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Carla F. Fredericks
University of Colorado Law School

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OPERATIONALIZING FREE, PRIOR, AND INFORMED CONSENT

*Carla F. Fredericks**

I. INTRODUCTION

The U.N. Declaration on the Rights of Indigenous Peoples ("UNDRIP") has acknowledged varying methods in which international actors can protect, respect, and remedy the rights of indigenous peoples.[1] One of these methods is the concept of free, prior, and informed consent ("FPIC") as described in Articles 10, 19, 28 and 29 of the UNDRIP.[2] As this article discusses, there has been much debate in the international community over the legal status of the UNDRIP, and member states have done little to implement it. In applied contexts, many entities such as extractive industries and conservation groups are aware of risks inherent in not soliciting FPIC and have endeavored to create their own FPIC protocols when interacting with indigenous peoples. At present, though, there is an absence of FPIC protocol that has been developed by indigenous peoples themselves. A tribal FPIC law and protocol may serve as a starting point and model to implement a portion of the UNDRIP and actualize these rights for the development or use of culture, lands, territories, and resources. This article contends that indigenous peoples must develop and implement their own FPIC protocol in order to assert their human rights, and offers a model

* Director, American Indian Law Program; Associate Clinical Professor and Director, American Indian Law Clinic, University of Colorado Law School. I would like to express deep gratitude to my research assistants, Michael Holditch and Kathleen Finn, as well as thank Kristen Carpenter, S. James Anaya, Sarah Krakoff, Charles Wilkinson, Fred Bloom, Christina Warner, Jesse Heibel, and Rich Bienstock for helpful comments, and Chairman David Archambault III, Jodi Gillette, Dean Depountis, Martin Wagner, Jan Hasselman, the Standing Rock Sioux Tribe, the Spokane Tribe of Indians, Jason Campbell, Chairwoman Carol Evans, Tom Fredericks, the Coalition of Large Tribes, United Nations Special Rapporteur on the Rights of Indigenous Peoples Victoria Tauli-Corpuz, Cathal Doyle, Robert Coulter, Elsa Stamatopoulou, Rebecca Adamson, and Nick Pelosi for the opportunity to experience the complexities of this topic firsthand. Any errors are mine alone.

[1] *See* G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

[2] *See id.*, arts. 10, 19, 28, 29.

under United States law for Indian tribes to assert their sovereign and human rights without waiting for member state implementation.

II. FPIC AND INDIGENOUS PEOPLES

FPIC is an evolving international rights standard for entities that interact with indigenous peoples.[3] Closely tied to the concepts of tribal sovereignty and self-determination, FPIC requires any entity engaged with a tribe in a manner that impacts tribal resources to first receive a tribe's free, prior, and informed consent.[4] FPIC is designed to replace the historical processes that excluded tribes from decision-making related to activities that took place on or near their land.[5] FPIC is an international rights-based standard, codified in the UNDRIP, for interactions with indigenous peoples.[6] Closely tied to the concepts of tribal sovereignty and self-determination, FPIC requires any entity engaged with a tribe in a manner that impacts tribal resources to first receive a tribe's free, prior, and informed consent.[7] FPIC is designed to replace the historical processes that excluded tribes from decision-making regarding activities that took place on or near their land.[8] FPIC has generally been applied in the context of lands and resources, but may be appropriate in other settings.[9]

A. Evolution of FPIC

A formal concept of FPIC for indigenous peoples began to emerge in the mid-1980s as a critical means to link to, and articulate the need for, self-determination for indigenous peoples.[10] At the time, most of the conversation around FPIC concerned geographic

[3] *See* James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Extractive Industries and Indigenous Peoples*, ¶ 28, U.N. Doc. A/HRC/24/41 (July 1, 2013) [hereinafter Anaya, *Extractive Industries*].

[4] *See id.* ¶¶ 28, 29.

[5] *See* UN-REDD Programme, Guidelines on Free, Prior and Informed Consent 11, 18 (Jan. 2013), http://www.uncclearn.org/sites/default/files/inventory/un-redd05.pdf [hereinafter UN-REDD Guidelines].

[6] *See id.* at 14.

[7] *See* Anaya, *Extractive Industries*, *supra* note 3, ¶ 27.

[8] *See* UN-REDD Guidelines, *supra* note 5, at 18.

[9] *See* Anaya, *Extractive Industries*, *supra* note 3, ¶¶ 1, 27.

[10] *See* Philippe Hanna & Frank Vanclay, *Human Rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent*, 31 IMPACT ASSESSMENT & PROJECT APPRAISAL 146, 150 (2013).

displacement of indigenous peoples.[11] Indeed, in the context of displacement, there was an "international acceptance of the idea that displacement of people should not go ahead if the potentially affected communities found it unacceptable."[12] In light of these concerns, when displacement was to occur, the displacing body would attempt to make displacement attractive such that it would be voluntary.[13] This practice created a norm, whereby the use of force and involuntary action were considered undesirable according to international consensus.[14]

The idea of "meaningful consultation" as a part of acquiescence or consent of indigenous peoples grew out of the World Bank Group in the 1980s.[15] In response to a call from indigenous peoples worldwide to have a convention or recognition of their rights from the United Nations, in September of 1984, the Working Group on Indigenous Peoples ("WGIP") adopted the "Declaration of [P]rinciples [A]dopted at the Fourth General Assembly of the World Council of Indigenous Peoples in Panama."[16] These principles explicitly mention "free" and "informed" consent in three of the principles. First, Principle 9 reads: "Indigenous people shall have exclusive rights to their traditional lands and its resources; where the lands and resources of the indigenous peoples have been taken away without their *free and informed consent* such lands and resources should be returned."[17] Principle 12 reads: "No action or course of conduct may be undertaken which, directly or indirectly, may result in the destruction of land, air, water, sea ice, wildlife,

[11] *See id.*

[12] Robert Goodland, *Free, Prior and Informed Consent and the World Bank Group,* 4 SUSTAINABLE DEV. L. & POL'Y 66, 66 (2004) [hereinafter Goodland, *Free, Prior and Informed Consent*].

[13] *See id.*

[14] *See* Robert Goodland, *The Institutionalized Use of Force in Economic Development: With Special Reference to the World Bank*, *in* SUSTAINING LIFE ON EARTH: ENVIRONMENTAL AND HUMAN HEALTH THROUGH GLOBAL GOVERNANCE 339, 344 (Colin L. Soskolne ed., 2008) [hereinafter Goodland, *Institutionalized Use of Force*]; *see also* Goodland, *Free, Prior and Informed Consent, supra* note 12, at 67 ("Consent has long been a requirement for indigenous peoples who may potentially be impacted by a development project.").

[15] Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,249 (Nov. 6, 2000); Goodland, *Free, Prior and Informed Consent*, *supra* note 12, at 66.

[16] Erica-Irene A. Daes (Chairman/Rapporteur on Indigenous Populations), *Study of the Problem of Discrimination against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1985/22, annex III (Aug. 27, 1985) [hereinafter Daes, *Discrimination against Indigenous Populations*]; *see also* Erica-Irene A. Daes, *The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples, in* MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 48, 49–50 (Claire Charters & Rodolfo Stavenhagen eds., 2009) [hereinafter Daes, *Contribution of the Working Group*] (listing all seventeen principles).

[17] Daes, *Contribution of the Working Group*, *supra* note 16, at 50 (emphasis added).

habitat or natural resources without *the free and informed consent* of the indigenous peoples affected."[18] Finally, Principle 16 expresses the importance of prior consultation to the consent process: "The indigenous peoples and their authorities have the *right to be previously consulted* and to authorize the realization of all technological and scientific investigations to be conducted within their territories and to have full access to the results of the investigation."[19]

Indigenous peoples groups submitted another draft declaration that mentioned prior and informed consent, but it was not adopted at the fourth session of the WGIP. This draft, submitted "by the Indian Law Resource Center, the Four Directions Council, the National Aboriginal and Islander Legal Service, the National Indian Youth Council, the Inuit Circumpolar Conference and the International Indian Treaty Council[,]" was more strongly worded than the adopted principles.[20] Among other things, the draft called for "free and informed consent" as to the rights to share and use land.[21] The draft also required "prior authorization" as to the rights to "technical, scientific or social investigations" on indigenous peoples or lands.[22] When negotiating the "[s]ubstantive principles" for the "Plan of Action of the WGIP," there were lots of questions including what type of mechanism should be used to allow indigenous peoples control over their own "cultural and educational activities[.]"[23]

Importantly, the concept of ethnodevelopment is related to FPIC and emerged about the same time as FPIC.[24] Former U.N. Special Rapporteur on the Rights of Indigenous Peoples, Dr. Rodolfo Stavenhagen, developed this concept in 1985.[25] Ethnodevelopment is essentially explicitly including ethnicity and racial differences in the political process, as well as the development process.[26]

[18] *Id.* (emphasis added).
[19] *Id.* (emphasis added).
[20] *See id.* at 51.
[21] *See id.*
[22] *Id.* at 52.
[23] *See* Daes, *Discrimination against Indigenous Populations*, *supra* note 16, at 56, 57.
[24] *See* Hanna & Vanclay, *supra* note 10, at 150.
[25] *See id.* Stavenhagen was the first U.N. Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples. *See* Office of the High Commissioner, U.N. Human Rights, Special Rapporteur on the Rights of Indigenous Peoples: Introduction, http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx (last visited Dec. 16, 2016). His term was from 2001–2008. *Id.*
[26] *See, e.g.*, Rodolfo Stavenhagen, *Ethnodevelopment: A Neglected Dimension in Development Thinking* (1986), *reprinted in* 2 SPRINGERBRIEFS ON PIONEERS IN SCIENCE AND PRACTICE 65, 65 (Hans Günter Brauch ed., 2013).

Communities should be able to define how their resources are used in ways that align with their cultural context, in juxtaposition to Western notions of development.[27] Stavenhagen wrote: "I submit that ethnodevelopment[,] that is, the development of ethnic groups within the framework of the larger society, may become a major issue in development thinking, both theoretically and practically."[28] The nexus between ethnodevelopment and FPIC is rooted in the need for indigenous peoples to have a mechanism with which to negotiate during development of their lands, territories, and resources. FPIC is therefore a means for an ethnically defined class of people (i.e., indigenous peoples) to negotiate and participate on their own terms, as a collective.[29]

In 1989, the concept evolved further in International Labour Convention No. 169 ("ILO 169"), with its incorporation of "free and informed consent" in its principles and with ratification by member states; ILO 169 Articles 6 and 7 together complete the concept.[30] Scholars and indigenous peoples relied on existing human rights principles regarding equal rights and self-determination when later elaborating the concept of FPIC in the UNDRIP.[31]

There has been much debate in the international community over the legal status of the UNDRIP.[32] However, the key distinction establishing the UNDRIP's non-binding legal character is that between soft law and hard law:

> [W]hether we like it or not, the distinction between *hard* law and *soft* law is a well-established one in modern international human rights law. This distinction draws on the basics of general international law, where the list of legally-binding sources is limited to treaties ratified by states, customary international law and general principles of law. Despite the specificities of the international human

[27] *See* Hanna & Vanclay, *supra* note 10, at 150.

