites/default/files/documents/miningrelations.pdf [https://perma.cc/Z9HP-2FM5] [hereinafter THE HARVARD PROJECT].

[21] *See* Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5321(a)(1) (2018).

[22] *See* Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-Management as a Reserved Right*, 30 ENVTL. L. 279, 282 (2000).

[23] Establishing if a reservation has been diminished is a process used by courts to determine the extent that tribes retain the ability to regulate activity on the reservation. The analysis includes an examination of laws that impact the reservation and the percentage of the reservation inhabited by tribal members. For more information on diminishment, see 1 COHEN'S HANDBOOK, *supra* note 11, at § 3.04.

[24] *Id.* at § 17.01.

hunting, trapping, and fishing.[25] Yet other federal laws, including those governing the management of timber on Indian lands, allow federal agencies to sell tribal resources without the tribe's consent.[26]

While some of these resources may remain accessible to tribes via usual and accustomed areas, trust lands, or federally managed lands, others may not. Accordingly, federal management policies and programs should provide for meaningful indigenous involvement in the formation of climate change policies and plans and ensure that indigenous communities in the United States have the capacity to address the impacts of climate change and fossil fuel industries on indigenous lands and resources. These policies and plans can address many important concerns, from treaty rights to the participation of indigenous youth in science education relevant to climate change. It is important to highlight, then, that collaboration can empower tribes to negotiate the cultural impacts of climate change and intersecting oppressions, as well as serve as the basis for forming regional alliances with non-tribal partners. Consultation between federal agencies and tribes can create strategies for creating this type of indigenous involvement and leadership. It can result in outcomes that address the needs of tribal and non-tribal communities in climate change plans, assessments, and policies.

Given the existing lack of effective guidance as to what tribal-federal consultation should normatively look like, this Article seeks to fill the void by looking to models of cooperative management and collaboration, which may serve as a useful mechanism in improving consultation between tribes and the federal government. Part I of the Article examines the requirement for consultation from a legal perspective. Ultimately, although many laws require consultation,[27] such laws provide little guidance on what effective consultation looks like. Because of this void, Part II posits that stakeholders in such consultations should look to other disciplines, such as ethics and Indigenous studies, for guidance as to what consultation should look like. Part III then argues that effective consultation processes lead to

[25] *E.g.*, 18 U.S.C. § 1165 (2018).

[26] *See, e.g.*, 25 U.S.C. §§ 406-07 (2018) (giving the Secretary of the Interior the power to regulate the sale of timber on any unallotted or Indian land held under trust).

[27] For information on federal laws requiring consultation, see *Relevant Federal Laws, Regulations, Executive Orders*, U.S. GEN. SERVS. ADMIN., https://www.gsa.gov/real-estate/historic-preservation/historic-preservation-policy-tools/legislation-policy-and-reports/section-106-of-the-national-historic-preservation-act/native-american-tribal-conultations/relevant-federal-laws-regulations-executive-orders (last visited Aug. 10, 2020) [https://perma.cc/F8RJ-57KS].

beneficial management decisions. To demonstrate this point, this Part begins with an example of an ineffective consultation — the Dakota Access Pipeline. The Article concludes with several discrete recommendations of what should be included in tribal-federal consultations to ensure that legal, moral, and ethical requirements are met. This Article therefore contributes to the existing literature in an important way — it provides concrete guidance on normative best practices for tribal-federal consultation — something that is lacking in the existing scholarship.

I. LEGAL CLAIMS TO EFFECTIVE CONSULTATION

This Part examines the legal justification for consultation between tribes[28] and other sovereigns. As an initial starting point, federal agencies are obligated to protect tribal resources and tribal rights to self-governance.[29] As part of this trust responsibility, federal agencies must engage in ongoing consultation with tribes on issues that will impact tribal rights and resources and affect tribal access to on- and off-reservation resources. A unique government-to-government relationship exists between Indian tribes and the United States federal government that requires that U.S. government entities consult directly with tribal governments when addressing issues that affect tribal lands, resources, members, and welfare.[30] This relationship is grounded in the U.S. Constitution, numerous treaties, statutes, federal case law,

[28] The first section of this Article uses the term "indigenous" to be inclusive of all people of indigenous ancestry living in the United States, especially those communities who have not been recognized by the federal government despite moral and ethical claims to their land. *See supra* INTRODUCTION. Part I of this Article focuses on federal Indian law, which examines the relationship between the federal government and tribes that have been federally recognized, so the term "tribe" is largely used to connote the political governmental organization recognized by the federal government. *See infra* Part I.

[29] *See* Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENVTL. & ADMIN. L. 397, 403 (2017) ("[F]ederal duties to Indians exist and remain enforceable because 'the government "has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements," in exchange for which "Indians . . . have often surrendered claims to vast tracts of land."'").

[30] For a discussion of the history of tribal consultation between tribes and the federal government, see Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37, 41-56 (2015) (discussing the history of tribal consultation between tribes and the federal government).

regulations, and executive orders.[31] Federal and state agencies must treat tribes in a fundamentally different way from the processes employed to solicit input from interested members of the general public. Consultation is the cornerstone of the government-to-government relationship because it is a guarantee that tribes will not be considered as interested members of the public — but as governments in their own right.

This Part examines this unique relationship from a legal perspective. It begins with a discussion of the federal trust relationship between tribes and the federal government by considering historical development and contemporary application of the trust doctrine. Following discussion of the federal trust relationship, the Article examines potential tribal claims to effective consultation based on tribal treaty rights. The Part then delves into some statutes that demand consultation, such as the National Historic Preservation Act, and the executive orders related to tribal consultation issued by President Clinton. The Part concludes by briefly examining the right to consultation under the free, prior, and informed consent doctrine of international law (this concept is also addressed in relation to the moral strength of the argument in the Part that follows). Ultimately, although this Part discusses numerous potential legal arguments demanding consultation between tribes and other sovereign governments, it also demonstrates how consultation law, policy, and legislation provides little guidance on what effective consultation looks like.

A. Federal Trust Relationship

There exists a federal trust relationship between the federal government and federally recognized tribes. Colette Routel and Jeffrey Holth suggest that the "modified trust responsibility contains at least three different duties: (1) to provide federal services to tribal members; (2) to protect tribal sovereignty; and (3) to protect tribal resources."[32] They go on to explain that, "[t]oday, the federal trust responsibility is part common law and part statutory law. It obligates the federal government to provide certain services to tribal members; it is the historical origin of congressional plenary power over Indian affairs; and

[31] Consultation obligations are found in numerous Executive Orders and statutes, including the National Historic Preservation Act to the Federal Land Policy and Management Act. TRIBAL CLIMATE CHANGE PROJECT, THE GOVERNMENT TO GOVERNMENT RELATIONSHIP IN A CHANGING CLIMATE: A REVIEW OF FEDERAL CONSULTATION POLICIES 3 (Draft - 2012), http://tribalclimate.uoregon.edu/files/2010/11/consultation_report_2-22-20122.pdf [https://perma.cc/5KDT-KFD7].

[32] Routel & Holth, *supra* note 15, at 430.

it requires federal officials to protect tribal resources and tribal sovereignty."[33] In keeping with these responsibilities, this federal trust responsibility calls for consultation between tribes and the federal government, as the trust relationship requires the federal government to act in the best interests of tribes. Further, the trust relationship is arguably the foundation of the duty to consult.[34] Should the federal government breach this trust responsibility, tribes may bring a claim against the federal government, assuming certain criteria are met[35] Accordingly, in examining the scope of the federal government's duty to consult, consideration of the federal trust relationship and its potential application in this context is helpful. Routel and Holth conclude that this responsibility:

> imposes a procedural duty on the federal government to consult with federally recognized Indian tribes. Meaningful consultation with federal officials is necessary to determine what services are most needed for tribal members, to understand how federal and state actions may be encroaching on tribal sovereignty, and to analyze whether a federal project will have an adverse effect on tribal resources.[36]

The federal trust relationship between the federal government and tribes has its origins in the "ward" relationship between the federal government and tribes.[37] The U.S. Supreme Court first styled the relationship between tribes and the federal government as a wardship in *Worcester v. Georgia*.[38] In *United States v. Kagama*, the Court

[33] *Id.* at 421.

[34] *Id.*

[35] *See* Rey-Bear & Fletcher, *supra* note 29, at 449.

[36] Routel & Holth, *supra* note 15, at 435.

[37] Peter S. Heinecke, *Chevron and the Canon Favoring Indians*, 60 U. CHI. L. REV. 1015, 1030 (1993). *But cf.* Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 359 (2003) (arguing that "[t]hose who believe that the trust doctrine can be useful today in protecting tribal rights could begin purging the trust responsibility of paternalistic guardian-ward language"). Wood acknowledges that the federal trust relationship is premised on paternalistic notions, as indicated by the language used by the courts. However, because her article seeks to explore the doctrine as applied by the courts, the article uses the same terminology used by the courts. It is unlikely that advocates would need to explore the historical origins of the federal trust relationship, and, therefore, modern day advocates may be well-placed to purse this "wardship" language in briefs to courts moving forward.

[38] *See* Worcester v. Georgia, 31 U.S. 515, 562 (1832); Routel & Holth, *supra* note 15, at 422-25 (detailing Chief Justice Marshall's early articulation of the federal-tribal relationship). "*Cherokee Nation* and *Worcester* have been the subject of much scholarly

considered whether Congress had the authority to enact a statute, the Major Crimes Act, which affected the criminal jurisdiction of tribes.[39] The Court ultimately determined that Congress did have this authority, as tribes were the wards of Congress. The Court explained that "[t]hese Indian tribes are the wards of the nation . . . . From their very weakness and helplessness . . . there arises the duty of protection, and with it the power."[40] The Court found that Congress has plenary power as a result of this wardship relationship.[41] In *Lone Wolf v. Hitchcock*, the Court elaborated on Congress' power in Indian country, explaining that Congress was obligated to act in good faith when exercising its plenary authority.[42]

In *Seminole Nation v. United States*, the Court considered the responsibility of the executive branch under the trust responsibility.[43] At issue in *Seminole Nation* was the Tribe's efforts to recover funds that were embezzled by tribal employees, and the Tribe argued that the federal executive branch was aware of the embezzlement. The executive agency argued that it had fulfilled its duties by merely distributing the money.[44] The Court, however, disagreed, finding that there is "a distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people"[45] and that the executive branch's dealings were to be judged by "the most

attention and have been interpreted in widely divergent ways. These two cases appear, however, to describe a federal-tribal relationship that is characterized by the existence of a sovereign and its protectorate." *Id.* at 425.

[39] *See* United States v. Kagama, 118 U.S. 375, 378-80 (1886).

[40] *Id.* at 383-84.

[41] *Id.* at 384-85.

[42] Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903). Overall, "[t]he Court has allowed Congress tremendous latitude in its dealings with Native Americans; nevertheless, once Congress has acted, the Court assumes Congress was acting as a guardian." Heinecke, *supra* note 37, at 1032; *see* Routel & Holth, *supra* note 15, at 427-29 (explaining how the Court's articulation of the relationship between tribes and the federal government changed from its earlier articulation in *Kagama* and *Lone Wolf*). Routel and Holth explain that, "[t]hus, the guardian-ward relationship that had protected tribal sovereignty and territorial boundaries in Cherokee Nation and Worcester was now significantly recast. Whereas Indian dependency had been a source of Indian rights in Worcester, it was now the source of unlimited federal power." Routel & Holth, *supra* note 15, at 429. Routel and Holth go on to explain that the federal trust relationship with tribes changed again in the modern trust era when the federal government began to work to protect tribal sovereignty and many federal services have been transferred to tribes to implement. *Id.* at 429-35.

[43] *See* Seminole Nation v. United States, 316 U.S. 286, 296 (1942).

[44] *See id.* at 295.

[45] *Id.* at 296.

exacting fiduciary standards."[46] It would appear that "the Court has repeatedly struck down executive actions that infringe on Native American rights or that do not live up to a strict fiduciary standard."[47] Accordingly, the federal trust relationship can be said to apply to the consultation provisions of the statutes enforced by the executive branch, as discussed below.

There are generally thought to be three categories of claims based on a breach of the federal trust responsibility that can be brought by Indian tribes against the federal government. These three categories include: (1) general trust claims; (2) bare/limited trust claims; and (3) full trust claims.[48] Some of the Supreme Court's early Indian law decisions, such as *Cherokee Nation*, *Worcester*, *Kagama*, and *Lone Wolf*, may form a claim under the first category of trust responsibility cases, a general trust claim.[49] These early Supreme Court cases reflect the basic understanding at the time that the federal government owed a duty of protection to tribes.[50] In *Seminole Nation v. United States*, the Court described the moral dimensions of the federal government's relationship with tribes, explaining that it is "a humane and self-imposed policy . . . [which the federal government] has charged itself with moral obligations of the highest responsibility and trust," and which should be "judged by the most exacting fiduciary standards."[51] In fact, "[t]he [Supreme] Court has consistently characterized the relationship between Congress and the American Indian as 'solemn,'

[46] *Id.* at 297.

[47] Heinecke, *supra* note 37, at 1032.

[48] JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES 300 (Carolina Academic Press, 2002).