[28] Stavenhagen, *supra* note 26, at 84.

[29] *See* Hanna & Vanclay, *supra* note 10, at 150.

[30] *Id*; *see, e.g.*, Int'l Labour Org. [ILO], Indigenous and Tribal Peoples Convention No. 169, arts. 6, 7 (June 27, 1989) [hereinafter ILO 169].

[31] *See, e.g.*, Hanna & Vanclay, *supra* note 10, at 150. There is a timeline of the codification of non-indigenous FPIC requirements: the UNFAO Code of Conduct was amended in 1989 to include mandatory consent; the 1989 Basel Convention on hazardous wastes includes FPIC; the 2001 Stockholm Convention on Persistent Organic Pollutants includes FPIC; and the 2002 Convention on Biological Diversity also includes FPIC. *See* Goodland, *Free, Prior and Informed Consent*, *supra* note 12, at 67.

[32] *See* Luis Rodríguez-Piñero Royo, *"Where Appropriate": Monitoring/Implementing of Indigenous Peoples' Rights under the Declaration, in* MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 16, at 314, 315, 316, 317.

> rights regime, it is nonetheless clear that the difference between an international treaty or convention and a declaration is still fully understood and applied by states, international organizations and other relevant operators.[33]

While this hard law/soft law distinction clarifies the non-binding legal status of the UNDRIP, this status does not, on a practical level, divest the UNDRIP of legal authority entirely.[34] The UNDRIP may itself be a "non-binding" document, but using the UNDRIP to sway domestic disposition is possible with domestic implementation.[35]

The UNDRIP can function as an embodiment of international "principles of self-determination and cultural integrity" that collectively "uphold the right of indigenous peoples to maintain and develop their own customary law systems of self-governance."[36] The most recent former U.N. Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya, points specifically to Article 33 of the draft of the UNDRIP, which states: "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with

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[33] *Id.* at 317.

[34] *See*, *e.g.*, Carla F. Fredericks, *Plenary Energy*, 118 W. VA. L. REV. 789, 829 (2015) ("[T]he declaration has no influence from a purely legal standpoint. However, [indigenous groups] . . . can still utilize UNDRIP as political capital to protect their rights.").

[35] *See id.* at 827, 828–29, 834 (discussing how the UNDRIP is an appropriate rights-based framework for approving tribal energy projects); *see also* Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 116–17, 119 (2012) (exploring consent theory as applied to United States federal Indian law); *cf.* Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,250 (Nov. 6, 2000) ("Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.").

[36] S. James Anaya, *International Human Rights and Indigenous Peoples: The Move toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13, 49, 50 (2004) [hereinafter Anaya, *International Human Rights*]; *see also* G.A. Res. 2200A (XXI), annex, art. 1, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."); G.A. Res. 2200A (XXI), annex, art. 1, International Covenant on Civil and Political Rights (Dec. 16, 1966) (providing the same language as the International Covenant on Economic, Social and Cultural Rights). Anaya cites to the latter two documents to exemplify his statement that "common article 1 of the international human rights covenants states" the following: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development." Anaya, *International Human Rights*, *supra*, at 49–50; *see* G.A. Res. 61/295, *supra* note 1, art. 34.

internationally recognised [sic] human rights standards."[37] According to Anaya, included in these "internationally recognised [sic] human rights" are rights that comport with indigenous conceptions of ownership that have proven to be problematic sources of dissonance between Western culture and native communities throughout the course of history.[38] Anaya looks specifically to ILO 169—providing for recognition of indigenous land tenure systems—in asserting that this convention "affirms the notion, promoted by various international institutions, that indigenous peoples, as groups, are entitled to a *continuing* relationship with lands and natural resources according to traditional patterns of use or occupancy."[39] Of course, land tenure itself would ensure that attendant rights regarding consent would be most fully protected.[40]

Indeed, so-called "soft law" may be one of the most effective means of promoting indigenous rights through an international law framework. Although the UNDRIP was adopted through a General Assembly Resolution,[41] its status as soft law does not divest it of legal authority.[42] Due to the intricate and dynamic processes that shape international law, international standards may evolve from all of the instruments in place, including those that are categorized

[37] Anaya, *International Human Rights*, *supra* note 36, at 51. Anaya's article was published in 2004 when the UNDRIP was still a proposed draft. Article 34 of the resulting UNDRIP states essentially the same as the draft: "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards." G.A. Res. 61/295, *supra* note 1, art. 34.

[38] *See* Anaya, *International Human Rights*, *supra* note 36, at 37, 51; s*ee generally* Kristen A. Carpenter et al., *In Defense of Property*, 118 Yale L.J. 1022, 1028–29 (2009) (proposing a model of ownership that shifts away from individual-based property law rights and into a stewardship model that more aptly protects tribal interests in obtaining and enforcing property rights as a means of protecting cultural heritage).

[39] Anaya, *International Human Rights*, *supra* note 36, at 40. Article 14(1) of the convention states: "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized [sic]." ILO 169, *supra* note 30, art. 14(1). Anaya points out the significance of the present tense in the word "occupy" but also notes that the convention, via Article 13, allows for a constructive present "occupancy" to be established by showing a cultural connection to the land. *See* Anaya, *International Human Rights*, *supra* note 36, at 40.

[40] The Dakota Access matter, discussed later, also highlights the need for land tenure to be considered within the context of treaty rights, even if the treaties have subsequently been abrogated by the State.

[41] *See* Mauro Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous People*, 58 INT'L & COMP. L.Q. 957, 959 (2009).

[42] *See id.* ("[S]oft law cannot be simply dismissed as non-law.").

as binding or non-binding.[43] In addition, there are many categories of soft law that do have governing weight, including "inter-State conference declarations, U.N. General Assembly resolutions, codes of conduct, guidelines and the recommendations of international organizations."[44] The array of international law and standards will necessarily include all instruments, particularly where normative aspects give the instrument its moral force.[45] This is particularly true in the human rights context where, like in the UNDRIP, the content of the rights-cases framework is so important that it challenges state sovereignty in order to ensure that the rights at stake are protected.[46] Even then, in the context of the UNDRIP and its protections that safeguard the relationship indigenous peoples have to their lands, there are complementary international binding agreements that encompass the same types of obligations.[47] Accordingly, where the norms that emerge from the UNDRIP intersect with binding international law, the UNDRIP serves to give those instruments moral force, and the instruments conversely bring the norms set forth in the UNDRIP into a more legally recognizable status.[48]

Even considering the rising legal influence of international soft law, it remains that domestic legal systems have "always been" the "primary means of enforcement of international law."[49] The UNDRIP can therefore still carry legal significance as it comports with treaties and international customary law. Walter Echo-Hawk

[43] *See id.* ("[U]nder the complexity and dynamism of contemporary international law-making, international standards may well emerge as a result of the interplay of different instruments, regardless of their nature.").

[44] *Id.* at 960.

[45] *See id.*

[46] *See id.* at 962.

[47] *See id.* at 972, 973.

[48] *See id.* at 959.

[49] Walter Echo-Hawk, *The Human-Rights Era of Federal Indian Law: The Next Forty Years*, 62-APR FED. LAW. 32, 37 (2015); *see also* Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 125–26 (1999) ("Beyond international law's own structures of enforcement, domestic legal systems should be looked at as the main engines of enforcing international law. In most domestic legal systems, the authoritative and controlling prescriptions of international law have been incorporated as standards of domestic legal systems, invited into the categorically different normative system of internal law through, usually, prescriptions of the highest rank, such as a constitutive document. In the United States, treaties, at least those of the 'self-executing' kind, form part of the 'supreme Law of the Land' as defined by the United States Constitution. Customary international law is seen as a standard of federal common law to be used by the courts either on the same level of normative strength as acts of Congress, or on a level just below. Courts in the United States, as well as in other domestic systems, therefore, remain important battlegrounds for the enforcement of international indigenous rights.").

aptly describes the UNDRIP's effect on United States law as a tool in the dynamic process of augmenting the legal effect of international human rights law, despite being a non-binding instrument in itself:

> [A]t the present moment the declaration is an authoritative statement of indigenous rights in the United States, with standards that build upon the U.N. treaty obligation of the United States to advance human rights under the U.N. charter. In addition, the declaration carries immediate power in five important respects: (1) it can be used by tribal litigants in carefully crafted test cases to influence courts in pending cases as persuasive authority when interpreting or reinterpreting federal Indian law doctrines and judge-made law; (2) it can guide and influence lawmakers and policy-makers when making new Indian laws and policies; (3) the widely approved international standards are a barometer for measuring U.S. conduct, laws, and practices and for judging that conduct in the court of world opinion and international forums; (4) the U.N. standards can guide Indian country in setting the agenda for social and legal reform in the 21st century; and (5) as mentioned above, courts can enforce those provisions that constitute customary international law norms or existing treaty obligations of the United States.[50]

Further, tribal legal systems, through tribal attorneys, are a critical means for moving the content of the UNDRIP into a binding domestic law framework.[51] Echo-Hawk further posits tribal legal advocates should consider alternative means and development of the international norms to best serve the needs of tribal clients:

> Legal advocates continually search for the best forums, the best facts and legal theories, and the best strategies for meeting their clients' needs. Sometimes this search entails *changing the law and finding new and better forums for presenting claims*. This is a proactive process called strategic law development. It can be done on a discrete issue-by-issue or client-by-client scale, or it can be done on a larger, grander scale by advocates when systematic legal problems are at stake.[52]

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[50] Echo-Hawk, *supra* note 49, at 37–38.
[51] *See id.* at 38.
[52] *Id.*

Indeed, the UNDRIP has influence that may prove quite significant as the dynamic processes of international and domestic human rights law-making continue to unfold.[53]

The right to FPIC and the modern conception of FPIC as written in the UNDRIP are generally considered to be grounded in the rights to self-determination, culture, and use of indigenous peoples' traditional lands, territories, and resources.[54] The implementation of free, prior, and informed consent would allow fundamental and internationally accepted standards for how governing states should carry out their responsibilities over indigenous communities as to resource extraction to prevail.[55] As to natural resource development on indigenous lands, Article 32 of the UNDRIP states: "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources."[56] It confers upon governing states the responsibility to "provide effective mechanisms for just and fair redress" to a tribe when the governing state itself approves of projects that would affect indigenous lands or natural resources.[57] Because of its grounding in indigenous self-determination, FPIC requires any entity engaged with indigenous peoples in a manner that impacts their lands and resources to first receive their free, prior, and informed consent.[58] FPIC is designed to replace the historical processes that excluded indigenous peoples from decision-making regarding activities that took place on or near their lands.[59]

Free, prior, and informed consent appears at multiple points in the UNDRIP.[60] Perhaps most notable are Articles 19 and 32. Article 19 of UNDRIP requires states to "consult and cooperate in good faith with the indigenous peoples concerned through their own

[53] *See* Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 215 (2014) (describing the "jurisgenesis" of international indigenous rights as a historic and on-going process driven by indigenous peoples and advocates).

[54] *See id.* at 191.

[55] *See id.* at 191, 206–13 (2014) (describing several examples of international human rights standards contributing to the development of a jurisprudential paradigm favorable to indigenous rights, even in the domestic sphere); *see also* Anaya, *International Human Rights*, *supra* note 36, at 14 ("Numerous processes within the international system have focused on the common set of ongoing problems that are central to the demands of indigenous groups, such that there are discernible patterns of response and normative understandings associated with the rubric of indigenous peoples. These international processes now reveal a contemporary body of international human rights law on the subject.").

[56] G.A. Res. 61/295, *supra* note 1, art. 32.

[57] *Id.*

[58] *See* Anaya, *Extractive Industries*, *supra* note 3, ¶ 26.

[59] *See* UN-REDD Guidelines, *supra* note 5, at 18.

[60] *See, e.g.,* G.A. Res. 61/295, *supra* note 1, arts. 10, 11, 19, 28, 29.

representative institutions in order to obtain their free, prior[,] and informed consent before adopting and implementing legislative or administrative measures that may affect them."[61] Article 32 requires that states obtain "free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[62]

Two forms of self-determination are reflected in FPIC in the UNDRIP: autonomous governance and participatory rights.[63] According to Anaya, "[t]he affirmation of these dual aspects reflects the widely-shared understanding that indigenous peoples are not to be considered unconnected from larger social and political structures."[64] Anaya argues that the rights in the UNDRIP are "derived from human rights principles of equality and self-determination" that are universally applied.[65]

B. Defining FPIC

In a legal sense, FPIC is currently only applied to indigenous peoples and other "traditional peoples."[66] The argument to expand the application of FPIC to other communities has been advanced by some scholars.[67] In the context of development, FPIC can function as a signal to interested parties that "indigenous peoples have rights and interests that will be protected in the development process."[68] FPIC appears in a variety of initiatives, "ranging from the safeguard policies of the multilateral development banks and international financial institutions; practices of extractive industries; water and energy development; natural resources management; access to genetic resources and associated traditional knowledge and benefit-sharing arrangements; scientific and medical research; and indigenous cultural heritage."[69] The veto power

[61] *Id.* art. 19.

[62] *Id.* art. 32.

[63] *See, e.g.*, *id.* arts. 4, 5, 18, 27, 41.

[64] S. James Anaya, *The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era, in* MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 16, at 184, 193.

[65] *Id.* at 193.

[66] *See, e.g.,* Hanna & Vanclay, *supra* note 10, at 148.

[67] *See id.*

[68] Joji Carino, *Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice,* 22 ARIZ. J. INT'L & COMP. L. 19, 25 (2005).

[69] JENNIFER FRANCO, TRANSNATIONAL INST., RECLAIMING FREE PRIOR AND INFORMED CONSENT (FPIC) IN THE CONTEXT OF GLOBAL LAND GRABS 3 (2014), https://www.tni.org/files/download/reclaiming_fpic_0.pdf.

embedded in FPIC is a critical means to give "the correlative power to negotiate on equal terms with the project proponent."[70]

FPIC can only be made freely if it is made without mental or physical coercion, external pressures from interested stakeholders (government or industry), manipulation, bribery, intimidation, or externally imposed timelines.[71] It is clear that an indigenous group must be given time to "understand, access, and analyze information" before giving consent.[72] However, there is disagreement about the stage in the planning and development process at which consent must be obtained.[73] Consent can only be properly obtained if an indigenous group is adequately informed of all of the potential harms and impacts of a proposed activity.[74] This means that the indigenous group should have accesses to information that is "clear, consistent, accurate, constant, and transparent," as well as objective and complete.[75] This includes access to information in the local language and in a format that is culturally appropriate.[76] The precise set of actions that constitutes consent is yet to be determined. This is due to the fact that FPIC is a relatively new concept that has most often been considered in an international, rather than a domestic, context.[77] It is clear, however, that consent is predicated on the ability for an indigenous group to say "no" to a proposed activity, as opposed to mere consultation.[78] One essential question is exactly whose consent must be obtained. Of course, consideration of all impacted rights holders and community members must be included in the process in order for there to be free, prior, and informed consent.[79] Another critical aspect is the inclusion of consent at each phase of an agreement's implementation.[80]

Each element of free, prior, and informed consent has legal significance. It is important to note that these definitions are still being developed and are often context-specific. First, consent can only be made freely if "given voluntarily and absent of 'coercion, intimidation or manipulation,'" and the process "is self-directed by

[70] Goodland, *Institutionalized Use of Force*, *supra* note 14, at 344.
[71] *See* UN-REDD Guidelines, *supra* note 5, at 18.
[72] *Id.* at 19.
[73] *See, e.g.*, *id.* at 24, 25.
[74] *See id.* at 19.
[75] *Id.*
[76] *Id.*
[77] *See, e.g.*, *id.* at 11.
[78] *See id.* at 20.
[79] *See id.*
[80] *See* UN-REDD Guidelines, *supra* note 5, at 20.

the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed . . . ."[81] It is clear that a tribe must be given time to "understand, access, and analyze information" before giving consent.[82] However, there is disagreement about the stage in the planning and development process at which consent must be obtained.[83]

C. Modern Contextualization of FPIC

In the public context, FPIC is seen as a minimum standard for nations working with indigenous groups.[84] FPIC is recognized in multiple articles of UNDRIP.[85] Article 32, for instance, states the following:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[86]

Although the document is not legally binding, this helps demonstrate a participating nation's acceptance of the concept of FPIC.

In the private context, FPIC is developing into an international standard for companies operating on indigenous lands.[87] Much of this progress is a result of shareholders concerned about the financial and reputational risks to which their companies are exposed when operating on indigenous lands without the consent of the impacted community.[88] For instance, in 2007, 91.6% of Newmont Mining Corporation's shareholders passed a resolution that directed the corporation to assess its practices and policies with respect to indigenous peoples.[89] Newmont, as a founding member of

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[81] *Id.* at 18.

[82] *Id.* at 19.

[83] *See, e.g.*, *id.* at 20.

[84] *See* FIRST PEOPLES WORLDWIDE, INDIGENOUS PEOPLES GUIDEBOOK ON FREE PRIOR INFORMED CONSENT AND CORPORATION STANDARDS 4 (2011), http://www.firstpeoples.org/images/uploads/IPs%20Guidebook%20to%20FPIC.pdf [hereinafter FIRST PEOPLES WORLDWIDE, GUIDEBOOK].

[85] *See, e.g.*, G.A. Res. 61/295, *supra* note 1, arts. 10, 11, 19, 28, 29, 32.

[86] *Id.* art. 32, § 2.

[87] *See* FIRST PEOPLES WORLDWIDE, GUIDEBOOK, *supra* note 84, at 4.

[88] *See id.*

[89] *Id.* at 3.

the International Council on Mining and Metals ("ICMM"), recently approved an "Indigenous Peoples and Mining" position statement—created by ICMM—that recognizes FPIC and discusses the importance of engaging and consulting with indigenous communities that may be impacted by the corporation's business operations.[90] The most recent ICMM position statement requires that indigenous people should be "able to freely make decisions without coercion, intimidation or manipulation; . . . given sufficient time to be involved in project decision-making before key decisions are made and impacts occur; and . . . fully informed about the project and its potential impacts and benefits."[91]

Free, prior, and informed consent is a key aspect in adhering to a "rights-and-risks" approach to decision-making regarding energy resource development, for example.[92] The "'rights-and-risks' approach explicitly combines human rights impact assessments with risks assessments" in ascertaining the stakeholders for these decisions.[93] Through a proper consent-seeking negotiation with stakeholders, tribes should be able to develop energy resources without undue interference from outside entities.

Although the United States and major extractive companies are moving toward a respect for tribal rights, it will be tribes themselves that are vested with the unique opportunity to proactively engage stakeholders with respect to FPIC as a condition for companies engaging with a tribe.[94] A consent regime recognizes this right and this reality, and considers both best interests and self-determination.[95] Tribes can move toward establishing their own "consent regime[s,]" shaping the requirement under *Montana v. United States*[96] that nonmembers must be engaged in a consensual

[90] *See Strengthening Our Commitment to the Rights of Indigenous Peoples*, NEWMONT MINING CORP. (May 22, 2013), http://ourvoice.newmont.com/2013/05/22/strengthening-our-commitment-to-the-rights-of-indigenous-peoples/.

[91] INT'L COUNCIL ON MINING & METALS, INDIGENOUS PEOPLES AND MINING: POSITION STATEMENT (2013), http://www.icmm.com/document/5433 [hereinafter ICMM 2013 POSITION STATEMENT].

[92] *See* Carino, *supra* note 68, at 21–22; *see also* WORLD COMM'N ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING 219 (2000), http://www.internationalrivers.org/sites/default/files/attached-files/world_commission_on_dams_final_report.pdf (discussing the importance of consent in terms of projects and negotiating conditions or terms).

[93] Carino, *supra* note 68, at 22–23.

[94] *See generally* FIRST PEOPLES WORLDWIDE, GUIDEBOOK, *supra* note 84, at 4 (indicating that indigenous peoples can use FPIC in both the public and private sector to advocate for their rights).

[95] *See generally* Fletcher, *supra* note 35, at 119 (discussing how consent theory allows tribes to take control over their lands and rights).

[96] Montana v. United States, 450 U.S. 544 (1981).

relationship with a tribe in order to fall under tribal jurisdiction.[97] This type of tribal juridical indoctrination can help fortify tribal jurisdiction over nonmembers, helping establish a foundational legal landscape supporting the implementation of consent theory.