[49] A "general trust claim" refers to a claim based on the relationship formed between tribal nations and the federal government in part due to the U.S. Supreme Court's decisions in *Cherokee Nation*, *Worcester*, *Kagama*, and *Lone Wolf*. Taken together, these cases stand for the idea that the federal government has restricted tribal expressions of external sovereignty. Because the federal government has limited the ability of tribal nations to exercise their external sovereignty, the federal government therefore owes a duty of protection to tribal nations and a duty to act in the best interests of tribal nations. Because this duty is not premised on any specific congressional statement or enactment and because such a duty has never been found to be legally enforceable against the United States, it is said to be a general duty or a moral obligation. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 566-67 (1903); United States v. Kagama, 118 U.S. 375, 383-84 (1886); Worcester v. Georgia, 31 U.S. 515, 556 (1832); Cherokee Nation v. Georgia, 30 U.S. 1, 18-19 (1831).

[50] Heinecke, *supra* note 37, at 1030.

[51] *Seminole Nation*, 316 U.S. at 296-97.

'unique,' or 'special,' and 'moral.'"[52] However, the Court typically rejects such claims, if the alleged moral obligation is the sole basis of the claim.[53] Courts have rejected such claims because, as a sovereign nation itself, the United States must explicitly accept obligations in order to be legally responsible for such obligations.[54] Accordingly, federal courts generally reject arguments based solely on these early cases because they find that the United States has not accepted any sort of obligation over the trust corpus at issue.

In more recent decades, the Supreme Court has provided more guidance on when such a claim will be successful. In 1980, the U.S. Supreme Court decided *United States v. Mitchell* (*Mitchell I*).[55] In *Mitchell I*, the U.S. Supreme Court evaluated section 5 of the General Allotment Act[56] to determine whether the Secretary of the Interior was liable for an alleged breach of trust related to the management of timber resources and related funds. Although the General Allotment Act included language that land was to be held "in trust," the Court concluded that, because the federal government had not agreed to manage the land, only a bare trust existed.[57] The U.S. Supreme Court remanded *Mitchell I* to the Court of Claims for a determination of whether government liability might have existed under other statutes.[58]

In 1983, the U.S. Supreme Court considered the matter again in *Mitchell II*.[59] *Mitchell II* differed from *Mitchell I*, because in *Mitchell II* the Tribes relied on a variety of statutes related to the management of timber resources, which is an area where the federal government has exercised sizeable control.[60] The U.S. Supreme Court agreed with the Indian tribe that the federal government had undertaken substantial control over the trust corpus at issue, finding that the statutes in question "clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians."[61] Once

[52] Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" – How Long a Time Is That?*, 63 CALIF. L. REV. 601, 658 (1975) (citations omitted).

[53] *See, e.g.*, Blackfeet Hous. v. United States, 106 Fed. Cl. 142, 148, 151 (2012) (rejecting the Blackfeet Housing Authority's argument that the U.S. Department of Housing and Urban Development had a "general trust relationship").

[54] *See* United States v. Jicarilla Apache Nation, 564 U.S. 162, 174 (2011).

[55] United States v. Mitchell (*Mitchell I*), 445 U.S. 535 (1980).

[56] 25 U.S.C. § 348 (2018).

[57] *Mitchell I*, 445 U.S. at 542-43.

[58] *Id.* at 546.

[59] United States v. Mitchell (*Mitchell II*), 463 U.S. 206 (1983).

[60] *Id.* at 224-27.

[61] *Id.* at 224.

the Court determined that the federal government had agreed to assume control over the trust corpus at issue, the Court then looked to the common law of private trusts to assess the government's liability.[62]

In determining whether there is an enforceable trust relationship, the Court focuses its analysis on the amount of control by the federal government over the trust corpus in question. Where the federal government had near complete control over the trust corpus, as in *White Mountain Apache*,[63] the Court found in the Tribe's favor. Therefore, scholars have concluded that "[a]fter these cases, finding a 'network' of statutes to base a breach of trust damages claim depends on: 1) express statutory language supporting a fiduciary relationship; and 2) comprehensive control over government property."[64]

On June 13, 2011, the U.S. Supreme Court revisited the question regarding the scope of the federal government's trust relationship in *United States v. Jicarilla Apache Nation*.[65] At issue in the underlying litigation is the federal government's management of the Nation's trust accounts from 1972 to 1992.[66] Asserting the attorney-client privilege and attorney work-product doctrine, the federal government declined to turn over 155 documents requested by the Nation.[67] "The Tribe argues, however, that the common law also recognizes a fiduciary exception to the attorney-client privilege and that, by virtue of the trust relationship between the Government and the Tribe, the documents that would otherwise be privileged must be disclosed."[68]

Accordingly, the U.S. Supreme Court considered whether the common-law fiduciary exception to the attorney-client privilege applied to the United States when it acted as trustee for tribal trust assets.[69] The Court held that the exception did not apply as the federal government acts as a private trustee in very limited circumstances.[70] Notably, the

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[62] *Id.* at 226.

[63] *See* United States v. White Mountain Apache Tribe, 537 U.S. 465, 480 (2003).

[64] DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR. & MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 342 (6th ed. 2011).

[65] 564 U.S. 162, 165 (2011). Because the underlying case in this matter involves Indian trust fund management, the Court's decision might properly be limited to such types of cases, which are not the focus of review in this Article. However, given that *Jicarilla Apache Nation* represents the Court's most recent discussion of the federal trust relationship, a review of the Court's analysis is still helpful in understanding the contours of that relationship.

[66] *Id.* at 166-67.

[67] *Id.* at 167.

[68] *Id.* at 170.

[69] *See id.* at 170-73.

[70] *See id.* at 178.

Court described the case as involving a claim to a "general trust relationship,"[71] which the Court has never found to be enforceable against the federal government. Furthermore, the Court explained that "[t]he Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship between the Government and the Indians a 'trust,'[72] that trust is defined and governed by statutes rather than the common law."[73] In fact, Congress may use the term "trust" in describing its relationship with tribes, but this does not mean that an enforceable trust relationship exists.[74] Rather, in order to be legally liable, the government must consent to be liable.[75] Ultimately, the Court explicated, that while common law principles may "inform our interpretation of statutes and . . . determine the scope of liability that Congress has imposed . . . the applicable statutes and regulations 'establish [the] fiduciary relationship and define the contours of the United States' fiduciary obligations.'"[76]

Despite the Court's determination, however, that the federal trust relationship did not exist in the matter at bar, the Court, in its majority opinion, did acknowledge the continued existence of the federal trust relationship, explaining, "[w]e do not question 'the undisputed existence of a general trust relationship between the United States and the Indian people.' . . . Congress has expressed this policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes."[77] Justice Sotomayor, in her dissent, went on to explain that:

> Since 1831, this Court has recognized the existence of a general trust relationship between the United States and Indian tribes. . . . Our decisions over the past century have repeatedly reaffirmed this "distinctive obligation of trust incumbent upon

[71] *Id.* at 165.

[72] *See, e.g.*, 25 U.S.C. § 162a (2018) (authorizing the Secretary of the Interior to deposit in banks funds of Indian Tribes held in trust by the United States).

[73] *Jicarilla Apache Nation*, 564 U.S. at 173-74 (citing United States v. Navajo Nation, 537 U.S. 488, 506 (2003)).

[74] *See id.* at 174.

[75] *See id.*

[76] *Id.* at 177 (alteration in original) (first citing United States v. White Mountain Apache Tribe, 537 U.S. 465, 475-76 (2003), then quoting United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 224 (1983)). The Court went on to explain that "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Id. But cf.* Wood, *supra* note 37, at 361 (explaining that the federal government owes tribes a common law duty of protection).

[77] *Jicarilla Apache Nation*, 564 U.S. at 176 (quoting United States v. Mitchell (*Mitchel II*), 463 U.S. 206, 225 (1983)).

> the Government" in its dealings with Indians. . . . Congress, too, has recognized the general trust relationship between the United States and Indian tribes. Indeed, "[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government."[78]

Following the Court's decision in *Jicarilla Apache Nation*, the lower federal courts have required that a tribe asserting the federal trust responsibility as the basis of its claim against the federal government must first assert a substantive source of law that requires the federal government to act as a fiduciary or undertake certain obligations.[79] Absent such an explicit requirement, neither the government's control nor common law obligations matter in terms of recognizing an enforceable trust relationship against the United States.[80] "Only once a statutory duty has been identified can common law trust principles potentially have relevance in defining the scope of that duty . . . ."[81] Some courts, however, have determined that they may "refer to traditional trust principles when those principles are consistent with the statute and help illuminate its meaning."[82] But tribes cannot resort to the common law in order to override the express language of the treaty or statute at issue.[83] Furthermore, the federal courts have explained that mere federal oversight does not amount to the necessary day-to-day control over operations typically required for a successful claim based on the federal trust relationship.[84] Some courts have spoken of applying the Indian canons of construction to resolve any ambiguities in determining whether or not a trust relationship exists.[85] Also, in determining whether a particular law provides a cause of action, it is not necessary that the law explicitly provide a private right of action.[86]

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[78] *Id.* at 192-93 (Sotomayor, J., dissenting) (alteration in original) (internal citation marks omitted).

[79] *See* Blackfeet Hous. v. United States, 106 Fed. Cl. 142, 149 (2012).

[80] *Id.*

[81] *Id.* at 150.

[82] Fletcher v. United States, 730 F.3d 1206, 1210 (10th Cir. 2013).

[83] *See id.* at 1208.

[84] *See Blackfeet Hous.*, 106 Fed. Cl. at 151.

[85] *See Fletcher*, 730 F.3d at 1210-11 ("[W]ithin the narrow field of Native American trust relations statutory ambiguities must be 'resolved in favor of the Indians.'" (quoting Bryan v. Itasca Cty., 426 U.S. 373, 392 (1976))).

[86] *See id.* at 1211.

In fact, "[a]ll that's required for a private right of action to exist is a showing the statute at hand 'can fairly be interpreted' to permit it."[87]

Despite the breadth of the federal trust relationship as initially contemplated in the early Supreme Court cases from the nineteenth century, it would appear that more recent U.S. Supreme Court cases, such as *Jicarilla* have limited the likelihood of a tribe succeeding on a claim based on the federal trust relationship in the context of protecting resources negatively impacted by climate change or in the context of natural resource development and extraction. This is because the Court, and lower federal courts interpreting the Court's decision seem to increasingly demand an explicit statement by the federal government that it intended to manage or control the resource at issue before a claim to the federal trust responsibility can be legally binding. Such specificity in the climate change context is rare — whether referring to legal issues tied to climate change adaptation or to the mitigation or safety of energy and natural resource development infrastructure. Further, the federal courts' conflation of federal trust responsibility claims based on the Tucker Acts versus the Administrative Procedure Act only increases the likelihood that tribes today will continue to face an uphill battle to protect natural resources based solely on this legal doctrine.

B. Tribal Treaty Rights

Having explored the definition(s) and legal history of the tribal federal trust relationship, it is helpful to now explore another potential tribal legal claim to effective consultation — tribal treaties and treaty rights. Such analysis is helpful to tribes because of the significance of treaties. Because the rights acknowledged in treaties were supposed to be permanent rights,[88] treaties can be particularly powerful tools in protecting natural resources — resources that are often hard hit by the negative impacts of climate change and energy development. Treaty rights are, in many cases, intimately connected to the cultural survival of tribes.[89] In this regard, it is not uncommon for tribal treaty rights to be threatened by the negative impacts of climate change and energy

[87] *Id.* (quoting United States v. Navajo Nation, 556 U.S. 287, 290 (2009)).

[88] Wilkinson & Volkman, *supra* note 52, at 602. For example, U.S. Senator Sam Houston described the perpetual nature of treaties in the following way: "As long as water flows, or grass grows upon the earth, or the sun rises to show your pathway, or you kindle your camp fires, so long shall you be protected by [the federal government], and never again be removed from your present habitations." *Id.* (citing CONG. GLOBE, 33d Cong., 1st Sess., App. 202 (1854)).

[89] *See* Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1619 (2000).

development. Further, as previously mentioned, it is not uncommon for such rights to exist outside tribal reservation lands.[90] As a result, given the importance and location of many of these rights, effective consultation may be necessary to protect tribal treaty rights.

In practice, some settler colonial laws and policies thwart cross-jurisdictional relationships that facilitate cooperative adaptation across governments, especially within the context of climate change. Treaty rights are an example of this. Some federally-recognized tribes hold the right to utilize natural resources located outside the boundaries of their reservations, on lands owned by the federal government or private individuals.[91] Given that tribes possess rights outside of their tribal lands, there is a need for direct interaction between tribes and the federal government to ensure that trust responsibility and treaty rights are upheld. Because over 400 treaties between tribes and the federal government exist, treaties play a significant role in determining the legal rights held by tribes.[92] As explained in Cohen's Handbook of Federal Indian Law, the seminal treatise on federal Indian law:

> Many tribes view these treaties not only as vital sources of law for the federal government, but also as a significant repository of tribal law in such areas as identification of tribal boundaries, environmental regulation, and the use and control of natural resources on the reservation. As organic documents made with the federal government, treaties constitute both bargained-for exchanges that are essentially contractual, and political compacts establishing relationships between sovereigns. In both capacities, treaties establish obligations binding on Indian nations and the federal government alike.[93]

Because of their importance to both tribes and the federal government, it is helpful to understand what tribal treaty rights are and how courts have used such rights to protect tribal interests in the past.

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[90] *See* THE HARVARD PROJECT, *supra* note 20, at 20.

[91] *See* Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1010-11 (2019).