III. INTERNATIONAL TRIBUNALS AND FPIC

The relevant international case law defines "consent" as "the canopy for, and is a derivative of, a myriad of human rights, *inter alia* the right to self-determination and self-determined development, the right to property . . . the right to practice traditional livelihoods, and collective dimensions of rights to health, food, life, housing, participation and cultural rights."[98] The jurisprudence of the Inter-American Commission on Human Rights ("Commission") and the Inter-American Court of Human Rights ("IACHR") grounds FPIC in property, self-determination, and culture.[99] The IACHR has found that FPIC is derived from rights "to cultural identity and right to life," among others, triggering FPIC at a lower threshold with a narrower set of limitations on FPIC than solely property rights.[100]

The most significant case on FPIC with domestic impacts is the 1985 case, *United States v. Dann*.[101] Mary and Carrie Dann, Shoshone sisters, were attempting to acquire title to their ancestral lands, which the United States had appropriated into federal property through Indian Claims Commission procedures.[102] After exhausting domestic remedies, they looked to international tribunals.[103] The Commission issued a report concluding that the

[97] *See id.* at 565 (citations omitted); Fletcher, *supra* note 35, at 119.

[98] CATHAL M. DOYLE, INDIGENOUS PEOPLES, TITLE TO TERRITORY, RIGHTS AND RESOURCES: THE TRANSFORMATIVE ROLE OF FREE PRIOR AND INFORMED CONSENT 130 (2015).

[99] *See* Alex Page, *Indigenous Peoples' Free Prior and Informed Consent in the Inter-American Human Rights System*, 4 SUSTAINABLE DEV. L. & POL'Y 16, 16 (2004); *see also* CATHAL DOYLE & JILL CARIÑO, MAKING FREE PRIOR & INFORMED CONSENT A REALITY: INDIGENOUS PEOPLES AND THE EXTRACTIVE SECTOR 8 (2013), http://solutions-network.org/site-fpic/files/2012/09/Making-Free-Prior-Informed-Consent-a-Reality-DoyleCarino.pdf ("In 2003, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, described FPIC as embodying 'the right to say no,' and being of 'crucial concern' and 'essential for the human rights of indigenous peoples in relation to major development projects.' The current Special Rapporteur on the rights of indigenous peoples has argued that we are witnessing the development of an international norm requiring the consent of indigenous peoples when their property rights are impacted by natural resource extraction.").

[100] *See* DOYLE, *supra* note 98, at 130.

[101] United States v. Dann, 470 U.S. 39, 43 (1985).

[102] *Id.*

[103] *See* Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc 5 rev. ¶ 1 (2002).

United States failed to ensure the Danns' right to property contrary to Articles 2, 17, and 23 of the American Declaration on Rights and Duties of Man.[104] In part, the court found that a determination as to indigenous peoples' land rights must be based on the consent of the whole community, who must be fully informed.[105] The court found that this did not occur in the *Dann* case.[106] This case illustrates the difficulty of operationalizing FPIC even in countries with a strong rule of law (in contrast to developing countries).[107] Significantly, the way the United States government handled the land negotiations amounted to a violation of human rights.[108] The case illustrates that FPIC is in part grounded in the inquiry about who can rightfully give "consent."[109] The procedural intricacies of the case also indicate that international tribunals should better develop their own understandings about whether a group of individuals has authority to speak for a whole community.[110]

In 2001, the Commission considered the collective rights and the nature of securing consent in *Awas Tingni Community v. Nicaragua*.[111] In that case, Nicaragua granted a Korean corporation licenses to cut trees on indigenous community lands, which the Nicaraguan government had never demarcated as indigenous lands.[112] The Awas Tingni community found out about logging when loggers were moving onto their territory, after Nicaraguan government gave permission.[113] Nicaragua failed to compensate the indigenous peoples for their losses and the Awas Tingni community filed a petition with the Commission in 1995.[114] The IACHR found that Nicaragua violated Articles 1, 2, 21 and 25 of the American Convention on Human Rights ("ACHR") and ordered Nicaragua to create a mechanism to demarcate indigenous lands.[115] However, the legal protections in place were not practiced in reality. The

[104] *See id.* ¶ 5.
[105] *See* Page, *supra* note 99, at 18.
[106] *See id.*
[107] *See id.*
[108] *See id.*
[109] *See id.*
[110] *See id.*
[111] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).
[112] *See* Claudio Grossman, Awas Tingni v. Nicaragua*: A Landmark Case for the Inter-American System,* 8 HUM. RTS. BRIEF 1, 1 (2001).
[113] *See* Page, *supra* note 99, at 16.
[114] *See id.* at 16, 20 n.6.
[115] *See Inter-American Court of Human Rights:* Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 7 AUSTL. INDIGENOUS L. REP. 37, 38 (2002); s*ee also Awas Tingni Community*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 173 (providing the outcome of the case).

IACHR found that Nicaragua had violated the community's right to property by issuing permissions without consent of the community,[116] based on Article 21 of the ACHR.[117] The court also found that lands, territories, and resources were particularly important to indigenous peoples to preserve spiritual and cultural heritage.[118] Self-determination played a central role in the decision because the decision mandated that Nicaragua could only proceed with the participation of the Awas Tingni community.[119]

In 2004, the Commission relied on *Dann* in *Maya Indigenous Communities of the Toledo District v. Belize*,[120] finding that land rights decisions cannot be made "without the free and informed consent of the peoples concerned."[121] There, the Belizean government granted concessions to logging and extractive companies because the Maya lands were considered "national lands."[122] The Commission recommended that the state provide the Maya peoples with an effective remedy including recognizing title to lands they have traditionally used and occupied in accordance with customary land use practices.[123] Importantly, the Commission did not specifically rely on FPIC as binding international law, but located the rights of indigenous peoples in property and spiritual and cultural connection to those lands.[124] Since 2004, this case has moved through various tribunals to enforce the Maya land claims.[125]

In 2007 case, the Commission in *Saramaka People v. Suriname*,[126] found that Suriname had a duty under Article 21 of the ACHR to obtain FPIC prior to granting concessions for the exploration and extraction of natural resources.[127] The IACHR held that the FPIC obligation required FPIC be obtained in accordance with the Saramaka peoples' customs and traditions and with recognition of

[116] *See Inter-American Court of Human Rights:* Mayagna (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 115, at 38, 40–41; Page, *supra* note 99, at 16.

[117] *See* Page, *supra* note 99, at 16.

[118] *See id.*

[119] *See id.*

[120] Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L./V/II.122, doc 5 rev. ¶ 1 (2004).

[121] Page, *supra* note 99, at 19.

[122] *See id.* at 18.

[123] Maya Indigenous Communities of the Toledo District, *supra* note 120, ¶ 6.

[124] Page, *supra* note 99, at 19.

[125] *See, e.g.*, *Belize: Advocating Maya People's Rights to Land*, MINORITY RTS. GROUP (Nov. 22, 2016), http://minorityrights.org/law-and-legal-cases/maya-in-belize/.

[126] Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

[127] *See id.* ¶ H5.

the Saramaka peoples' communal property rights.[128] The IACHR "held that the right to give or withhold consent is premised on the nature of the impact to indigenous peoples' self-determination-informed right to property over their lands, territories and natural resources."[129] Additionally, the court linked the requirement for FPIC to the land, as well as cultural and physical survival.[130] This case affirmed the right of indigenous peoples to give or withhold FPIC, which then makes FPIC more appropriately conceived of as a "right" because it flows from and is necessary for the realization of the right of self-determination, per Dr. Cathal Doyle.[131] This case also clarifies that indigenous peoples should determine who gives consent according to their own traditions and customs.[132]

Recently, in 2012, the IACHR held in *Kichwa Indigenous People of Sarayaku v. Ecuador*,[133] that Ecuador was liable for breaching the Sarayaku peoples' right to FPIC in accordance with international standards by signing contracts with a third party for the exploration of hydrocarbons and crude oil in the Sarayaku territories, sixty-five percent of which they legally owned.[134] The third party contracts were signed in 1996; Ecuador signed ILO 169 in 1998 and the court relied heavily on Ecuador's obligations under ILO 169 in its opinion that FPIC is required and is based on indigenous peoples' rights to life, culture, and communal property.[135] The IACHR affirmed that the right to consultation with the "objective of consent, is derived from the right to cultural integrity."[136] The ruling also affirmed that consent should be the "objective" of consultations, though the court did not speak as to making it a requirement.[137] This case is "considered an important

[128] *See id.* ¶¶ H3, H5.

[129] DOYLE, *supra* note 98, at 129.

[130] *See id.*; *see also* David Szablowski, *Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice,* 30 CANADIAN J. DEV. STUD. 111, 115 (2010) (describing how development decisions need to consider the survival of indigenous tribes).

[131] *See* DOYLE, *supra* note 98, at 132.

[132] *See* Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 185, ¶¶ 18, 22 (Aug. 12, 2008); DOYLE & CARIÑO, *supra* note 99, at 12.

[133] Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012).

[134] *See id.* ¶¶ 63–65, 127, 186–87, 341.

[135] *See id.* ¶¶ 64, 70, 179–81; *see also* Dani Bryant, Sarayaku v. Ecuador*: Lessons in Free, Prior and Informed* Consultation, FASKEN MARTINEAU (Oct. 24, 2012), http://www.fasken.com/sarayaku-v-ecuador-lessons-in-free-prior-and-informed-consultation/ (describing the obligation under ILO 169).

[136] DOYLE, *supra* note 98, at 129.

[137] *See id.*

legal precedent[,] as it establishes a legal meaning on how and when FPIC should be applied."[138]

IV. TRIBAL FPIC

The precedents of the Commission and the proliferation of international norms has resulted in many companies beginning to explore FPIC rules regarding indigenous interactions, and lay out processes to obtain a tribe's free, prior, and informed consent. But ultimately, self-determination is achieved by indigenous communities establishing their own FPIC rules, enabling them to take control of their own business interactions.

In the United States, tribes have a unique opportunity to harness the possibility of FPIC by asserting civil jurisdiction over individuals acting on its reservation, because of the Supreme Court's holding in *Montana v. United States*, which states that tribes have civil jurisdiction over "nonmembers who enter [into] consensual relationships with [a] tribe or its members" and over nonmembers who threaten or "[have] some direct effect on the political integrity, the economic security, or the health or welfare of [a] tribe."[139] Tribes in the U.S. therefore have a unique opportunity to integrate FPIC into business licenses under a "Law and Order" code, thereby creating the necessary consensual relationship to ensure that its FPIC code applies to non-Indian businesses operating on non-Indian fee land on the reservation under the first *Montana* exception. This section describes how a tribe may integrate an FPIC protocol into its tribal code to ensure its ability to prosecute offenders in tribal court. The section will close by briefly discussing considerations that should be made regarding enforcement of the code.

A. Integrating FPIC as a License to Operate[140]

Many U.S. tribes already secure jurisdiction over nonmember businesses through their business licensing codes.[141] By

[138] Hanna & Vanclay, *supra* note 10, at 152.

[139] Montana v. United States, 450 U.S. 545, 565–66 (1981) (citations omitted).

[140] There is also the possibility of integrating an FPIC requirement into a Tribal Employment Rights Ordinance ("TERO") process. FPIC can fit either into a business licensing code or a TERO, which generally serves to ensure fair employment and prevent discrimination against tribal members in hiring on the reservation. A tribe could still rely on processes developed in a TERO context when drafting an FPIC code to insure reservation-wide compliance with the FPIC code.

[141] *See, e.g.*, EASTERN BAND CHEROKEE INDIANS CODE § 106-20 (2016). Often a sworn

incorporating FPIC into the already existing business licensing code, a tribe will be able to ensure that non-Indian businesses operating on the reservation first obtain FPIC.

To integrate an FPIC requirement into the business licensing process, a tribe would require the licensee to comply with FPIC either through a tribal law or protocol, or as expressed in the UNDRIP.[142] It would be preferable for a tribe itself to define the process with which businesses must comply in order to obtain a tribe's free, prior, and informed consent and thus meet the business license condition.[143] Under this structure, if a tribe chooses to deny consent, the business would not be able to obtain a license to operate on the reservation.[144] By requiring consent before granting a license, a tribe is ensuring that their consent is obtained before any harmful actions are taken by businesses operating within the boundaries of the reservation.

B. Implementing an FPIC Code: A Case Study

Working in partnership with an American Indian tribe to develop the first of its kind FPIC code in the United States, I developed three options for structuring the potential new FPIC chapter of the tribal code ("FPIC chapter"), tentatively titled "FPIC code." These models differ based on the entity that a tribe would like to designate as responsible for providing consent. The three possibilities are: a Tribal Business Council ("Council"); a separate entity within the tribal government; or the tribal membership.[145] This section will discuss how each of these decision-making models would be implemented and will evaluate the potential advantages and disadvantages of each.

1. Tribal Business Council

Under this model, a Tribal Business Council would be solely responsible for ensuring that businesses comply with the FPIC chapter in obtaining a tribe's free, prior, and informed consent. In order to comply with the FPIC chapter, the company would likely

statement that the business consents to tribal court jurisdiction as part of the business license application is required. *See, e.g.*, COLO. RIVER TRIBAL CODES § 1-106(6) (2006).

[142] *See, e.g.*, COLO. RIVER TRIBAL CODES § 1-106(6) (providing an example of a current application for business license code and protocols).

[143] *See, e.g.*, *id.*

[144] *See, e.g.*, *id.* § 1-110 (providing an example of a current denial of license or renewal code provision).

[145] *See infra* Parts IV(B)(1), IV(B)(2), IV(B)(3).

have to provide any required information to the Tribal Business Council. The Council would need to set a minimum standard of information, which may include how the proposed business activity would impact the reservation's environment, culture, and economy both positively and negatively. The Council would then review the information and have a process in place through which to determine whether it wants to give consent, thus bringing the company into compliance with the FPIC chapter and allowing the company to move forward with the chapter on business licensing process.[146]

One drawback of this model is that it is time consuming for the Tribal Business Council to review relevant information and to make an informed decision regarding each proposed business activity. The Council may not have the resources to meet these demands and the process may prove overly burdensome for companies, possibly resulting in a backlog for the granting of tribal business licenses. There are a number of ways to address these concerns.

One option is to refrain from binding the Council to the process. FPIC is currently an emerging norm and seen as an aspirational goal rather than binding international law.[147] A tribe could choose to develop the FPIC chapter as an aspirational goal rather than a process with which the Council and companies must comply. Though this would be less burdensome, it would also greatly reduce the positive impacts associated with enacting an FPIC code. Another option is to limit application of the requirement to particular types of companies. For instance, a tribe could require that only large-scale, for-profit businesses (to be defined in the FPIC chapter) must comply with the FPIC chapter. An additional option, discussed below, is to task a commission within the tribal government to ensure that businesses are complying with the FPIC chapter.

2. Separate Tribal Government Entity

Under the FPIC chapter, a tribe could task an entity within the tribal government to ensure compliance with the FPIC code and to provide tribal consent. Possible entities include the tribe's Business License Commission,[148] the tribe's Tribal Employment Rights

[146] *See, e.g.*, REVISED LAW AND ORDER CODE OF THE SPOKANE TRIBE OF INDIANS § 31-4.06 (2013) (providing an example of a current code section that describes conditions that must be met before a license will be granted).

[147] *See supra* note 53 and accompanying text.

[148] *See* REVISED LAW AND ORDER CODE OF THE SPOKANE TRIBE OF INDIANS §§ 31-3.01, 31-3.03, 31-3.05.

Commission Office,[149] another preexisting commission within the tribal government that would be well-suited for the work, or an FPIC commission to be created under the FPIC chapter. Under this model, the entity selected, rather than the Tribal Business Council, would be responsible for evaluating information regarding the impact of proposed extractive activity and then either deny or provide consent. This may help alleviate the constraints associated with the first model.

This model is advantageous because it relies largely on existing resources and structures. If it were not overly burdensome on the entity, implementing an FPIC requirement may be as simple as statutorily empowering the tribe's Business License Commission or Tribal Employment Rights Commission Office to assume the duties listed above. Or, if sufficient resources are available, an FPIC commission could be established by the same procedure used to create the Business License Commission and Tribal Employment Rights Commission Office. Once an entity is chosen, those drafting the FPIC chapter could use the language and processes already utilized in the tribal code as models for determining how the FPIC code will be executed. For instance, a tribe could look to the TERO processes when creating an FPIC commission (or delegating power to another tribal entity) and use it to establish the rules, regulations, and policies governing the Commission's duty to insure reservation-wide compliance with the FPIC code. This may include looking to the language that establishes the TERO commission, defining the duties and powers of the Commission and its Director, developing a process for complaints and hearings, and discussing enforcement and penalties for violations.[150] Another option regarding the placement of the FPIC code would be to expand the purpose of the TERO code and integrate an FPIC process into the TERO code.

If the Tribal Business Council is concerned about delegating its authority to give consent, this model may seem problematic. One way to alleviate that concern, however, is to require Council approval of all determinations made by the chosen entity. Another important factor that a tribe should consider, as discussed below, is the extent to which it wants to integrate tribal members and community stakeholders into the process.

[149] *See id.* § 45-1.1.
[150] *See id.* §§ 45-3.0, 45-6.0, 45-7.0.

3. Tribal Membership

Most discussions of FPIC emphasize the need to engage individual stakeholders and community members in the consent process. We understand, however, that there are times that the Tribal Business Council disagrees with the tribal membership and vice versa. It is ultimately up to a tribe to determine the role of tribal members in the consent process.

If a tribe chooses to engage its members in the consent process, the engagement could take a variety of forms. To ensure that the membership remains informed, the FPIC chapter could require that information concerning proposed extractive activity and any potential impacts is disseminated throughout the community by radio, newspapers, flyers, and/or during community meetings. Community hearings could also provide an opportunity for those members potentially impacted by the activity to voice their concerns. Another option is to have a "comment and feedback" period—similar to the process required for Environmental Impact Statements[151]—to allow members to express their support of or opposition to a proposed business activity. If a tribe selects one of these methods for soliciting comments from tribal members, it must also determine the weight that will be given to those comments.

Community engagement, which by its nature is an involved and lengthy process, has the ability to slow or stall business activity on the reservation. However, it is an important element of FPIC that a tribe should meaningfully consider. If a tribe is concerned about delay, it could solicit comments from tribal members regarding large-scale development projects only. Another option would be to limit the role of community comment to a persuasive, rather than determinative, one; thereby leaving the ultimate decision to grant or deny consent with the Tribal Business Council or appointed entity.

C. Enforcing an FPIC Code: Defining Violations and Choosing Sanctions

Under each of the three models discussed above, a tribe must define the conduct that constitutes a violation of its FPIC code, which would be prosecutable in tribal court. One offense could be if

[151] *National Environmental Policy Act Review Process: Environmental Impact Statements (EIS)*, ENVTL. PROT. AGENCY, https://www.epa.gov/nepa/national-environmental-policy-act-review-process (last visited Mar. 3, 2017).

a business does not obtain tribal consent "freely." "Freely" would be defined in the FPIC chapter and could exclude consent obtained through fraud, duress, or bribery. Another offense could be if the business does not "inform" a tribe based on the standards provided in the FPIC chapter. A tribe must also determine who is eligible to bring a claim for a violation of the FPIC code in tribal court. That will depend largely on which implementation model a tribe chooses to pursue. If the business is found guilty of a violation, it could be forced to pay a fine, to mitigate any resulting impacts, or to adhere to any other sanctions developed in the FPIC chapter. A tribe could also rely on sanctions codified in the business licensing chapter of the tribal code, which may include revocation of the business license, fines, and the removal or exclusion of non-Indians from the reservation.[152]

V. FEDERAL IMPLICATIONS

Federal law does not prohibit a tribe—assuming that it has civil jurisdiction over the individuals and land in question—from conditioning the extraction of its mineral resources on the procurement of FPIC. The 1981 U.S. Supreme Court decision in *Montana v. United States* was a "pathmarking" case for determining tribal civil jurisdiction over nonmembers.[153] In *Montana*, the Court found that tribes lack the "inherent sovereign powers" to regulate activities of nonmembers, even on land that is within reservation boundaries but not tribally owned, because this power had been implicitly divested as a result of tribes' dependent status.[154]

The *Montana* Court articulated two exceptions to this general rule precluding civil jurisdiction over nonmembers. These exceptions are first, situations in which nonmembers have entered into a consensual relationship with a tribe, and second, situations in which the regulated conduct directly threatens tribal integrity:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe

[152] *See generally* REVISED LAW AND ORDER CODE OF THE SPOKANE TRIBE OF INDIANS § 31-5 (providing a section of a tribal code that is dedicated to codified sanctions).

[153] *See* Fletcher, *supra* note 35, at 100.

[154] *See* Montana v. United States, 450 U.S. 544, 565 (1981) (citations omitted) (establishing that relations between tribes and nonmembers is one area in which implicit divestiture of sovereignty has occurred); *see also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194, 209–10 (1978) (applying the principle of divestiture of inherent sovereign powers over nonmembers in the criminal context).

> may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[155]

As Professor Sarah Krakoff explains, the *Montana* opinion left many questions open on tribal civil jurisdiction over nonmembers:

> Was the Court assuming that exercises of civil jurisdiction over nonmembers on tribal lands automatically fit within one of the *Montana* exceptions? Or was the Court assuming that the presumption of tribal authority on tribal lands, even over nonmembers, remained intact? . . . Finally, how would the Court interpret the second *Montana* exception? Would it be necessary for a tribe to argue that absent regulation of the particular behavior[, a] tribe's welfare would be imperiled? Or would tribes be able to contend that certain exercises of self-government are sufficiently connected to what it means to be a sovereign that the inability to assert them would necessarily threaten their political integrity?[156]

In 1997, in *Strate v. A-1 Contractors*,[157] the U.S. Supreme Court expounded upon the jurisdictional framework established under *Montana*. This was a personal injury action brought by a nonmember resident of the Fort Berthold Reservation who was injured in an automobile accident that took place on a state highway located both within the reservation boundaries and atop

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[155] *Montana*, 450 U.S. at 565–66 (internal citations omitted).