[92] *See* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.05[2] (2019) [hereinafter 1 COHEN'S HANDBOOK (2019)]. Some believe the number of treaties between the federal government and tribes exceeds 500. *See* Samuel Vargo, *With More Than 500 Treaties Already Broken, the Government Can Do Whatever It Wants, It Seems…*, DAILY KOS (Nov. 21, 2014, 2:06 PM PT), https://www.dailykos.com/stories/2014/11/21/1345986/-With-more-than-500-treaties-already-broken-the-government-can-do-whatever-it-wants-it-seems [https://perma.cc/UVP6-GBJ7].

[93] 1 COHEN'S HANDBOOK (2019), *supra* note 92, at § 4.05[2] (citations omitted).

Tribal treaty rights refer to rights tribes retained following negotiation of a treaty with the United States. Between 1789 and 1871, when treaty making between the federal government and tribes was ended, the federal government and numerous tribes entered into treaties.[94] A treaty between a tribe and the United States "is essentially a contract between two sovereign nations."[95] Such treaties have also been described as "quasi-constitutional" documents.[96]

Tribes have often turned to their treaties with the United States to ensure that their rights are protected, including rights that exist outside of reservation boundaries.[97] For example, the protection of tribal fishing rights is of paramount importance to many tribes. This importance is demonstrated below in the examination of how tribes have successfully invoked treaty rights to protect against development projects seen as adverse to tribal interests. Treaty rights are, in many cases, intimately connected to the cultural survival of tribes.[98] The U.S. Supreme Court and other federal courts have consistently upheld the right of tribes to fish at their usual and accustomed places, as the right is "not much less necessary to the existence of Indians than the atmosphere they breathed."[99] This right to take fish is a property right protected by the Fifth Amendment of the U.S. Constitution.[100] This right to take fish at usual and accustomed places includes the right to cross private property to access those areas, and, as a result, a servitude is therefore imposed on these lands.[101] Additionally, tribal treaty fishing rights include the right to protect fisheries from actions that may imperil their survival, as "a fundamental prerequisite to exercising the right to take fish is the

94 *See* 1 COHEN'S HANDBOOK, *supra* note 11, at § 1.03.

95 *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) (citation omitted).

96 *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 408 (1993) (considering whether tribal treaties can be analogized to "fundamental, constitutive document[s]").

97 *See, e.g.*, Herrera v. Wyoming, 139 S. Ct. 1686, 1702-03 (2019) (holding that a citizen of the Crow Nation had the right to hunt elk outside of the Nation's reservation because the area where he hunted was included in the Nation's treaty with the federal government).

98 *See* Tsosie, *supra* note 89, at 1619 (explaining how the rights, such as usufructuary rights, protected by many treaties are intimately connected to the culture and traditions of tribes).

99 *See Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 680-83 (quoting United States v. Winans, 198 U.S. 371, 380-81 (1905)).

100 Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988) (citing Menominee Tribe of Indians v. United States, 391 U.S. 404, 411 n.12, 412 (1968)).

101 *See* United States v. Winans, 198 U.S. 371, 381 (1905).

existence of fish to be taken."[102] Courts have further found that the environment cannot be so degraded as to threaten fish or make the consumption of fish a threat to human health.[103]

Historically, federal courts have interpreted treaties in expansive and progressive ways given the time when such decisions were made. For example, in 1908, the U.S. Supreme Court determined that tribal treaties, which made no explicit mention of water rights, reserved water rights sufficient for the primary purposes of a reservation.[104] Similarly, in 1974, a federal district court determined that tribal treaties provided for a reserved right of tribes to be co-managers of fisheries along with the states, despite the fact that the treaties involved did not explicitly reference such a right to co-management.[105] Accordingly, court decisions have consistently upheld the ability of tribes and tribal members to protect and access tribal treaty rights outside of reservation lands. As a result of these court decisions, states should work toward collaboration to protect these tribal treaty rights.

The recent decision of the U.S. Supreme Court in *Washington v. United States* demonstrates the strength and utility of tribal treaties in protecting cultural and natural resources important to tribes. In *Washington*, the United States, on behalf of several tribes, brought an action alleging that the barrier culverts built and maintained by the State of Washington violated tribal treaties because they prevented salmon from returning to spawning grounds in the sea, prevented smolt from moving out to sea, and prevented young salmon from moving freely in a way to avoid predators.[106] Notably, the State of Washington failed to consult with tribes in a meaningful way to protect these tribal treaty rights, and, as a result, the Tribes moved forward with a lawsuit against the State.[107] In the proceedings below in relevant part, the U.S. Court of Appeals for the Ninth Circuit held that treaties required that fish be available to the tribes, and that the State of Washington had violated its treaty obligations to the tribes by constructing the culverts in such a

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[102] *See* United States v. Washington, 506 F. Supp. 187, 203-04 (W.D. Wash. 1980); *cf. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 678-79 (explaining that tribes with treaty reserved fishing rights are entitled to something more tangible than "merely the chance . . . occasionally to dip their nets into the territorial waters").

[103] *See* United States v. Washington, 20 F. Supp. 3d 986, 1021 (W.D. Wash. 2013); *see also* Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1033-35 (9th Cir. 1985) (holding that a tribe's fishing right can be protected by enjoining a water withdrawal that would imperil fish eggs that had not yet hatched).

[104] *See* Winters v. United States, 207 U.S. 564, 576-78 (1908).

[105] *See* United States v. Washington, 384 F. Supp. 312, 339 (W.D. Wash. 1974).

[106] United States v. Washington, 853 F.3d 946, 954 (9th Cir. 2017).

[107] *See id.*

way as to threaten the survival of the fish relied upon by the tribes.[108] The court explained that "[t]he Indians reasonably understood Governor Stevens [who negotiated the treaty] to promise not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sustain them."[109] This conclusion was consistent with the court's understanding that "[w]e have long construed treaties between the United States and Indian tribes in favor of the Indians."[110] An equally divided U.S. Supreme Court affirmed the Ninth Circuit's decision in June 2018.[111] The tribes' and United States' recent success in this case confirms that tribal treaties continue to be strong legal tools to protect cultural and natural resources of importance to tribes. This case is also a recent example of how, despite decades of court decisions protecting tribal treaty rights off the reservation, states still fail to consult with tribes in a meaningful way to protect these resources.

Despite the strength of potential claims to tribal treaty rights and the connection to consultation described just now, tribal treaties do not speak to how consultations between tribes and other stakeholders should take place. Therefore, even though those are relatively robust legal claims available to tribes, such arguments do little to provide guidance as to how such consultations should occur. Additionally, because tribal treaties were written before the negative impacts of climate change and energy development were within the collective thoughts of tribes,[112] tribal treaties with the United States do not speak to such negative impacts either.

C. Statutory Requirements for Consultation

Another example of legal requirements that impact consultation between tribes and other sovereign governments are statutes. Despite speaking specifically to consultation, these statutes provide little guidance as to what such consultation should look like. Several statutes require some form of consultation between the federal government and

[108] *Id.* at 966.

[109] *Id.* at 964.

[110] *Id.* at 963.

[111] Washington v. United States, 138 S. Ct. 1832, 1832 (2018) (per curiam) (J. Kennedy took no part in the decision).

[112] *See* Elizabeth Ann Kronk Warner, *Everything Old Is New Again: Enforcing Tribal Treaty Provisions to Protect Climate Change-Threatened Resources*, 94 NEB. L. REV. 916, 933 (2016).

relevant tribes.[113] For example, the American Indian Religious Freedom Act ("AIRFA") provides that it is the policy of "the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."[114] Further, the joint congressional resolution provides that "[t]he President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices."[115] As Justice Brennan explained, "Congress expressly recognized the adverse impact land-use decisions and other governmental actions frequently have on the site-specific religious practices of Native Americans, and the Act accordingly directs agencies to consult with Native American religious leaders before taking actions that might impair those practices."[116] However, Justice Brennan also went on to agree with the majority that AIRFA does not create any judicially enforceable rights.[117] In relevant part in *Havasupai Tribe v. U.S.*, the district court explained that, "AIRFA requires a federal agency to . . . consult with Indian organizations in regard to the proposed action. AIRFA does not require Indian traditional religious considerations to always prevail to the exclusion of all else."[118] The finding that AIRFA does not require the federal government to act in a certain way that is protective of American Indian religions has been

[113] This subpart focuses on relatively recent statutory provisions that protect natural resources, as the Article focuses on the impacts of climate change to natural and cultural resources. For information on the historical development of such statutory provisions, see Routel & Holth, *supra* note 15, at 438-39.

[114] American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2018).

[115] American Indian Religious Freedom, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified as amended at 42 U.S.C. § 1996 (2018)).

[116] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 471 (1988) (Brennan, J., dissenting).

[117] *Id.*

[118] Havasupai Tribe v. United States, 752 F. Supp. 1471, 1488 (D. Ariz. 1990); *see also* Wilson v. Block, 708 F.2d 735, 745-46 (D.C. Cir. 1983) (holding that AIFRA does require federal agencies to consult, but that it does not compel agencies to act in a way that is protective of American Indian religious practices).

repeatedly upheld by the federal courts.[119] Additionally, AIRFA is silent as to how consultation is to occur.

Another example is section 106 of the National Historic Preservation Act ("NHPA"), which also requires a consultation process for any "undertakings" by a federal agency, or assisted or licensed by a federal agency, that may have an effect on "any district, site, building, structure, or object" that is on, or is eligible to be included in, the National Register.[120] Like AIRFA, however, the NHPA is also silent as to what the consultation process should look like. Additionally, the NHPA consultation requirement does not trigger an independent cause of action in the federal courts. The U.S. Court of Appeals for the Ninth Circuit analogized this mandatory consultation process to that required under the National Environmental Policy Act ("NEPA"),[121] noting that "what [section] 106 of NHPA does for sites of historical import, NEPA does for our natural environment."[122] In that case, the Tribe had brought a claim directly under the NHPA, seeking to enjoin the federal government from releasing water from the San Carlos Reservoir. However, the Ninth Circuit held that, like NEPA, the NHPA creates no private right of action against the federal government; thus, the Tribe must proceed under the Administrative Procedure Act.[123]

Ultimately, tribes have had mixed success with claims that agencies have violated the consultation requirement. In an unpublished decision, one district court held that the Bureau of Land Management had violated the NHPA's consultation requirement, and further that the failure to comply "constituted a breach of the agency's trust obligations

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[119] *See Lyng*, 485 U.S. at 455 ("Nowhere in [AIRFA] is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights."); United States v. Mitchell, 502 F.3d 931, 949 (9th Cir. 2007) ("ARIFA is simply a policy statement and does not create a cause of action or any judicially enforceable individual rights." (quoting Henderson v. Terhune, 379 F.3d 709, 711 (9th Cir. 2004))).

[120] National Historic Preservation Act of 1966, Pub. L. No. 89-665, § 106, 80 Stat. 915, 917. Also, this discussion of the National Historic Preservation Act is largely excerpted from JUDITH V. ROYSTER, MICHAEL C. BLUMM & ELIZABETH ANN KRONK WARNER, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 45-48 (Carolina Academic Press 4th ed. 2018). Elizabeth Kronk Warner is both an author of this Article and author of the casebook.

[121] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (2018).

[122] San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1097 (9th Cir. 2005).

[123] *See id.* at 1096. *But see* Boarhead Corp. v. Erickson, 923 F.2d 1011, 1017 (3d Cir. 1991); Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown, 875 F.2d 453, 458 (5th Cir. 1989) (both holding that the NHPA impliedly creates a private right of action).

to the Tribe."[124] Another district court faulted the Interior Department for failing to adequately consult with the Quechan Tribe concerning its decision to approve a solar energy project on federal public lands in the California Desert that the Tribe believed would destroy hundreds of ancient cultural sites and the habitat of the flat-tailed horned lizard, a species of considerable cultural significance to the Tribe; the court consequently enjoined the project.[125] In contrast, the First Circuit rejected a Tribe's claim of an NHPA violation in *Narragansett Indian Tribe v. Warwick Sewer Authority*,[126] agreeing with the district court that a local sewer authority adequately consulted with the Tribe in determining that its project would have no effect on historic properties.[127] The court noted that the sewer authority kept the Tribe informed and took seriously the Tribe's "belated objections," adjusting its plans in light of those objections.[128] In another case, the Ninth Circuit ruled that the Federal Energy Regulatory Commission was not obligated to consult with the Snoqualmie Tribe concerning a hydropower relicensing decision because the Tribe was not a federally recognized tribe.[129]

In sum, although section 106 of the NHPA does require consultation, the legal effect of that requirement seems somewhat uncertain. Courts are split on how to interpret the requirement. Some courts give the requirement "teeth" by pushing back in the face of inadequate consultation, and others do not.[130] The fact that the statute itself does not specify when and how consultation is required complicates the matter. The legal status of the consultation requirement is explored more fully in the discussion of the Dakota Access pipeline controversy

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[124] *See* N. Cheyenne Tribe v. U.S. Bureau of Land Mgmt., 32 INDIAN L. REP. 3270, 3274 (D. Mont. 2005).

[125] *See* Quechan Tribe of the Fort Yuma Reservation v. U.S. Dep't of the Interior, 755 F. Supp. 2d 1104, 1119-22 (S.D. Cal. 2010).

[126] Narragansett Indian Tribe v. Warwick Sewer Authority, 334 F.3d 161 (1st Cir. 2003).

[127] *See id.* at 168-69 (explaining the Tribe's strongest argument against the sewer authority's proposed method of consultation, and why the court rejected that argument).

[128] *Id.* at 169.

[129] Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm'n, 545 F.3d 1207, 1216 (9th Cir. 2008).