[156] Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1209 (2010); *see also* John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the Cohen's Handbook Cutting-Room Floor*, 38 CONN. L. REV. 731, 744 (2006) ("Read against the backdrop of previous case law affirming tribal powers, these two exceptions can be reconciled with the general proposition that tribes retain broad authority in Indian country over the conduct of Indians and non-Indians alike, limited only in the rare instance where no significant tribal interest is at stake with respect to the conduct of nonmembers on reservation lands owned in fee by non-Indians. This contextual reading of *Montana* suggests that in most cases tribes' inherent civil regulatory authority over non-Indians and nonmember Indians in Indian country should be cognizable under *Montana's* exceptions, which must be construed broadly to comport with longstanding principles of Indian law.").

[157] Strate v. A-1 Contractors, 520 U.S. 438 (1997). The author wishes to note that the nonmember resident in question was the mother of the author's half siblings.

land held in trust for the reservation's tribes.[158] The defendant, also a nonmember, was a party to a construction contract with the tribes of the reservation.[159] The Court made several significant findings in this case, including: first, the *Montana* presumption against civil jurisdiction over nonmembers applies to both adjudicatory and regulatory civil jurisdiction, because "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction[;]"[160] second, despite the trust status of the land underlying the highway, the highway was the "equivalent, for nonmember governance purposes, to alienated, non-Indian land" because the federal government had granted the state and the public a right-of-way over the land to use the highway, meaning the tribes had "retained no gatekeeping right[;]"[161] and third, this matter did not meet the consensual relationships exception to the *Montana* presumption due to the "non-tribal nature" of the accident and the lack of a sufficient nexus between the parties and the tribes:

> The dispute, as the Court of Appeals said, is "distinctly non-tribal in nature." It "arose between two non-Indians involved in [a] run-of-the-mill [highway] accident." Although A-1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a "consensual relationship" with the Tribes, "Gisela Fredericks was not a party to the subcontract, and the Tribes were strangers to the accident."[162]

Accompanying this analysis of the first *Montana* exception, footnote number eleven acknowledges that tribal police have the power to patrol portions of the highway that are within reservation boundaries, "including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on

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[158] *See id.* at 442–43.

[159] *See id.* at 443.

[160] *See id.* at 453. The Court was contextualizing its statement in *Iowa Mutual Insurance Company v. LaPlante*, that "[c]ivil jurisdiction over [the] activities [of non-Indians on reservation lands] presumptively lies in the tribal courts . . . ." *Id.* at 451 (quoting Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987)). The Court did so in positing that this statement merely stands for the "unremarkable proposition" that tribes presumptively have jurisdiction over nonmembers when "tribes possess authority to regulate the activities of nonmembers . . . ." *Strate*, 520 U.S. at 453; *see also* LaVelle, *supra* note 156, at 756 ("The effect of the *Strate* Court's unconventional reading of the *Iowa Mutual* statement was to transform *Iowa Mutual's* presumption favoring tribal court jurisdiction over the activities of nonmembers into a presumption against such jurisdiction, requiring tribes to justify their assertions of adjudicative authority over nonmembers under the Court's *Montana* test.").

[161] *See Strate*, 520 U.S. at 454, 455–56.

[162] *Id.* at 457 (quoting A-1 Contractors v. Strate, 76 F.3d 930, 940 (8th Cir. 1996)).

the highway for conduct violating state law."[163]

Some scholars have asserted that the *Strate* Court's decision had the compounding effects of expanding the *Montana* presumption while diminishing its exceptions.[164] One of these arguments rests on the viewpoint that the Court's analogizing of the state highway to non-Indian fee land is in preservation of the critical nature of the land status inquiry in determining tribal civil jurisdiction over nonmembers:

> *Strate* thus appears to have effected a diminishment of both *Montana* exceptions while extending *Montana's* "general rule"—i.e., *Montana's* presumption against inherent tribal governing authority over nonmembers—to include (1) tribal adjudicative jurisdiction as well as legislative jurisdiction and (2) conduct on state highways as well as non-Indian fee lands. *Strate's* determination that, for purposes of a *Montana* analysis, the state highway at issue was sufficiently analogous to non-Indian fee lands suggested nonetheless that the status of the land would remain a crucial threshold consideration.[165]

Another view presents a spin on the effect of the *Strate* decision on what *types* of claims can meet the consensual relationship exception under *Montana*, explaining that "but for" causation (i.e., incidents that would not have occurred but for the existence of a consensual relationship with a tribe) will likely not suffice to meet the exception:

> After *Strate*, it is safe to assume that only claims arising directly out of a consensual relationship, such as a breach of contract, violation of a licensing, royalty, or other agreement, or perhaps a tort arising from the breach of any such agreement or arrangement, will suffice. Arguments that, "but for" a consensual relationship with a tribe or its

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[163] *Strate*, 520 U.S. at 456 n.11.

[164] *See* LaVelle, *supra* note 156, at 757–58.

[165] *Id.* at 758–59; *see* Todd Miller, Comment, *Easements on Tribal Sovereignty*, 26 AM. INDIAN L. REV. 105, 105–06 (2002) (explaining how the Court's expansion of the *Montana* rule under *Strate* influenced the Ninth Circuit ruling in *Big Horn Country Elec. Coop. v. Adams* (Big Horn Country Elec. Coop. v. Adams, 219 F.3d 944, 955 (9th Cir. 2000)), a case in which the Ninth Circuit held that the Crow Tribe could not impose a utility tax on power lines for which a private cooperative had obtained an easement, analogizing it to fee simple lands); *see also* Nevada v. Hicks, 533 U.S. 353, 359 (2001) ("Indian ownership suspends the 'general proposition' derived from *Oliphant* that 'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of [a] tribe' except to the extent 'necessary to protect tribal self-government or to control internal relations.'" (quoting Montana v. United States, 450 U.S. 545, 564–65 (1981))).

> members, the nonmember would not have engaged in the activity on the reservation that ultimately gave rise to a legal claim, are unlikely to succeed.[166]

The 2001 U.S. Supreme Court decision in *Atkinson Trading Company v. Shirley*[167] elaborated upon the *Strate* Court's ruling on the first *Montana* exception. In this case, a non-Indian proprietor of a hotel located on fee land within reservation boundaries sued to prevent the Navajo Nation from imposing a tax on the hotel rooms.[168] There, the tribe argued that the hotel fell under the first *Montana* exception because the hotel's guests benefitted from emergency services provided by the tribe (e.g., police, fire, and emergency medicine).[169] Invoking *Strate*, the Court rejected this argument:

> [A] nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection. If it did, the exception would swallow the rule: All non-Indian fee lands within a reservation benefit, to some extent, from the "advantages of a civilized society" offered by the Indian tribe. . . . Such a result does not square with our precedents; indeed, we implicitly rejected this argument in *Strate*, where we held that the nonmembers had not consented to [a] Tribes' adjudicatory authority by availing themselves of the benefit of tribal police protection while traveling within the reservation.[170]

Some scholars have argued that the *Atkinson* Court was wrong in its analysis of the first *Montana* exception, positing that the hotel had voluntarily submitted to the regulatory regime established under the applicable "Indian Traders" statutes, thereby creating the necessary consensual relationship:

> The Court failed to properly consider the argument that Atkinson Trading Post obtained a license from the Navajo Nation in order to conduct business on the reservation. This type of "dealing" and "arrangement" meets the consensual relationship test on its face. By engaging in business within the borders of the Navajo Nation the petitioner entered into a "consensual relationship" with [a] tribe via the regulations

166 Krakoff, *supra* note 156, at 1215.

167 Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

168 *See id.* at 648–49.

169 *See id.* at 654–55.

170 *Id.* at 655 (first citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137–38 (1982); then citing Strate v. A-1 Contractors, 520 U.S. 438, 456–57 (1997)).

> incorporated in the "Indian Traders" statutes. "The regulations reflect a determination that all non-members who engage in retail business on the Navajo Reservation, have a sufficient nexus with [a] tribe and its members" in order to support the tax. Atkinson Trading Post's "voluntary submission to the regulatory regime," established by the "Indian Trader" statutes, creates a consensual relationship with the Navajo Nation, thereby satisfying the first exception of the *Montana* test. As a result of the Petitioner obtaining an "Indian Trader" license, the entire business is brought within the first exception under the *Montana* analysis.[171]

A remedial measure may be for Congress to enact a tribal jurisdictional scheme, as "[a]bsent legislative efforts by Congress to return proper control to the tribes, tribal governments will not be able to move forward and govern properly."[172]

Professor Matthew Fletcher argues that there exists a double standard of consent between tribal governments asserting authority over nonmembers and the federal government asserting authority over tribes:

> When the Supreme Court speaks about consent of nonmembers to tribal governance, the Court robustly demands that the tribal government produce literal, express consent by nonmembers to tribal authority. This requirement stands in great contrast to the implied, often illusory, consent that the Court finds important in the context of federal assertions of authority over Indian affairs . . . .[173]

Fletcher also argues that the overall applicability of the first *Montana* exception is unclear because the cases on this exception

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[171] *See* Leonika Charging, Note, Atkinson Trading Company v. Shirley*: A Taxing Decision on Tribal Sovereign Power*, 47 S.D. L. REV. 134, 151 (2002). The amicus brief for the United States conveys regulations as "requir[ing] licensed businesses to comply with tribal health regulations and standards for weights and measures, and to make themselves available semi-annually at meetings of [a t]ribe's governing body," and "prohibit[ing] a licensee from selling or leasing a building without the consent of both the Bureau of Indian Affairs and [a t]ribe." *See* Brief for the United States as Amicus Curiae Supporting Respondents, Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (No. 00-454), 2001 WL 185386, at *18; *see also* 25 C.F.R. §§ 141.6(b), 141.9(d), 141.17, 141.22 (2016) (providing the specific statutory provisions).

[172] Charging*, supra* note 171, at 156; *see also* Fletcher, *supra* note 35, at 101 (arguing that congressional silence on the issue of tribal civil jurisdiction over nonmembers should signal courts to abstain from making more common law determinations that unnecessarily complicate issues of tribal jurisdiction).