[130] *Compare* N. Cheyenne Tribe v. U.S. Bureau of Land Mgmt., 32 INDIAN L. REP. 3270, 3274 (D. Mont. 2005) (reaching different conclusions about whether consultation was adequate), *with Narragansett Indian Tribe*, 334 F.3d at 169 (granting the Northern Cheyenne Tribe's motion for summary judgement on the grounds that the Bureau of Land Management failed to meet their consultation requirements under NHPA).

below.[131] Also, all of these statutes require consultation when tribal resources are potentially being impacted; they do not require such consultation when tribal sovereignty is allegedly impacted.[132]

Similarly, in May 1972, the federal government published a policy entitled "Guidelines for Consultation with Tribal Groups on Personnel Management Within the Bureau of Indian Affairs."[133] Although the guidelines were specific to consultation, they generally defined consultation as merely "providing pertinent information to and obtaining the views of tribal governing bodies."[134] Accordingly, these guidelines did not provide any information on how tribal-federal consultations should be operationalized, nor what constituted normatively good consultations. These guidelines were also limited in that they only applied to Bureau of Indian Affairs personnel matters. In sum, despite statutes and guidelines from the federal government, the question of what good or effective consultation is remains unanswered.

Unlike the federal trust relationship and tribal treaties with the federal government, several federal statutes do require consultation. These statutes, however, fail to outline what such consultation should look like. A legal void therefore remains as to the scope and substance of consultations with tribes. Moreover, none of these federal statutes speak to the type of consultation that should occur when tribes are threatened by the negative impacts of climate change or energy and natural resource development.

D. Executive Order

Like statutes, Presidential executive orders may impact the federal requirement to consult with tribes under certain circumstances.[135] But,

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131 *See infra* CONCLUSION.

132 *See* Routel & Holth, *supra* note 15, at 441.

133 Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 717 (8th Cir. 1979).

134 *Id.*

135 "An executive order is a signed, written, and published directive from the President of the United States that manages operations of the federal government. They are numbered consecutively, so executive orders may be referenced by their assigned number, or their topic . . . . All three types of presidential documents — executive orders, proclamations, and certain administrative orders — are published in the *Federal Register,* the daily journal of the federal government that is published to inform the public about federal regulations and actions. They are also catalogued by the National Archives as official documents produced by the federal government. Both executive orders and proclamations have the force of law, much like regulations issued by federal agencies, so they are codified under Title 3 of the Code of Federal Regulations, which is the formal collection of all of the rules and regulations issued by the executive branch and other federal agencies. Executive orders are not legislation; they require no approval

also like statutes, these executive orders fail to provide clear guidance as to what such consultation should look like. President Clinton enacted several Executive Orders that potentially impact tribal-federal consultations. First, he enacted Executive Order 12,895, "Enhancing the Intergovernmental Partnership."[136] This was a mandate imposed on "state, local, and tribal governments" to develop a process that would "provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."[137] In 1994, President Clinton signed a Memorandum on *Government to Government Relations with Native American Tribal Governments,* which establishes principles for federal executive departments and agencies to consult with tribal governments before taking actions that affect federally recognized tribal governments, assessing the impact of federal initiatives on tribal trust resources, and ensuring that tribal rights are considered in those initiatives.[138] Another Executive Order, Executive Order 13,007, also created obligations 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."[139]

Consultation obligations are found in several statues, as well as Executive Order 13,175 (2000) *Consultation and Coordination with Indian Tribal Governments*, which requires federal agencies to "have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."[140] This Order provided more guidance by requiring the creation of an internal consultation process.[141] These "Executive Orders resulted in a proliferation of internal consultation policies and regulations within federal agencies. Since then, each President has reaffirmed that the federal government has a duty to consult with Indian

from Congress, and Congress cannot simply overturn them. Congress may pass legislation that might make it difficult, or even impossible, to carry out the order, such as removing funding. Only a sitting U.S. President may overturn an existing executive order by issuing another executive order to that effect." *What Is an Executive Order?*, AM. B. ASS'N (Nov. 27, 2018), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order-/ [https://perma.cc/9EYQ-ZK3K].

136 Exec. Order No. 12,875, 58 Fed. Reg. 58,093 (Oct. 26, 1993).

137 *Id.*

138 Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (Apr. 29, 1994).

139 Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

140 Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

141 *See id.*

tribes as necessary to achieve the substantive goals of the trust responsibility."[142] Despite this proliferation, however, consultation policies remain vague and ineffective.[143]

President Obama issued a memorandum ("the Memorandum") to executive departments and agencies, which formally adopted President Clinton's Executive Order 13,175.[144] The Memorandum also reminded that federal officials "are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications."[145] Further, each agency was required to submit a plan that indicated what steps the agency would take to implement the mandate.[146] Despite these requirements, however, "[the Memorandum] falls short of initiating meaningful changes to the federal-tribal consultation process."[147] Further, the "Obama Memorandum does not even explain what 'consultation' means or when the consultation right is triggered."[148] So, again, despite Executive Orders addressing the requirement for tribal-federal consultation, what constitutes effective consultation remains largely undefined. Further, the timing and scope of such consultation also remains vague and ill-defined. And, finally, "[b]oth President Clinton's Executive Order and President Obama's Memorandum recite that their statements are not intended to create substantive or procedural rights enforceable against the United States."[149]

Under domestic law, therefore, what consultation is required to be remains vague at best. It is not clear what consultation should consist of.[150] It is not clear which parties should be involved in consultations.[151]

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142 Routel & Holth, *supra* note 15, at 443-44.

143 *See id.* at 444.

144 *See* Tribal Consultation, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57,881 (Nov. 5, 2009).

145 *Id.*

146 *Id.*

147 Routel & Holth, *supra* note 15, at 447.

148 *Id.* at 448.

149 Butzier & Stevenson, *supra* note 13, at 316.

150 *See* Routel & Holth, *supra* note 15, at 453-57 (discussing how courts and agencies have struggled to define consultation).

151 *See id.* at 458-60 (discussing the differing views of Indian tribes and the federal government as to whether consultation requires a federal representative with decision-making authority and providing examples thereof).

> Indian tribes usually seek consultation sessions with high-ranking federal officials because the tribe is typically represented at these sessions by its highest elected officials. . . . Consultation with high-ranking federal officials ensures that the person charged with making the decision respecting a federal

It is not clear when consultation should take place.[152] It is not clear how a tribe will be informed of consultations.[153] Further, there is no uniformity of process between federal agencies.[154] In sum, although numerous domestic statutes, guidelines, and Executive Orders speak to tribal-federal consultations, much uncertainty exists as to how consultation should be conducted.[155] This uncertainty is exacerbated by the fact that tribes and the federal government may have different definitions of what constitutes success.[156] Additionally, if the federal government views consultations as purely a procedural requirement, there is an increased likelihood that tribes will be less likely to engage in a mere *process* of consultation.[157]

E. Obligations Under International Law

Aspects of international law may also impact the federal government's obligation to consult with tribes under certain circumstances. Several provisions of the U.N. Declaration on the Rights of Indigenous People ("UNDRIP") have direct bearing on whether governments are required to consult with tribes. For example, Article 8 provides that states shall ensure effective mechanisms to protect tribal lands and resources.[158] Article 11's Free Prior and Informed Consent ("FPIC") requirement demands that indigenous communities be included early on in any

> action has been provided direct information about tribal concerns without having that information filtered, perhaps incorrectly or ineffectively, through another agency employee. In addition, participation by senior-level federal employees has the important effect of symbolically communicating to tribes that their concerns are being taken seriously.
>
> The federal government, on the other hand, often designates low-ranking federal employees to attend consultation sessions. High-ranking officials have many pressing issues to address, and federal-tribal consultations can be time consuming. Additionally, high-ranking officials may not be as familiar with the details of the project or regulation in question.

Id. at 458.

152 *See id.* at 461.

153 *See id.* at 462.

154 *See id.* at 463.

155 Notably, case law does little to remedy this uncertainty. "[T]he case law at least tends to show the tentative and slippery nature of consultation requirements: courts are split on whether or not they exist and split again as to whether those found have been violated or not." Haskew, *supra* note 15, at 54-55.

156 *See id.* at 25.

157 *See id.* at 28. In fact, the existing scheme may result in entrenching historical distrust of the federal government by tribes. *See id.* at 73-74.

158 G.A. Res. 61/295, art. 8 (Sept. 13, 2007).

discussions potentially affecting them.[159] Such participation should be absent of "coerc[ion], manipulat[ion], or intimidat[ion],"[160] and "'consent' should be intended as a process of which consultation and participation represent central pillars."[161]

Further, many of the provisions of UNDRIP reflect general human rights law,[162] and to the extent it follows general human rights law, it is binding. Some scholars have argued that International Labour Organization ("ILO") Convention 169 and UNDRIP are evidence of customary international law.[163] Tribes have also raised claims related to the abrogation of their treaties with the United States.[164] UNDRIP calls on domestic states to honor their treaties with indigenous nations.[165] Although, as explained above, tribal treaties do not spell out when consultation is triggered and the scope of such consultation.

The foregoing Part demonstrated that claims exist under both domestic and possibly international law to require the federal government to engage in government-to-government consultation with tribes. Despite these legal claims, however, very little guidance is given as to what that consultation should look like and which sovereign, whether the tribe or the federal government, gets to dictate the process

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159 *See id.* at art. 11; Stephanie Baez, *The "Right" REDD Framework: National Laws that Best Protect Indigenous Rights in a Global REDD Regime*, 80 FORDHAM L. REV. 821, 842 (2011). There is some question as to whether the FPIC standard would be binding on the United States. *See* Jason Searle, *Exploring Alternatives to the "Consultation or Consent" Paradigm*, 6 MICH. J. ENVTL. & ADMIN. L. 485, 502 (2017) ("Instead, the United States remains unbound by Article 32.2's requirements despite having 'endorsed' the UNDRIP in 2010. The conditional ratification rendered the UNDRIP completely unable to hold the United States to FPIC, even in international forums, and left the United States with essentially unchanged commitments to tribes."). For a discussion of the history behind the drafting of the FPIC provision, see Miller, *supra* note 30, at 67-86.

160 Baez, supra note 159, at 842.

161 Mauro Barelli, *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead*, 16 INT'L J. OF HUMAN RIGHTS 1, 3 (2012).

162 *See* Miller, *supra* note 30, at 88-89.

163 S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 185 (2009) (explaining that resolutions adopted by the UN General Assembly may not be legally binding, but nevertheless "reflect or embody customary or general principles of international law").

164 *See, e.g.*, Kristen A. Carpenter & Angela R. Riley, *Standing Tall: The Sioux's Battle Against a Dakota Oil Pipeline Is a Galvanizing Social Justice Movement for Native Americans*, SLATE (Sept. 23, 2016, 1:30 PM), https://slate.com/news-and-politics/2016/09/why-the-sioux-battle-against-the-dakota-access-pipeline-is-such-a-big-deal.html [https://perma.cc/JFU6-QSHY] (discussing the litigation over the Dakota Access Pipeline).

165 G.A. Res. 61/295, *supra* note 158, at art. 37; *see* MANUAL FOR HUMAN RIGHTS, *supra* note 1, at 23.

of consultation. Further, existing domestic and international law provides little guidance as to the scope of such consultation or when it is triggered. In fact, some scholars have suggested that as a result of these vague federal laws "agencies have often turned consultation into a *pro forma* box to check, rendering tribal consultation inconsequential."[166] Given the law's inability to fully answer the question of what effective consultation looks like, it is helpful to turn to other disciplines for potential answers.

II. MORAL CLAIMS TO EFFECTIVE CONSULTATION[167]

Having examined the requirement of consultation between tribes and the federal government from a legal lens and finding it lacking guidance as to what consultation should entail, it is helpful to examine the issue from other perspectives, such as a moral lens. Literatures in ethics and Indigenous studies have a lot to convey about consultation. For consultation can be considered key policy or a requirement of any government system that favors freedom, democracy, and cooperation.[168] For example, this Article previously viewed what the international requirement of free, prior, and informed consent means in terms of how the federal government must consult with tribes.[169] From a moral perspective, consultation can be linked to the norm that all parties should have a chance to give their free, prior, and informed consent to the actions of any other party when those actions may impact them (positively or negatively) in some way.[170] In the literature on

166 Searle, *supra* note 159, at 487.

167 Some of the text in this section is related to forthcoming articles by Whyte. Any resemblance occurs only because it would have been irresponsible to recraft sentences simply for the sake of differentiation. Any resemblance does not alter the originality or integrity of this Article or the press articles. *See generally* Kyle Whyte, *Environmental Justice, Indigenous Peoples, and Consent*, *in* LESSONS IN ENVIRONMENTAL JUSTICE: FROM CIVIL RIGHTS TO BLACK LIVES MATTER AND IDLE NO MORE (Michael Mascarenhas ed., 2020) (examining the intersection of environmental justice and consent within indigenous communities); Kyle Whyte, *Sciences of Consent: Indigenous Knowledges and Governance*, *in* THE ROUTLEDGE HANDBOOK OF FEMINIST PHILOSOPHY OF SCIENCE (Sharon Crasnow & Kristen Intemann eds., 2020) (emphasizing consent as a fundamental element of Indigenous scientific traditions).

168 *See* ANAYA, *supra* note 163, at 190-92.

169 *See supra* Part I.E.