[173] Fletcher, *supra* note 35, at 109–10.

have all involved nonmembers who were "outliers in Indian Country," as opposed to the majority of nonmembers on reservation land who do likely have the requisite consensual relationship with a tribe.[174] First, many nonmembers are employed with Indian tribes, and thus have established the requisite consensual relationship.[175] Second, nonmembers live on tribal lands in tribal housing, some of whom have signed forms consenting to tribal jurisdiction and regulation.[176] For these reasons, most aspects of nonmember reservation activity meet the requirements set forth in the *Montana* exceptions.[177]

Consent theory, even in its confused state, has utility if applied properly under the UNDRIP.[178] Article 19 of the UNDRIP demands free, prior, and informed consent before "adopting and implementing legislative or administrative measures" that may affect tribes but does not speak to judicial decisions, and courts should defer to congressional silence on the issue of civil jurisdiction over nonmembers.[179]

One important consideration in the FPIC implementation context is federal preemption. However, preemption does not prohibit a tribe, assuming that it has civil jurisdiction over the individuals and land in question, from conditioning business upon FPIC, but tribal regulatory authority is limited by federal law.[180] Certainly some environmental statutes—the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act—provide for the treatment of tribes as states ("TAS") in administering regulatory programs.[181] These programs, which can be no less protective than their federal counterparts, allow tribes to tailor their regulatory efforts to unique local conditions.[182] The Environmental Protection Agency ("EPA") determines the extent of tribal jurisdiction under TAS programs on a "[t]ribe-by-[t]ribe basis"[183] and in addition,

> [R]equir[es] "a showing that the potential impacts of regulated activities on [a] tribe are serious and substantial" before granting tribes TAS status throughout [a] reservation.

[174] *See id.* at 110–11.
[175] *See id.* at 115.
[176] *See id.*
[177] *See id.*
[178] *See id.* at 116.
[179] *See id.* at 117.
[180] *See supra* notes 153–56 and accompanying text.
[181] *See* 33 U.S.C. § 1377(e) (2012); 42 U.S.C. §§ 300j-11(a)(1), 7601(d)(1)(A).
[182] *See* 33 U.S.C. § 1377(b); 42 U.S.C. § 7601(d)(2)(B).
[183] *See* Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 TULSA L.J. 541, 627 (1994).

> However, [the] EPA has stated that "the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare," and as a result, [the] EPA has determined that tribes will usually be able to make the showing necessary to obtain program delegation over all pollution sources within the tribe's territory.[184]

For most tribes, the regulatory authority conveyed by TAS provisions extends to all activities except the surface mining of tribal coal. Under the Surface Mining Control and Reclamation Act of 1977,[185] which regulates the environmental impact of surface exploration, mining, and reclamation on Indian lands, the Department of the Interior's Office of Surface Mining Reclamation and Enforcement ("OSM") is the sole permitting authority for the mining of Indian coal.[186]

> Absent a federal-tribal agreement, however, there is no provision requiring OSM to consult directly with the affected Indian tribes before issuing a permit. Instead, the regulations direct the Bureau of Indian Affairs (BIA) to be responsible for tribal consultations. [Accordingly, t]he BIA then makes recommendations to OSM concerning permits, and OSM determines whether to approve or disapprove the [requisite permits] . . . .[187]

Therefore, the exercise of tribal regulatory authority would be limited to applicable federal authority when the resource at issue is tribal coal.

VI. CORPORATIONS AND IMPLEMENTATION OF THE UNDRIP

Corporations throughout the world must take steps to understand and manage risks of opposition from indigenous communities lest they suffer avoidable losses. In November 2014, First Peoples Worldwide published the "Indigenous Rights Risk Report" ("Risk Report").[188] This report provided quantified risk assessment for

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184 *Id.*

185 *See* Surface Mining Control and Reclamation Act, Pub. L. No. 95-87, 91 Stat. 445 (1977) (codified as amended in scattered sections of 30 U.S.C. (2012)).

186 *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 17.03[3] (Nell Jessup Newton ed., 2012).

187 *Id.*

188 *See* FIRST PEOPLES WORLDWIDE, INDIGENOUS RIGHTS RISK REPORT 1 (2014), http://www.firstpeoples.org/images/uploads/Indigenous%20Rights%20Risk%20Report(1).pdf [hereinafter FIRST PEOPLES WORLDWIDE, RISK REPORT].

three hundred and thirty oil, gas, and mining projects conducted by extractive industries "on or near [i]ndigenous territories."[189] The report identified five risk factors, the "weighted average" of which "determined a project's risk score, gauging its susceptibility to [i]ndigenous community opposition, or violations of [i]ndigenous [p]eoples' rights."[190] These factors were:

- *Country Risk*: "[T]he strength of legal protections for [i]ndigenous [p]eoples, and the degree to which they are enforced, in the country where the project is located."[191]
- *Reputation Risk*: "[C]urrent and former negative attention to the project, and other projects in close geographic proximity, from the media, NGOs, and other groups that influence public opinion and can affect the company's reputation."192
- *Community Risk*: "[T]he project's susceptibility to community opposition, and whether the conditions are in place for successful community engagement."[193]
- *Legal Risk*: "[C]urrent and former legal actions taken against the project, and other projects in close geographic proximity, in the past five years."[194]
- *Risk Management*: "[T]he project's efforts to establish positive relations with impacted [i]ndigenous [p]eoples, and mitigate its risk exposure to [i]ndigenous [p]eoples' rights."[195]

The Risk Report made several significant findings. First, eighty-nine percent of the projects assessed had high (thirty-five percent) or medium (fifty-four percent) risk exposure to "[i]ndigenous community opposition or violations of [i]ndigenous [p]eoples' rights . . . ."[196] Risk exposure was higher within the oil and gas industry than within the mining industry, which is "possibly attributable to the mining industry's noticeably stronger standards related to [i]ndigenous [p]eoples' rights, compared to the oil and gas industry."[197] Second, there is a "direct correlation between Country

189 *Id.* at 9.
190 *Id.*
191 *Id.* at 16.
192 *Id.* at 17.
193 *Id.* at 18.
194 *Id.* at 20.
195 *Id.* at 21.
196 *Id.* at 24.
197 *Id.*

Risk and projects' overall risk scores," meaning that "projects in countries with weak or nonexistent legal protections for [i]ndigenous [p]eoples were far more likely to receive high risk scores."[198] The report then makes the connection between governance and business as it pertains to indigenous rights: "These numbers indicate that poor governance is bad for business. Governments that disregard their commitments to UNDRIP (often with the justification that they are obstacles to development) actually propagate volatile business environments that threaten the viability of investments in their countries."[199]

Further, the Risk Report states that Legal Risk constituted only five percent of each project's overall risk assessment, but that there was a trend of growth in the weight of this factor due to increasing adherence to the UNDRIP:

> While [Legal Risk] is a smaller percentage of risk than the other indicators, First Peoples believes it is the fastest growing, evidenced by strengthening legal protections for [i]ndigenous [p]eoples' rights around the world. Although governments maintain that their commitments to UNDRIP are aspirational and nonbinding, [i]ndigenous [p]eoples are successfully using the document to influence domestic laws and court rulings, and stop unwanted projects from moving forward. Not only will this yield more lawsuits against companies that violate FPIC, it also renders them increasingly liable for retroactive damages from past abuses of [i]ndigenous [p]eoples' rights.[200]

The ICMM's 2013 position statement exemplifies an uneasy dynamic between companies and governments vis-a-vis the UNDRIP and, in particular, indigenous communities' right to FPIC. As First Peoples Worldwide explains, the 2013 position statement diverges significantly from the ICMM's 2008 position statement.[201] The 2008 Statement warned companies "not to rely too heavily on national governments, which may have a history of dismissing [i]ndigenous [p]eoples' 'distinct identity, legitimate interests, and perhaps, their rights as articulated in relevant international conventions.'"[202] The 2008 Statement also encouraged companies to

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198 *Id.* at 26.

199 *Id.*

200 *Id.* at 30.

201 *See Mining Council's "New" Commitment to FPIC Falls Short*, FIRST PEOPLES WORLDWIDE (June 25, 2013), http://firstpeoples.org/wp/mining-councils-new-commitment-to-fpic-falls-short/ [hereinafter *Mining Council's "New" Commitment to FPIC*].

202 *Id.*; *see also* INT'L COUNCIL ON MINING & METALS, MINING AND INDIGENOUS PEOPLES:

communicate with governments about implementation gaps regarding UNDRIP and other international agreements these governments have joined.[203] The 2013 Statement, on the other hand, "allows member companies to rely on the 'good faith' of the state and removes all language acknowledging that many governments have a history of systemic oppression of [i]ndigenous [p]eoples"[204]:

> States have the right to make decisions on the development of resources according to applicable national laws, including those laws implementing host country obligations under international law. Some countries have made an explicit consent provision under national or sub-national laws. In most countries however, "neither [i]ndigenous [p]eoples nor any other population group have the right to veto development projects that affect them," so FPIC should be regarded as a "principle to be respected to the greatest degree possible in development planning and implementation."[205]

The Equator Principles is a "risk management framework"[206] that has been adopted by eighty financial institutions throughout the world "in order to ensure that the [p]rojects [these institutions] finance and advise on are developed in a manner that is socially responsible and reflects sound environmental management

POSITION STATEMENT (2008), http://hub.icmm.com/document/293 [hereinafter ICMM 2008 POSITION STATEMENT] ("Some governments in the past, and sometimes still today, have not recognized their distinct identity, legitimate interests and, perhaps, their rights as articulated in relevant international conventions. Conversely, governments sometimes may have concerns that rights or autonomy demanded by [i]ndigenous [p]eoples should not conflict with national development priorities or the integrity of the state and any possible inconsistencies need to be properly considered. A range of international instruments exist in this area.").

[203] *See Mining Council's "New" Commitment to FPIC*, *supra* note 201; *see also* ICMM 2008 POSITION STATEMENT, *supra* note 202 ("Legal frameworks should preferably be developed in consultation with [i]ndigenous [p]eoples and allow for processes which allow them to participate effectively. Where existing national or provincial law deals with [i]ndigenous [p]eoples issues, the provisions of such laws will prevail over the content of this [p]osition [s]tatement to the extent of any inconsistencies. Where no relevant law exists the [p]osition [s]tatement will guide member practices. ICMM members are not political decision-makers and cannot disregard national laws or national government policy. Equally, some national legal frameworks may be no more than a minimum requirement for companies seeking to build relationships of respect and trust with [i]ndigenous [p]eoples. Companies may also sometimes legitimately point out in discussions with governments any gaps in implementation of international conventions which they have agreed to and ratified.").

[204] *Mining Council's "New" Commitment to FPIC*, *supra* note 201.

[205] ICMM 2008 POSITION STATEMENT, *supra* note 202.