170 *See* MANUAL FOR HUMAN RIGHTS, *supra* note 1, at 26; *cf.* Cathal M. Doyle, *The Evolving Duty to Consult and Obtain Free Prior and Informed Consent of Indigenous Peoples for Extractive Projects in the United States and Canada*, *in* 3 HUMAN RIGHTS IN THE EXTRACTIVE INDUSTRIES 169, 215 (Isabel Feichtner, Markus Krajewski & Ricarda Roesch eds., 2019) (discussing States' need for the appearance of consent in negotiations with First Nations); Dayna Nadine Scott, *Extraction Contracting: The Struggle for Control of*

ethics, "free," "prior," and "informed" consent are taken as being defined in certain ways. There are a range of legal and other purposes for consultation. Morally speaking, consultation can be understood as one process or strategy for fulfilling the general moral duty of consent.[171]

Emerging Indigenous studies literatures pertaining to ethics add additional moral requirements to these definitions. In the ethics literature, "free" simply means non-coerced or that parties are not under external pressure to consent or dissent; "prior" means that the actions have yet to be performed, there is a chance to stop them in advance, and, in some cases, that all parties have been involved in the designing of plans at the ground level; "informed" means that the parties have all the facts and possibilities in front of them when they weigh and deliberate the costs and benefits of consent, or decide to dissent or request more time to form a response.[172] Given the long histories of experiencing domination from states and societies such as the United States, Indigenous studies that work to define these terms, are often modified and strengthened.[173] "Free" can also include that tribes should

Indigenous Lands, 119 S. ATLANTIC Q. 269, 274 (2020) (discussing the legitimizing role of purported consent in contract negotiations between First Nations and extractive industries).

171 *See* KRISTIN SHRADER-FRECHETTE, ENVIRONMENTAL JUSTICE: CREATING EQUALITY, RECLAIMING DEMOCRACY 122-24 (2002); IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 23 (2000); Joji Cariño, *Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice*, 22 ARIZ. J. INT'L & COMP. L. 19, 20 (2004). *But see* Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law*, 10 NW. J. INT'L HUM. RTS. 54, 59 (2011) (viewing "consultation" and "consent" as discrete conceptualizations).

172 MANUAL FOR HUMAN RIGHTS, *supra* note 1, at 28 (quoting U.N. Permanent Forum on Indigenous Issues, Rep. of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples, ¶¶ 46–49, U.N. Doc. E/C.19/2005/3 (Jan. 17–19, 2005)).

173 *See* U.N. FOOD & AGRIC. ORG., FREE PRIOR AND INFORMED CONSENT: AN INDIGENOUS PEOPLES' RIGHT AND A GOOD PRACTICE FOR LOCAL COMMUNITIES: MANUAL FOR PROJECT PRACTITIONERS 15-16 (2016) [hereinafter FREE, PRIOR AND INFORMED CONSENT MANUAL]; *see, e.g.*, Terry Williams & Preston Hardison, *Culture, Law, Risk and Governance: Contexts of Traditional Knowledge in Climate Change Adaption*, *in* CLIMATE CHANGE AND INDIGENOUS PEOPLE IN THE UNITED STATES: IMPACTS, EXPERIENCES, AND ACTIONS 23, 28-31 (Julie Koppel Maldonado, Benedict Colombi & Rajul Pandya eds., 2013) (defining the terms and arguing their implementation leads to benefits for both Indigenous peoples and those with whom they consult). *But see, e.g.*, Preston Hardison, *ICBG-Maya: A Case Study in Prior Informed Consent*, *in* 16 IBIN.NET: MONTHLY BULL. CAN. INDIGENOUS CAUCUS ON CONVENTION ON BIOLOGICAL DIVERSITY (2000), https://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122178.pdf [https://perma.cc/9ZS9-7LME] (discussing an attempt at using free, prior, and informed consent that was

not be pressured to consent or dissent owing to disadvantages in governance capacities that may have accrued over the years due to the consolidation of U.S. power and control over tribes.[174] "Prior" means that tribes are able to deliberate with, give feedback, and even co-design at the early stages of the design of the actions themselves.[175] Prior here means "at conception."[176] "Informed," as is common in the medical ethics literature, must also include culturally-relevant means of expression and sufficient time and access to expertise for analysis of any information relevant to consent.[177]

These meanings of FPIC suggest a conduct for U.S. federal agencies and corporations who are involved in actions that may impact tribes. There must be processes in place at the earliest design phases of the project in question.[178] While unrealistic in some cases, this would mean that as plans are being solidified for a certain action, prior to even a permit application or other advance is made, tribes would be invited to the table.[179] It would also suggest that measures were in place that would ensure tribes, and all other parties, have the capacities to participate in the consultation process fairly.[180] Finally, it would suggest that any information about the costs, benefits, and risks of an action would both be expressed in culturally relevant ways and that tribes would be able to gather their own evidence.[181] Tribal evidence, whether scientific or testimonial, would have its due weight without being subject to unjustified domination from other forms of evidence that other governments, like the U.S. federal government, use.[182]

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met with Indigenous criticism). *See generally* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS (2001).

174 *See* FREE, PRIOR AND INFORMED CONSENT MANUAL, *supra* note 173, at 15; Hardison, *supra* note 173; Williams & Hardison, *supra* note 173, at 29.

175 FREE, PRIOR AND INFORMED CONSENT MANUAL, *supra* note 173, at 15.

176 *Id.*

177 *See* BEAUCHAMP & CHILDRESS, *supra* note 173, at 62; FREE, PRIOR AND INFORMED CONSENT MANUAL, *supra* note 173, at 15-16.

178 FREE, PRIOR AND INFORMED CONSENT MANUAL, *supra* note 173, at 15.

179 *See id.*

180 *See id.* at 16.

181 *See id.* at 15-16; *cf.* Williams & Hardison, *supra* note 173, at 29-30 (discussing indigenous knowledge-sharing and the risks thereof).

182 *See* Nicholas J. Reo, Kyle P. Whyte, Deborah McGregor, MA (Peggy) Smith & James F. Jenkins, *Factors that Support Indigenous Involvement in Multi-Actor Environmental Stewardship*, ALTERNATIVE: INT'L J. INDIGENOUS PEOPLES 1, 4 (2017); *cf.* Williams & Hardison, *supra* note 173, at 29-30. *See generally* K. S. SHRADER-FRECHETTE, RISK AND RATIONALITY: PHILOSOPHICAL FOUNDATIONS FOR POPULIST REFORMS (1991); Mary Arquette, Maxine Cole, Katsi Cook, Brenda LaFrance, Margaret Peters, James Ransom, Elvera Sargent, Vivian Smoke & Arlene Stairs, *Holistic Risk-Based Environmental*

Additionally, FPIC should be viewed in many cases as including a "veto" right. Given that most tribes' formal relationship to or incorporation into the U.S. is not legitimate by their perspectives, tribes often consider themselves ultimately — and factually so — as separate sovereign entities.[183] Though tribes use the "trust doctrine" and other language to support their goals and the well-being of their members, many Indigenous persons still firmly ground themselves in the ultimate sovereignty of their peoples. Moreover, given the difference in relative power between the U.S., corporations and many Tribes, tribal communities are commonly at risk of being exploited. These features, as well as the norm of consent itself, indicate that tribes should be able to veto or dissent to the actions of others that may affect them. Another way of understanding this is that FPIC policies that have restrictions on veto powers must have justifications for why veto power has been restricted. The establishment of those justifications must itself be based on processes that are consensual. The ideal of consent, as a moral norm, suggests a relationship between the U.S., tribes, and other parties that would flow much more like a cooperative partnership than a formal consultation, and where tribes would have veto rights (the right to say "no") to any actions that would impact them. Yet consultation policies and tribal contexts are rarely suited to meet such a version of this norm even if doing so was the intent of consultation by the U.S. The National Congress of American Indians expressed related to concerns to how Executive Order 13,175 is set up. A National Congress of American Indians ("NCAI") report suggests that consultation is viewed "merely as a procedural requirement with no focus on the goals of tribal self-government and fulfillment of the federal trust responsibility," there was little attention paid to Tribal recommendations about how consultation should be shaped and understand, and "no mechanisms for accountability" when "federal agencies ignore or refuse to carry out their responsibilities under the Executive Order."[184] In the authors' professional experiences, it has come to our attention anecdotally that there are also some dilemmas that tribes are in when they critique

Decision Making: A Native Perspective, 110 ENVTL. HEALTH PERSP. 259 (2002) (arguing environmental risk assessment should be more holistic by including factors which reflect the values of Indigenous peoples); Kristin Shrader-Frechette, *Analyzing Public Participation in Risk Analysis: How the Wolves of Environmental Injustice Hide in the Sheep's Clothing of Science*, 3 ENVTL. JUST. 119 (2010) (discussing issues caused by the technocratic monopoly on risk-assessment in the United States).

183 *See* Murray Lee, *What is Tribal Sovereignty?*, PARTNERSHIP WITH NATIVE AM. (Sept. 9, 2014, 7:36 AM), http://blog.nativepartnership.org/what-is-tribal-sovereignty/ [https://perma.cc/82ML-28JH].

184 NAT'L CONG. OF AM. INDIANS, *supra* note 13, at 2.

consultation processes. For there is sometimes a concern that criticizing consultative policies will feed into a biased narrative that non-Indigenous parties may adopt. The biased narrative is that Indigenous peoples are not sufficiently organized to engage in consultation. The problem with such a narrative is that it does not look carefully at the hurdles Indigenous governments nor does it reflect on whether Indigenous peoples even had the opportunity to shape the policies to suit their cultural traditions and government capacity-building efforts.

Indigenous traditions of ethics place a great deal of emphasis on consent and dissent as a cornerstone of political relationships and political decision-making. Haudenosaunee and Anishinaabe peoples are well-known for traditions of treaty-making that prioritized the idea that all parties to the agreement should be able to consent or dissent. The Haudenosaunee *Kaswentha* refers to a philosophy that political agreements between two parties are like two vessels navigating parallel running rivers in a shared ecosystem. In the agreement each party should maintain its independence and way of life, yet both parties should find beneficial ways to cooperate. In this way of thinking of political agreement, the core of treaty-making is respect for each party's independence, or consent. Haudenosaunee people today continue to use the *Kaswentha* philosophy as the basis for environmental protection and justice. For example, the Akwesasne Task Force has created protocols for how environmental scientists from outside the Tribe can collaborate with the Tribe in ways that respect each other's mutual independence and consent.[185] Susan Hill, speaking of treaties and agreements of Haudenosaunee people and colonists, writes that the:

> relationship was to be as two vessels travelling down a river — the river of life — side by side, never crossing paths, never interfering in the other's internal matters. However, the path between them, symbolized by three rows of white wampum beads in the treaty belt, was to be a constant of respect, trust, and friendship . . . Without those three principles, the two

[185] *See* Susan Hill, *Travelling Down the River of Life Together in Peace and Friendship, Forever: Haudenosaunee Land Ethics and Treaty Agreements as the Basis for Restructuring the Relationship with the British Crown*, *in* LIGHTING THE EIGHTH FIRE: THE LIBERATION, RESURGENCE, AND PROTECTION OF INDIGENOUS NATIONS 23, 30-32 (Leanne Simpson ed., 2008); James W. Ransom & Kreg T. Ettenger, *'Polishing the Kaswentha': A Haudenosaunee View of Environmental Cooperation*, 4 ENVTL SCI. & POL'Y 219, 224 (2001).

> vessels could drift apart and potentially be washed onto the bank (or crash into the rocks).[186]

Hill's account of the *Kaswentha* embodies strong norms of consent and dissent through concepts of non-interference and independence. Such recognition of the importance of consent requires constant "respect, trust, and friendship," which can be understood to guide consultative processes between sovereigns.[187] The Dish with One Spoon refers to another treaty-making tradition that connects Anishinaabe and Haudenosaunee people.[188] On one interpretation, the philosophy is that both parties live in a common bowl/dish (ecosystem) and have just one spoon to share together to eat from the dish.[189] Every time someone seeks to take from the ecosystem to satisfy their survival and sustenance, they must think about the implications on the other party who shares the same dish and spoon.[190] In this way, parties in the agreement respect each other's consent to the actions that they take because of how they impact one another. The Dish with One Spoon philosophy indicates strong standards of consent and consultation, as consultative activities would be a cornerstone of shared governance relationships in "the dish."[191]

Within Indigenous peoples, consensus is also privileged as a best practice for how to organize a society. In the Navajo Nation, local leaders were selected by informal consensus.[192] Robert Yazzie writes that this ensures "everyone can have their say, and when someone is out of line, they get a 'talking to' by a naat'aani [peacemaker/mediator]."[193] Yazzie describes this process "as a circle, where everyone (including a naat'aanii) is an equal. No person is above the other. In this 'horizontal' system, decisions and plans are made through consensus."[194] The Navajo process encourages discussion (long, when needed), the sharing of perspectives, and in-depth learning

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186 Hill, *supra* note 185, at 30.

187 *Id.*

188 *See* Leanne Simpson, *Looking After Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships*, 23 WICAZO SA REV. 29, 37 (2008).

189 *See id.*

190 *See id.*

191 *See id.*

192 Robert Yazzie, *"Hozho Nahasdlii" – We Are Now in Good Relations: Navajo Restorative Justice*, 9 SAINT THOMAS L. REV. 117, 122 (1996).

193 *Id.*

194 *Id.*

about the nature of the problem being looked at.[195] Robert Yazzie describes the Navajo restorative justice process:

> [f]or example, to Navajos, the thought that one person has the power to tell another person what to do is alien. The Navajo legal maxim is "it's up to him," [*sic*] meaning that every person is responsible for his or her own actions, and not those of another. As another example, Navajos do not believe in coercion. Coercion is an undeniable aspect of a vertical justice system. However, because coercion tends to be authoritarian, it is thus alien to the Navajo egalitarian system . . . . It is illustrated as a circle where everyone is equal.[196]

Consent also plays a role in some Indigenous cultural and intellectual traditions in terms of consenting to environmental expertise and leadership. Coast Salish societies, for example, are well-known for their giveaway traditions. In the case of salmon stewardship, leaders of houses had to go through educational processes, widely understood by society that would give them the basis for expertise in managing salmon habitats.[197] Given that the ecosystems were interconnected, a giveaway ceremony meant that a titleholder in a house had to show to others that they had done a good job harvesting. If one's harvest that one gave away was not adequate or inappropriate for some reason, then one's position as a title holder could be challenged. Title holders, who played roles as both leaders and experts, were accountable to the consent of those who were affected by their decisions.[198]

These Indigenous North American models of consent fit well with the ethics literature on consent. Shared governance, whether within a sovereign entity or between sovereign entities, ought to be consensual. Consultation is a key activity by which consent can occur and be appropriately legitimated. Or it can be a space in which dissent and veto can be expressed, and the different parties can begin to learn from each other before returning to the table. The vagueness of U.S. Indian law on consultation represents a breakdown in respect for the consent and veto rights of Indigenous peoples. The adequacy of a consultation policy can be judged according to how well it describes a process of consent between parties. The policy cannot be one in which some parties have more time or capacity to deliberate than others, or in which one cultural

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[195] *Id.*

[196] *Id.* at 120.

[197] *See* Ronald L. Trosper, *Northwest Coast Indigenous Institutions that Supported Resilience and Sustainability*, 41 ECOLOGICAL ECON. 329, 340 (2002).

[198] *See id.* at 339.

understanding of consent is dominant. It must be a policy in which veto rights, even if restricted in various ways, are recognized, honored, and validated with respect.

III. BENEFICIAL OUTCOMES RESULTING FROM EFFECTIVE CONSULTATION

The ethics literature therefore provides valuable guidance on what consultation between tribes and the federal government should look like. With this guidance in place, this Part now examines situations where such guidance is implemented and where it was not. The effectiveness of consultation between federal agencies and tribes has the potential to lead to tribally led resource management decisions benefiting the tribe, or, alternatively, to have a detrimental impact on the management of tribally valued resources. This Part describes two such examples of the outcomes of effective consultation (or the lack of effective consultation) in relationship to upholding tribal sovereignty and protecting tribal rights and resources.

A. A Lack of Effective Consultation: Dakota Access Pipeline

In 2016, Indigenous peoples and their supporters gathered in historic proportions near the Standing Rock Sioux Reservation in North Dakota.[199] Beginning late in the summer, people gathered near the Reservation to protest the construction of the Dakota Access Pipeline.[200] These "water protectors"[201] challenged the construction of the pipeline and related pollution that will occur if it leaks. They argued that the Standing Rock Sioux Tribe was not adequately included in consultations leading to the pipeline approval (along with making other legal arguments).[202] It appeared that tribes were treated like any other party throughout the consultation process rather than a governmental

[199] *See* Sasha von Oldershausen, *Standing Rock Pipeline Fight Draws Hundreds to North Dakota Plains*, NBC NEWS (Oct. 17, 2016, 8:29 AM PT), http://www.nbcnews.com/news/us-news/standing-rock-pipeline-fight-draws-hundreds-north-dakota-plains-n665956 [https://perma.cc/6DRT-LZSH].

[200] *Id.*

[201] Many involved in this movement refer to themselves as "water protectors" given their actions are taken to protect tribal waters from anticipated pollution from a leak of the Dakota Access Pipeline. *See* Mary Annette Pember, *Another Day of Actions as Water Protectors Stand Firm*, INDIAN COUNTRY MEDIA NETWORK (Sept. 28, 2016), http://indiancountrytodaymedianetwork.com/2016/09/28/direct-action-and-arrests-continue-dapl-construction-site-nd-165926 [https://perma.cc/VW3E-8NJ3].

[202] *See* Carpenter & Riley, *supra* note 164.

entity with special consultation requirements.[203] "When the government-to-government concept is recognized as a legal foundation, so too are fundamental obligations, including consultation."[204] In this regard, the federal government failed to follow guidance on effective consultations provided in literature on ethics and morality.[205] Although the proposed pipeline does not cross existing tribal lands,[206] it comes within a half of a mile and would threaten Lake Oahe, and potentially the Missouri River, which are sources of water vital to the Tribe's survival.[207] Further, significant sites of tribal cultural, religious, and spiritual importance are located along the route.[208]

Many tribal water protectors were troubled that the federal government considered and rejected a proposed route for the pipeline that would have crossed the Missouri River ten miles north of Bismarck.[209] This Bismarck route was rejected, in part, because of concerns about protecting municipal water supply wells from potential pipeline spills.[210] It may be argued that this decision — to move the pipeline away from non-Native communities and towards a Native community — is evidence of the federal government's discriminatory intent against Indigenous people. Water protectors intended to maintain their encampment of the area for a long time,[211] but, citing

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[203] Jason Searle, *Exploring Alternatives to the "Consultation or Consent" Paradigm*, 6 MICH. J. ENVTL. & ADMIN. L. 485, 497 (2017) ("In USACE's explanation of pre-application consultations, tribes are not mentioned at all, even though they are supposed to be consulted as early as possible in the review process. . . . In its short mention of NHPA and Section 106 review, the document mentions the THPO, but only to say that it and SHPO may 'review and comment' on certain permits. This document demonstrates how extensive the slippage is when the government-to-government relationship is ignored." (citations omitted)).

[204] *Id.*

[205] Notably, morality and ethics both loosely distinguish between "good and bad" or "right and wrong." For purposes of this Article, the authors are referring to morality as something that's personal and normative, whereas ethics is the standard of "good and bad" established within a community or social setting.

[206] *See id.* at 506 (stating that portions of the Pipeline are located within traditional tribal lands that were guaranteed to the Tribe in prior treaties).

[207] Amy Dalrymple, *Confused About Dakota Access Controversy? This Primer Will Get You Up to Speed*, INFORUM (Sept. 24, 2016, 11:00 AM), http://www.inforum.com/news/4122538-confused-about-dakota-access-controversy-primer-will-get-you-speed [https://perma.cc/4BVP-HXRZ].

[208] Carpenter & Riley, *supra* note 164.

[209] Dalrymple, *supra* note 207.

[210] *Id.*

[211] von Oldershausen, *supra* note 199. On December 4, 2016, the Army Corps of Engineers announced that it was not approving the easement to cross Lake Oahe for the proposed Dakota Access Pipeline. The Corps will instead develop an environmental

environmental and safety concerns associated with an increased likelihood of flooding, the State of North Dakota ordered the camps evacuated and closed.[212] On February 23, 2017, the majority of the water protectors complied with the evacuation order, and the camps were closed.[213]

To fully understand perhaps why there was such a strong reaction to the pipeline and the federal government's failure to engage in effective consultation, it is helpful to first put this historic event in its proper context. The Lakota/Dakota/Sioux people have long suffered at the hands of the federal government. For example, the federal government abrogated treaties with the Great Sioux Nation after gold was found in the Black Hills.[214] Additionally, after the Sioux gave up the lands in question, the federal government tried to starve them by overhunting buffalo and denying treaty rations.[215] In 1890, approximately 200 Sioux

impact statement and consider alternative routes. *Standing Rock Sioux Tribe's Statement on U.S. Army Corps of Engineers Decision to Not Grant Easement*, CULTURAL SURVIVAL (Dec. 4, 2016), https://www.culturalsurvival.org/news/standing-rock-sioux-tribes-statement-us-army-corps-engineers-decision-not-grant-easement [https://perma.cc/8RLZ-KLH7]. However, because this decision does not absolutely preclude the Pipeline from going through Lake Oahe, many are still staying in the camps throughout the winter. Valerie Volcovici, *Only the Hardiest Remain at Dakota Protest camp*, REUTERS (Dec. 18, 2016, 9:30 AM), https://www.reuters.com/article/us-north-dakota-pipeline-camp/only-the-hardiest-remain-at-dakota-protest-camp-idUSKBN1470E4 [https://perma.cc/7BRX-BDML]. On January 24, 2017, President Trump signed a presidential memorandum directing the Secretary of the Army to direct the appropriate Army Corps of Engineers official to grant access approval for the Pipeline consistent with existing laws. Athena Jones, Jeremy Diamond & Gregory Krieg, *Trump Advances Controversial Oil Pipelines with Executive Action*, CNN (Jan. 24, 2017, 5:57 PM ET), http://www.cnn.com/2017/01/24/politics/trump-keystone-xl-dakota-access-pipelines-executive-actions/index.html [https://perma.cc/F6P3-88QP]. On February 7, 2017, the Army Corps of Engineers announced its intention to approve the easement for the Dakota Access Pipeline under Lake Oahe. Letter from Paul D. Cramer, Deputy Assistant Sec'y of the Army, to Hon. Raul Grijalva, Ranking Member of the U.S. House of Representatives Comm. on Nat. Res. (Feb. 7, 2017), https://turtletalk.files.wordpress.com/2017/02/dakota-access-pipeline-notification-grijalva.pdf [https://perma.cc/Q6MZ-45VG]. This will pave the way for completion of the Pipeline. On February 22, 2017, water protectors dug in and resisted efforts to clear the camps. Tom DiChristopher, *Standing Rock Activists Dig in Ahead of Deadline to Clear Protest Camp*, CNBC (Feb. 22, 2017, 9:54 AM ET), http://www.cnbc.com/2017/02/22/standing-rock-activists-dig-in-ahead-of-deadline-to-clear-protest-camp.html [https://perma.cc/QVY4-CJ8V].

[212] Mayra Cuevas, Sara Sidner & Darran Simon, *Dakota Access Pipeline Protest Site Is Cleared*, CNN (Feb. 23, 2017, 7:09 PM ET), http://www.cnn.com/2017/02/22/us/dakota-access-pipeline-evacuation-order/ [https://perma.cc/F7WL-7MXV].

[213] *Id.*

[214] Carpenter & Riley, *supra* note 164.

[215] *Id.*

people were shot and killed by the federal government while they prayed during a ceremony called a Ghost Dance.[216]

Such atrocities were not limited to the nineteenth century. Fifty years ago, the federal government seized individual homes on the Standing Rock Reservation to build the Oahe hydroelectric dam project, and today, many descendants of the Great Sioux Nation live in some of the poorest reservations and counties within the United States.[217] For many of the water protectors, federal approval of the Dakota Access Pipeline offers another example in a long history of the federal government acting to the detriment of Indigenous people.

With this historical context in place, it is easier to situate the concerns of the Tribe. To start, the legal controversy focused on the Tribe's efforts to secure an emergency injunction to halt construction of the pipeline around the Lake Oahe area. "The Tribe fears that construction of the pipeline . . . will destroy sites of cultural and historical significance. [The Tribe asserts] principally that the [Army Corps of Engineers] flouted its duty to engage in tribal consultations under the National Historic Preservation Act and that irreparable harm will ensue."[218] The U.S. District Court for the District of Columbia denied the Tribe's motion for preliminary injunction, finding that the Corps complied with NHPA and the Tribe failed to demonstrate irreparable harm.[219]

In reaching its decision, the district court detailed extensive instances, beginning years ago, when tribal officials failed to respond to requests for consultation and missed meetings with Corps officials.[220] The court determined that the Corps had gone out of its way to consult, going beyond the requirements of the NHPA, as "the Corps has documented dozens of attempts it made to consult with the [Tribe] from the fall of 2014 through the spring of 2016 . . . . These included at least three site visits to the Lake Oahe crossing . . . ."[221] The court then went on to explain that the Tribe bore the burden of establishing: (1) likelihood of success on the merits, (2) likelihood of suffering irreparable harm without the preliminary relief, (3) balance of equities in party's favor, and (4) the injunction's public interest.[222] Because the

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[216] *Id.*

[217] *Id.*

[218] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4, 7 (D.D.C. 2016).

[219] *Id.*

[220] *See id.* at 14-28.

[221] *Id.* at 24.

[222] *Id.* at 26 (quoting Winter v. Nat. Res. Def. Advisory Council, Inc., 555 U.S. 7, 20 (2008)).

court determined the Tribe was unlikely to succeed on the merits and it would not suffer irreparable harm without injunction, the court did not consider the other two requirements of an emergency injunction.[223] Notably, the court failed to articulate normative guidance about what constituted good consultation practices, nor did the court implement guidance from the ethics and morality literature.

The Department of Justice, the Army, and the Interior released a joint statement regarding the case on the same day the district court released its opinion.[224] While these departments acknowledged and appreciated the district court's decision, they also recognized that important issues raised by the Tribe remained, despite the issues adjudicated by the court.[225] The departments referenced concerns "regarding the Dakota Access pipeline specifically, and pipeline-related decision-making generally . . . ."[226] The joint statement goes on to acknowledge that concerns about the consultation process exist and that there may be a potential need for reform of the consultation processes.[227] This was a notable event, as the federal government acknowledged what was demonstrated above — existing federal law does little to provide guidance on how effective tribal-federal consultation should occur. The departments announced that "[t]he Army will not authorize constructing the Dakota Access pipeline on Corps land bordering or under Lake Oahe until it can determine whether it will need to reconsider any of its previous decisions regarding the Lake Oahe site under [NEPA] or other federal laws."[228] In their joint statement, the departments also requested the pipeline company voluntarily halt construction until the Corps made its decision.[229]

The Tribe appealed the district court's decision.[230] On October 9, 2016, the U.S. Court of Appeals for the District of Columbia Circuit denied the emergency injunction request, and, at the end of its order denying the emergency injunction, the court explained:

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[223] *Id.* at 26-27.

[224] *See* Press Release, Dep't of Justice Office of Pub. Affairs, 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 Eng'rs* (Sept. 9, 2016), https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing [https://perma.cc/S4UK-YM2B].

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] Emergency Motion for Injunction Pending Appeal at 1, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4 (D.C. Cir. 2016) (No. 16-5259).

> A necessary easement still awaits government approval — a decision Corps' counsel predicts is likely weeks away; meanwhile, Intervenor DAPL [Dakota Access Pipeline] has rights of access to the limited portion of pipeline corridor not yet cleared — where the Tribe alleges additional historic sites are at risk. *We can only hope the spirit of Section 106* [of the National Historic Preservation Act] *may yet prevail*.[231]

On December 5, 2016, the Army Corps of Engineers announced that it would not grant the easement for the Dakota Access Pipeline to cross Lake Oahe.[232] On January 24, 2017, however, President Trump issued a presidential memorandum on the pipeline directing the Secretary of the Army to direct the appropriate assistant secretary to "review and approve in an expedited manner, to the extent permitted by law and as warranted, and with such conditions as are necessary or appropriate, requests for approvals to construct and operate the DAPL . . . ."[233] The memorandum goes on to direct the assistant secretary to consider whether to rescind the December 4, 2016 memorandum mentioned above and withdraw the Notice of Intent to Prepare an Environmental Impact Statement.[234] On February 7, 2017, the Army Corps of Engineers announced its intention to approve the easement for the Dakota Access Pipeline under Lake Oahe.[235] On February 22, 2017, water protectors dug in and resisted efforts to clear the camps,[236] but, as mentioned above, the camps were ultimately cleared and closed on February 23, 2017.[237]

As an interesting aside, in addition to the emergency injunction action discussed above, in July of 2016, the Tribe (and later the Cheyenne River Sioux Tribe intervened) brought a claim based on the National Environmental Policy Act alleging that the Environmental Assessment prepared for the pipeline did not comply with NEPA. Specifically, the Tribes sought summary judgment on several counts

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231 *Id.* at 2 (emphasis added).

232 *Standing Rock Sioux Tribe's Statement on U.S. Army Corps of Engineers Decision to Not Grant Easement*, NAT'L GEOGRAPHIC (Dec. 5, 2016), https://blog.nationalgeographic.org/2016/12/05/standing-rock-sioux-tribes-statement-on-u-s-army-corps-of-engineers-decision-to-not-grant-easement/ [https://perma.cc/9GUS-UWY3].

233 Memorandum on Construction of the Dakota Access Pipeline, No. 02032, 82 Fed. Reg. 11, 129 (Jan. 24, 2017), https://www.govinfo.gov/content/pkg/DCPD-201700067/pdf/DCPD-201700067.pdf.

234 *Id.*

235 Letter from Paul D. Cramer to Hon. Raul Grijalva, *supra* note 211.

236 DiChristopher, *supra* note 211.

237 Cuevas et al., *supra* note 212.

related to the Army Corps of Engineers failure to comply with NEPA.[238] On June 14, 2017, the D.C. district court reached its decision on the Tribes' NEPA claims. Although the court rejected the majority of the Tribes' arguments related to NEPA, the court did agree that the Corps "did not adequately consider the impacts of an oil spill on fishing rights, hunting rights, or environmental justice, or the degree to which the pipeline's effects are likely to be highly controversial."[239] Typically, in the D.C. Circuit, when similar violations of NEPA are found, vacatur is the standard remedy.[240] Given the pipeline, however, was already in operation as of June 14, 2017, the court acknowledged that "[s]uch a move, of course, would carry serious consequences that a court should not lightly impose."[241] And, as a result, the court ordered the parties to submit briefs as to the appropriate remedy in the case.[242]

In terms of the environmental assessment, James Grijalva discusses some of the concerns the Tribe had in the process leading up to the completion of the pipeline:

> The [Army] Corps [of Engineers] did not address the Tribes' expert reports documenting numerous EA [Environmental Assessment] flaws and gaps, including: dismissing impacts on Indian treaty rights without analysis; violating NEPA [National Environmental Policy Act] regulations for actions with impacts that are "highly controversial" and "highly uncertain"; understating the risk of significant pipeline leaks; ignoring the inability of detection systems to identify slow leaks that could result in large oil discharges over time; inadequately analyzing spill risks; and depriving the public of comment by keeping the underlying spill modeling data secret.[243]

Grijalva documents how an initial draft of the environmental assessment did not mention the location of the Standing Rock Reservation — less than a mile downstream from the proposed Lake Oahe crossing. Moreover:

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[238] *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 255 F. Supp. 3d 101, 122 (D.D.C. 2017).

[239] *Id.* at 112.

[240] *Id.* at 147.

[241] *Id.*

[242] *See id.* at 112.

[243] James M. Grijalva, *Resistance, Resilience and Reconciliation: Indigenous Human Rights to Environmental Protection in a Fossil Fuel Frenzy*, JURIST (Apr. 11, 2017, 3:43:29 PM), https://www.jurist.org/commentary/2017/04/resistance-resilience-and-reconciliation-indigenous-human-rights-to-environmental-protection-in-a-frenzy/ [https://perma.cc/4KTX-AC9Y].

> [While] [t]he final EA "recognized" that fact [of the proximity], . . . rather than confront the health and cultural impacts of contaminating the Reservation's largest water body and its shorelines, the EA instead re-emphasized the pipeline's off-Reservation location, the expensive and high-tech nature of the horizontal drilling technique for putting the pipeline below the lake, and the very low likelihood of spills. Illogically, that same low risk of spills justified rejecting an alternate route upstream of the State Capitol of Bismarck, whose racial composition is overwhelmingly White.[244]

At the time of writing, the legal claims related to the original consultative and assessment processes for the final segment of the pipeline are not settled. In March 2020, Judge Boasberg questioned whether Army Corps of Engineers had adequately fulfilled its duties. He wrote that:

> The many commenters in this case pointed to serious gaps in crucial parts of the Corps' analysis — to name a few, that the pipeline's leak-detection system was unlikely to work, that it was not designed to catch slow spills, that the operator's serious history of incidents had not been taken into account, and that that the worst-case scenario used by the Corps was potentially only a fraction of what a realistic figure would be . . . .[245]

On July 6, 2020, Judge Boasberg held that "[c]lear precedent favoring vacatur during such a remand coupled with the seriousness of the Corps' deficiencies outweighs the negative effects of halting the oil flow for the thirteen months that the Corps believes the creation of an EIS will take."[246] As a result of this decision, the district court held that the Dakota Access Pipeline should be shut down within thirty days of the court's decision. This decision was heralded as a major victory for the Tribes.[247] On July 14, 2020, the U.S. Court of Appeals for the District of

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[244] *Id.*

[245] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 440 F. Supp. 3d 1, 26 (D.C. Cir. 2020).

[246] Memorandum Opinion at 2, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-1534, (D.D.C. July 6, 2020), 2020 WL 3634426, at *1.

[247] Jacey Fortin & Lisa Friedman, *Dakota Access Pipeline to Shut Down Pending Review, Federal Judge Rules*, N.Y. TIMES (July 6, 2020), https://www.nytimes.com/2020/07/06/us/dakota-access-pipeline.html [https://perma.cc/SXZ8-5A2J].

Columbia Circuit issued an administrative stay of the lower court's decision pending emergency review by the circuit court.[248]

Despite recent events that potentially favor tribal interests, the controversy over the Dakota Access pipeline exemplifies a situation where the federal government failed to engage in effective consultation with the relevant Tribes, and, as a result, numerous complaints were filed against the federal government. Such a result is not only unacceptable for tribes, but also ineffective and potentially disastrous for the federal government and its goals. As one author noted:

> Ideally, consultation allows federal agencies to understand how regulated projects could adversely affect tribes and their resources. Consultation potentially serves as a powerful tool to protect tribal interests, but its record in practice is mixed, due to inconsistent or incomplete implementation among agencies. Recent controversies surrounding the Dakota Access Pipeline and other infrastructure projects affecting tribal territories also highlight the perils associated with incomplete or insincere consultation.[249]

In the case of the Dakota Access Pipeline, the consent of the Standing Rock Tribe was not valued, even though a consultative process took place. Consultation was shallow, and ultimately was not organized in ways that reflected free, prior, and informed consent or Indigenous philosophies such as respect, trust, and friendship.[250] There was not an emphasis on ensuring all parties were able to express themselves, which was especially problematic given the issues related to historic land dispossession and discrimination that the Standing Rock Tribe has endured. Such legacies were not unrelated to the struggle against the pipeline itself.

B. Consultation as a Pathway to Strengthening Government-to-Government Relations

Not all examples of tribal-federal consultation, however, are negative. Positive examples prove instructive as to what effective consultation can

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[248] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16 Civ. 1534 (D.C. Cir. July 14, 2020).

[249] Ryan E. Emanuel, *Climate Change in the Lumbee River Watershed and Potential Impacts on the Lumbee Tribe of North Carolina*, 163 J. CONTEMP. WATER RES. EDUC. 79, 83 (2018).

[250] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16 Civ. 1534, 2016 U.S. Dist. LEXIS 121997, at *2 (D.D.C. Sep. 9, 2016).

look like. They demonstrate how parties can incorporate the principles articulated in the ethics and morality literature. For example, the importance of the government-to-government relationship is emphasized in the 1994 Northwest Forest Plan. The plan addresses management of federal forest land in the Pacific Northwest within the range of the northern spotted owl.[251] The Record of Decision ("ROD") for the Northwest Forest Plan ("NWFP") recognizes that the implementation of the NWFP may affect tribal treaty rights and trust resources as restrictions under the NWFP may limit access to tribal cultural resources, and calls for consultation on a government-to-government basis with tribal governments when treaty-protected lands or trust resources may be affected.[252]

Agencies managing federal land within the NWFP region are required to monitor the effects of implementation and evaluate the conditions and trends of trust resources identified in treaties with tribes, as well as protections for, access to and use of forest species, resources, and places that are in religious and cultural heritage sites.[253] These monitoring reports have consistently found that while consultation is recognized in federal law and administrative policy as the primary mechanism for federal agencies to work with tribes when federal action may impact tribal lands and resources, consultation does not always ensure that tribal interests are upheld. In fact, consultation may in some cases be little more than notification of planned federal action.[254] This is evidence of what this Article concluded above — that, although federal law may require consultation in some areas, little guidance is given as to what effective consultation looks like.

The NWFP requires a series of monitoring reports to be conducted every five years to assess a broad spectrum of issues, including

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[251] Reg'l Ecosystem Office, *Northwest Forest Plan*, USDA FOREST SERV., https://www.fs.fed.us/r6/reo/ (last visited Feb. 15, 2020) [https://perma.cc/J9E3-PY77] [hereinafter NFP]. This Article focuses on the NFP as an example of effective tribal consultation. For other examples of successful collaboration and consultation, see Gail Thompson & Connie R. Freeland, *Improving Relations with Indian Tribes*, HYDRO REV. 80 (2002).

[252] FOREST SERV. & BUREAU OF LAND MGMT., RECORD OF DECISION FOR AMENDMENTS TO FOREST SERVICE AND BUREAU OF LAND MANAGEMENT PLANNING DOCUMENTS WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL 55 (1994), https://www.fs.fed.us/r6/reo/library/downloads/documents/NWFP-ROD-1994.pdf [https://perma.cc/PL85-V887].

[253] *See* NFP, *supra* note 251.

[254] RESOURCE INNOVATION GROUP & INST. FOR A SUSTAINABLE ENV'T, U. OR., KATHY LYNN, KATIE MACKENDRICK, HANNAH SATEIN, GARY R. HARRIS, NORTHWEST FOREST PLAN & TRIBAL MONITORING LEAD, NORTHWEST FOREST PLAN: THE FIRST 15 YEARS (1994–2008): EFFECTIVENESS OF THE FEDERAL-TRIBAL RELATIONSHIP 16 (2011).

populations and habitat of the northern spotted owl and marbled murrelet, late-successional and old growth forests, watershed conditions, socioeconomic conditions, and the tribal-federal relationship. As an initial starting point, it is laudable that the Plan seeks to re-evaluate the tribal-federal relationship. This is consistent with the idea expressed in the ethics and morality literature that relationships should be dynamic partnerships. Since 1999, the United States Department of Agriculture ("USDA") Forest Service Regional Ecosystem Office has published these monitoring reports that document the status and trends of these issues over time.[255]

The most recent of Tribal Monitoring Reports have followed a protocol developed by the NWFP Tribal Monitoring Advisory Group to examine consultation processes, the effect of the NWFP on tribal values of interest (including cultural, social, and economic resources), and strategies to strengthen federal-tribal relations.[256] Findings from the reports highlight the need for more effective consultation to move agency practices from merely notifying tribes of proposed actions, but rather engage tribes in working with federal agencies to develop strategies that would meet tribal cultural resource management objectives.[257] Recommendations to strengthen consultation focus on increasing agency accountability for meeting the federal trust responsibility through staff education and training, development of formal agreements for consultation, and government-to-government interactions such as Memoranda of Understandings, and ensure that agency and tribal leadership understand and come to a consensual agreement about consultation policies and practices.[258]

The NWFP tribal monitoring reports have also examined the extent to which tribal rights and access to cultural resources have been impacted by the Northwest Forest Plan. The twenty-year tribal monitoring report describes some of the ways that tribal rights and access to resources have been impacted by the NWFP, including "[r]oad closure, decreased ability to harvest traditional cultural resources, reduced economic opportunities, and limitations on land

[255] *See* Reg'l Ecosystem Office, *Northwest Forest Plan Interagency Regional Monitoring Program*, USDA FOREST SERV., https://www.fs.fed.us/r6/reo/monitoring/ (last visited Sept. 2, 2020) [https://perma.cc/N3AZ-WBYM].

[256] LYNN ET AL., *supra* note 254, at i; KIRSTEN VINYETA & KATHY LYNN, FOREST SERV., NORTHWEST FOREST PLAN THE FIRST 20 YEARS: STRENGTHENING THE FEDERAL-TRIBAL RELATIONSHIP: A REPORT ON MONITORING CONSULTATION UNDER THE NORTHWEST FOREST PLAN 9 (2015).

[257] LYNN ET AL., *supra* note 254, at 2-6; *see* VINYETA & LYNN, *supra* note 256, at 1-3.

[258] *See* VINYETA & LYNN, *supra* note 256, at 1-3.

management."[259] Recommendations to improve tribal rights and access to cultural resources under the Northwest Forest Plan focus on training agency staff across all levels to ensure strong cultural competency in tribal matters, reviewing and updating policies that severely impact tribes' rights to interact with traditional lands and resources and adopting practices that protect sensitive tribal and traditional knowledge.

The NWFP monitoring reports also look at federal-tribal forest management compatibility. Interviews that took place for the twenty-year tribal monitoring report described some ways that federal forest management practices align with tribal values, including restoration and protection of fish and wildlife habitat, and the incorporation of tribal forest management practices in agency land management (e.g., prescribed fire).[260] Some of the ways that respondents described incompatibilities in tribal and federal forest management included prioritization of timber and industry over other forest resources and tribal needs, lack of incorporation of traditional knowledge and tribal values into management, and an all-or-nothing approach that could deplete ecosystems or impact economies.[261] Recommendations to improve the compatibility of federal-tribal forest management focus on increasing formal consultation and collaborative approaches between federal agencies and tribes to enhance the compatibility of federal-tribal forest management practices. This would increase opportunities for tribal leadership in land management decisions and leverage opportunities for funding and resources to support tribal natural resource departments.

A 2018 synthesis of science to inform land management within the NWFP area examined strategies to promote tribal ecocultural resource management and effectively engage tribes in forest management and planning.[262] Ensuring effective consultation was among the recommendations included in the report, along with strategies for

[259] *Id.* at 29.

[260] *Id.* at 35.

[261] *Id.* at 36.

[262] Jonathan Long, Frank K. Lake, Kathy Lynn & Carson Viles, *Chapter 11: Tribal Ecocultural Resources and Engagement*, *in* 1 FOREST SERV., NORTHWEST FOREST PLAN: SYNTHESIS OF SCIENCE TO INFORM LAND MANAGEMENT WITHIN THE NORTHWEST FOREST PLAN AREA 851, 851 (Thomas A. Spies, Peter A. Stine, Rebecca Gravenmier, Jonathan W. Long & Matthew J. Reilly eds., 2018), https://www.fs.fed.us/pnw/pubs/pnw_gtr966.pdf [https://perma.cc/25Y6-JQ2B].

bolstering federal-tribal collaboration, coordination, and cooperative management of tribally-valued cultural resources.[263]

The NWFP, with its five-year review cycle and constant reflection on what constitutes effective consultation with area tribes, demonstrates the principles for effective consultation articulated in the ethics and morality and Indigenous studies literature. This is because the ideal of consent, as a moral norm, suggests a relationship between the U.S., tribes, and other parties that establishes collaborative processes and partnerships as mechanisms to help achieve more effective consultation.

CONCLUSION

A. Strengthening Federal-Tribal Relationships to Address Climate Change and Fossil Fuel Industries

The case examples are related to climate change adaptation, fossil fuel industries, and the topic of consent and veto, as discussed previously. The Dakota Access pipeline and NWFP examples are instructive in that they provide real world examples of the ramification of ineffective tribal consultation versus effective consultation, respectively. The government-to-government relationship is a formal mechanism for Indigenous peoples to interact with non-indigenous entities to protect indigenous cultural connections to the earth, address climate change at multiple scales, and negotiate policies to stop multiple oppressions. Based on lessons gleaned from these examples coupled with guidance from the morality and ethics literature, this section describes strategies to strengthen federal-tribal relations and effectiveness of consultation. Such strategies and considerations are incredibly valuable given the absence of effective guidance provided by existing federal law. Importantly, while this analysis focused on climate change and fossil fuel industries, the same considerations about consultation are important for other risks faced in Indian country with the emergence of the energy transition.

With this background in place, we offer the following guidance on how consultations with tribes should be handled:

[263] *See id.* at 880-81.

1. Establish common understandings of the role, purpose, and principles of "consultation."

Consultation policies are not the sole domain of non-tribal agencies — tribes may have their own consultation policies to address the many different policies that agencies operate under, and *both* agencies and tribes can initiate consultation. Agencies and tribes must remain on equal terms through consultation processes, so that conflicts are not resolved by a presumption that agencies have the final word over tribes. Ensuring that tribes are treated as equal sovereigns in consultation and can initiate their own consultation processes can lessen some of the powerlessness and lack of respect that many Indigenous peoples face in relations with non-indigenous nation states.[264] Indigenous traditions of consultation — including ones with ancient origins — should be considered as among the most important intellectual bases for envisioning roles, purposes, and principles. Consent must be discussed as a key guiding norm for consultation. The meaning of concepts like "environmental justice" cannot be taken for granted based on how they may be defined in certain U.S. policies. Their meaning must be discussed and agreed upon at the earliest stages of consultation.

2. Assess and build knowledge about the federal trust responsibility, government-to-government relationships and consultation.

The extent to which tribal and non-tribal partners understand and are responsive to the federal-tribal relationship will directly affect the ability of agencies and tribes to engage meaningfully on climate change, resource management issues, and economic development related to extractive industries. Lake et al. notes that trust and understanding between tribes and non-tribal partners can increase the effectiveness of research and management. "*[I]t is imperative that managers and researchers understand and use formal and culturally sensitive approaches for contacting tribal government and community members.*"[265]

[264] For additional thoughts and guidance on how to build strong relationships with tribes, see Thompson & Freeland, *supra* note 251.

[265] Frank K. Lake, Vita Wright, Penelope Morgan, Mary McFadzen, Dave McWethy & Camille Stevens-Rumann, *Returning Fire to the Land: Celebrating Traditional Knowledge and Fire*, 115 J. FORESTRY 343, 349 (2017) (emphasis added).

3. Agency climate change and energy development policies, research, resources, and plans should directly and meaningfully address issues related to indigenous communities in the United States.

When agency programs and initiatives related to climate change and extractive industries only include tribes as general stakeholders, they undermine Indigenous sovereignty. They are also failing to recognize the contributions that indigenous communities in the U.S. can offer in addressing climate change and extractive industries, as well as the implications that climate change may have on off-reservation tribal resources and ancestral territory. Moreover, often agencies are not sensitive to the fact that Tribes did not choose to be in the situation where extractive industries can be sited nearby. Tribes also did not choose to be a in a position where extractive industries pose the possibility of being profitable beyond other options that Tribes should be able to freely choose from, but that are not options due to the impacts of land dispossession and policies that limit tribal pursuit of a greater variety of economic options, including ones that correspond to a higher degree to tribal values.

4. Recognize the role and protect the use of traditional knowledge in consultations.

Some tribes have adopted their own policies and programs to assess and adapt to climate change impacts on resources of concern, and many of these efforts incorporate the use of traditional knowledge. Traditional knowledge can play an important role in understanding the impacts from climate change and identifying strategies for adaptation. Federal-tribal consultation on climate change-related issues should involve procedures and agreements when traditional knowledges are involved and strategies to ensure the protection of culturally sensitive tribal information from disclosure.[266] This recommendation avoids the cultural imperialism implicit in policies where tribal knowledge is not given a fair seat at the table in terms of informing policy and climate change related research and risk assessment for extractive industries.

[266] Williams & Hardison, *supra* note 173, at 23.

5. Examine how the impacts of climate change and extractive industries on the quantity and distribution of culturally important species will affect tribal access to and management of these tribal resources, on- and off-reservation.

Climate change and extractive industries may result in changes to ecological processes, as well as the quantity and distribution of species that have cultural and economic importance to tribes in terms of practices and relationships.[267] These shifts create the need to examine treaty rights and federal land management obligations in consulting with tribes to assess and plan for the potential socioeconomic and ecological impacts from climate change. There is a need to examine how tribal rights and access to culturally important practices and relationships that (both on- and off-reservation) will be affected by the impacts from climate change. This level of investigation must happen at a local level and through direct consultation and collaboration between tribal and agency leadership and staff to identify strategies to protect tribal access to these practices and relationships in the future.

6. Strengthen tribal and agency capacity to engage in meaningful consultation and achieve a more robust government-to-government relation.

In 2000, Executive Order 13,175 directed federal agencies to develop consultation plans that would "establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes . . . ."[268] These consultations are critically important to ensuring the protection of tribal resources, and as such, American Indian and Alaska Native tribes are faced with numerous calls for "consultation" from federal agencies working to meet their trust responsibility to the tribes.[269] Tribes must have the capacity and resources to proactively engage in consultations, particularly those that pertain to the federal

[267] *See* Karletta Chief, John J. Daigle, Kathy Lynn & Kyle Powys Whyte, *Indigenous Experiences in the U.S. with Climate Change and Environmental Stewardship in the Anthropocene*, *in* FOREST SERV., RMRS-P-71, FOREST CONSERVATION AND MANAGEMENT IN THE ANTHROPOCENE: ADAPTATION OF SCIENCE, POLICY, AND PRACTICES 161, 161 (V. Alaric Sample & R. Patrick Bixler eds., 2014), https://www.fs.fed.us/rm/pubs/rmrs_p071.pdf [https://perma.cc/Q6YN-LCUZ].

[268] Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

[269] *Id.*

actions that threaten indigenous sovereignty. Climate change and extractive industries require action at multiple scales and necessitates federal-tribal consultations for a range of actions, including land and resource management, adaptation measures and actions related to extractive industries. Federal-tribal relations are critical in considering the cross-boundary nature of climate change.

It will support tribal engagement in consultations with agencies located outside their immediate geographic region. It will also prevent certain forms of powerlessness and marginalization that occur when a tribe is not only isolated geographically but lacks the capacity to travel outside of that region, even when there are willing agency partners located elsewhere. In terms of agency capacity, culturally sensitive training needs to be strengthened, as well as the facilitation of new relationships when staff turnover occurs.

7. For cases of climate change planning and renewable energy, find direct pathways to strengthen federal-tribal relations and opportunities for co-management.

Decisions regarding the protection and management of indigenous lands and tribally valued cultural resources will be strengthened by the inclusion of tribal leadership, traditional knowledges, and tribal direction in planning and policymaking. Chief et al. examines various participatory research frameworks and several case studies for tribal engagement in water management decisions and finds that tribal engagement is critical to the success of these management decisions.[270] "Because of the deep connection tribes have to the natural environment and tribal specific challenges in water management, the manner of engaging tribal participants, from individuals to communities to nations, is important to the success of the project, goals, and dialogue."[271] Co-management, or resource management goals and responsibilities shared by tribes and federal agencies, offers a framework for this kind of meaningful tribal engagement by ensuring that tribes

[270] *See* Karletta Chief, Alison Meadow & Kyle Whyte, *Engaging Southwestern Tribes in Sustainable Water Resources Topics and Management*, 8 WATER 350, 350 (2016) ("For the five select cases of collaboration involving Southwestern tribes, the success of external researchers with the tribes involved comprehensive engagement of diverse tribal audience from grassroots level to central tribal government, tribal oversight, on-going dialogue, transparency of data, and reporting back.").

[271] *Id.* at 365.

are a part of all stages of development, implementation, and monitoring of land development and resource management decisions.[272]

These recommendations, if adopted, will go a long way toward realizing effective tribal consultation.[273] The recommendations, we feel, are consistent with National Congress of American Indian's recent recommendations on consultation, which are to "Refocus the Executive Order [13,175] on Tribal Sovereignty, the Trust Responsibility and the Goal of Building Consensus Between Nations," "Develop New Accountability Provisions," and "Create Opportunities for both Formal Consultation on Developed Proposals and Early Informal Scoping on Tribal Issues."[274] Federal law provides a framework for such consultation to occur, as it provides legal claims, such as the federal trust relationship, treaties, statutes, and Executive Orders that may lead to consultation occurring. The law, ultimately, however is limited, as it does not provide guidance on the scope or operation of such consultation. This is where turning to ethics literature is helpful, as it fills the void left by existing law, and, it does so in an effective manner. These strategies can provide a way forward in terms of finding effective consultation mechanisms that are acceptable to both tribes and the federal government.

[272] *See generally* Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RESOURCES J. 585 (2008) (surveying co-management arrangements between tribes and the federal government).

[273] Admittedly, these recommendations are made from the perspective of a non-tribal entity consulting with a tribe. Tribes interested in improving consultations with non-tribal entities may want to consider adopting their own tribal consultation provisions. *See* Butzier & Stevenson, *supra* note 13, at 323.

[274] NAT'L CONG. OF AM. INDIANS, *supra* note 13, at 2-3.