[206] EQUATOR PRINCIPLES, http://www.equator-principles.com/ (last visited Mar. 4, 2017).

practices."[207] The latest edition of the Equator Principles, published in 2013, expressly requires that "[p]rojects with adverse impacts on indigenous people will require their . . . [FPIC]."[208] The principles also provide a working definition for FPIC:

> There is no universally accepted definition of FPIC. Based on good faith negotiation between the client and affected indigenous communities, FPIC builds on and expands the process of Informed Consultation and Participation, ensures the meaningful participation of indigenous peoples in decision-making, and focuses on achieving agreement. FPIC does not require unanimity, does not confer veto rights to individuals or sub-groups, and does not require the client to agree to aspects not under their control. Process elements to achieve FPIC are found in IFC Performance Standard 7.[209]

This reliance on IFC Performance Standards in establishing criteria demonstrates that institutions influencing what types of projects receive financing are using international standards for guidance, which could put more pressure on both governments and corporations to take steps toward UNDRIP implementation.

VII. LIMITING UNDRIP

The four initial objectors to the UNDRIP (the U.S., Canada, New Zealand, and Australia)[210] have managed to maintain their own terms on indigenous rights whether in objecting to or in endorsing the UNDRIP. According to one scholar, "[p]atriarchal white sovereignty's possessive logic determines what constitutes [i]ndigenous peoples' rights, and what they will be subjected to in accordance with its authority and law."[211]

Attorney Akilah Jenga Kinnison describes a consultation-consent

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[207] EQUATOR PRINCIPLES FIN. INSTS., THE EQUATOR PRINCIPLES 2 (2013), http://www.equator-principles.com/resources/equator_principles_III.pdf.

[208] *Id.* at 8.

[209] *Id.* at 8 n.3; *see also* INT'L FIN. CORP., IFC PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY: PERFORMANCE STANDARD 7: INDIGENOUS PEOPLES 50 (2012) (showing how the 2013 Equator Principles' FPIC standard is consistent with that of the IFC Performance Standard 7).

[210] *See* Megan Davis, *To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On*, 19 AUSTL. INT'L L.J. 17, 18 (2012).

[211] Aileen Moreton-Robinson, *Virtuous Racial States: The Possessive Logic of Patriarchal White Sovereignty and the United Nations Declaration on the Rights of Indigenous Peoples*, 20 GRIFFITH L. REV. 641, 644, 656 (2011) ("[T]he possessive logic of patriarchal white sovereignty operates discursively, deploying virtue as a strategic device to oppose and subsequently endorse the Declaration. As an attribute of patriarchal white sovereignty, virtue functions as a useable property to dispossess [i]ndigenous peoples from the ground of moral value.").

spectrum that exists in international law, even with the UNDRIP in place:

> Although an international consensus has emerged about the importance of the principle of FPIC, there remains no singular, commonly accepted definition of the term "consent" as it is used in articulating the principle. Rather, a spectrum of interpretations of the principle of FPIC has developed in addition to the emerging view that different contexts invoke different obligations along this spectrum. Thus, operationalizing FPIC requires examining the types of activities a state considers implementing and their likely or possible consequences. At a minimum, states have a duty to engage in prior, meaningful consultation in good faith with indigenous peoples concerning activities that affect them. The more a particular activity or development project affects indigenous peoples and their lands, the greater the required level of participation and consultation. . . . [T]he U.N. Declaration explicitly recognizes a state duty to obtain full consent before moving ahead with a project only in the contexts of forced relocation and storage or dumping of toxic materials.[212]

Kinnison goes on to assert that "there seems to be a shift in the international arena toward viewing states' duty to consult with indigenous peoples as falling on the consent end of the consultation-consent spectrum" for any activity directly affecting their traditional lands.[213] Kinnison concludes that this is the appropriate path for the United States to take as well:

> The United States has articulated a commitment to the importance of indigenous consultation both through its endorsement of the U.N. Declaration on the Rights of Indigenous Peoples and its domestic policies, such as E.O. 13,175 and President Obama's Tribal Consultation Memorandum. However, in order to fully realize this commitment, the United States should embrace a policy shift away from the currently articulated meaningful consultation standard. U.S. law and policy should move toward viewing indigenous consultation as involving a spectrum of requirements—with good-faith, meaningful consultation as a

[212] Akilah Jenga Kinnison, Note, *Indigenous Consent: Rethinking U.S. Consultation Policies in Light of the U.N. Declaration on the Rights of Indigenous Peoples,* 53 ARIZ. L. REV. 1301, 1327–28 (2011).

[213] *Id.* at 1328.

> minimum and with consent required in certain contexts, including large-scale extractive industries.[214]

Neither President Obama's remarks at the White House Tribal Nations Conference in December 2010 nor the "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples" ("Announcement") appear to represent a shift toward the consent side of the spectrum.[215] The remarks and the Announcement continue to refer to consultation (rather than consent) throughout, and the Announcement alarmingly dismisses consent as a necessary element of "meaningful consultation" with tribes even under the UNDRIP's FPIC regime: "[T]he United States recognizes the significance of the Declaration's provisions on free, prior, and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken."[216]

This perpetuation of the consultation status quo has not gone unnoticed. In a June 30, 2012, article, a journalist argued that the Obama Administration is pursuing a path of least resistance concerning the UNDRIP:

> Whether UNDRIP will be successful in the U.S. will depend on whether the government chooses to apply it in a way that gets past the status quo of current federal-tribal policy. . . . Many officials in the Obama administration familiar with Indian policy know that UNDRIP adds a new dimension to federal-tribal relations. It's just that for now the easiest

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[214] *Id.* at 1331.

[215] *See* U.S. DEP'T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 2, 3, 5 (2010), http://www.state.gov/documents/organization/184099.pdf [hereinafter ANNOUNCEMENT]; *Remarks by the President at the White House Tribal Nations Conference*, WHITE HOUSE: OFF. PRESS SECRETARY (Dec. 16, 2010), http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference.

[216] ANNOUNCEMENT, *supra* note 215, at 5; *see also Update of IFC's Policy and Performance Standards on Environmental and Social Sustainability, and Access to Information Policy*, REDD-MONITOR (May 12, 2011), http://www.redd-monitor.org/wp-content/uploads/2011/06/IFC-policy-review-final-policy-May-12-2011-US-position-to-post.pdf ("With respect to the concept of . . . [FPIC], as the U.S. explained at the time it announced its support for the [U.N.] Declaration on the Rights of Indigenous Peoples, the U.S. understands the concept of . . . 'FPIC' to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken. In the context of the Sustainability Policy and Performance Standards, the IFC has proposed a higher threshold for some projects. The U.S. supports additional protections for indigenous peoples in the context of certain projects with special circumstances. However, the U.S. does not believe there is an international consensus in favor of a definition of FPIC that requires the agreement of indigenous peoples.").

> course of action is to offer a façade of understanding, while largely continuing in a status quo manner.[217]

In the June 9, 2011, Oversight Hearing before the Senate Committee on Indian Affairs, tribal leaders expressed the need for Congress to take legislative action to effectuate free, prior, and informed consent.[218] The Black Hills Sioux Nation Treaty Council brought attention to its 2011 "Resolution of the Black Hills Sioux Nation Treaty Council: Rejection of the United States' Statement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples" ("Resolution") in repudiating the use of federal Indian law to limit tribal rights.[219] This Resolution contains the following condemnation of the U.S.'s Announcement:

> The world has long recognized that the United States has lost any moral authority it may have ever claimed with regards to human rights or even the international laws of aggression and peace. This statement is further indication that, rather than leading in the work in human rights, the United States prefers to arrogantly stand outside the circle of nations while demanding that others conform to policies the U.S. is happy to violate. They even manage to get in a comment that reduces Native Americans (and probably, more significantly, our lands and territories) to an exclusive right of dominion. Apparently the State Department and the President are comfortable referring to Indians in a subservient, unequal and even proprietary manner.[220]

The Resolution then provides the following strongly worded recommendation for a preferred course of action for the U.S.:

> We would respectfully suggest that a good start at moving ahead togethering [sic] would be to honestly endorse the Declaration, recognize the human rights of [i]ndigenous

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[217] Rob Capriccioso, *The Obama Administration Now Supports UNDRIP—But that's not Enough*, INDIAN COUNTRY TODAY MEDIA NETWORK (June 30, 2011), http://indiancountrytodaymedianetwork.com/2011/06/30/obama-administration-now-supports-undrip-thats-not-enough-40428.

[218] *See Setting the Standard: Domestic Policy Implications of the UN Declaration on the Rights of Indigenous Peoples*: *Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 44–45 (2011) (statement of Fawn R. Sharp, President, Quinault Indian Nation) [hereinafter *Setting the Standard*]; NAT'L AERONAUTICS & SPACE ADMIN., NATIVE PEOPLES–NATIVE HOMELANDS: CLIMATE CHANGE WORKSHOP II FINAL REPORT 121–24 (Nancy G. Maynard ed., 2009), https://neptune.gsfc.nasa.gov/uploads/images_db/NPNH-Report-No-Blanks.pdf.

[219] *See Setting the Standard*, *supra* note 218, at 117–18.

[220] BLACK HILLS SIOUX NATION TREATY COUNCIL, RESOLUTION: REJECTION OF THE UNITED STATES' STATEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 2 (2011), http://www.oweakuinternational.org/_Media/bhsntc-rejection-of-us.pdf.

> peoples, and honor the [three hundred and thirty-five] treaties that have been broken. As it stands, the U.S. support of the Declaration is a meaningless shell that permits the American people and their government to continue the colonial policies it has practised [sic] with respect to Indian peoples since the settler nation, the United States, established its own right to self-determination. To expect that we, as [i]ndigenous peoples, would accept anything less is a barely veiled attempt to deny our humanity.[221]

While the Sioux Nation's manner of expression may be particular to that tribe, the foregoing material shows that the Black Hills Sioux Nation is not alone in recognizing that the Announcement of U.S. support for the UNDRIP fails to compel deviation from the status quo of federal Indian law.

VIII. IMPLEMENTATION AND THE CONTEMPORARY CONSULTATION SCHEME IN THE U.S.

Like FPIC, the consultation regime in the United States cannot be fully traced back to a single authoritative source. Rather, it has developed over time through statutory language and executive actions. The contemporary executive action that provides the most direct guidance on consultation with tribes is Executive Order 13,175 ("E.O. 13,175").[222] However, events prior to E.O. 13,175 contributed to the development of a consultation regime.[223] The following conveys some important pre-executive order events that helped build the foundation for the consultation regime as it exists today. In 1970, President Nixon's Special Message to Congress acknowledged:

> [T]hat the federal government had a duty "to provide community services such as health, education and public safety" to Indian people. He also noted that only 1.5 percent of the Department of [the] Interior's programs that were directly serving Indians were under Indian control. The

[221] *Id.* at 3.

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

[223] *See, e.g.*, Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 436 (2013); *see also* Michael Eitner, Comment, *Meaningful Consultation with Tribal Governments: A Uniform Standard to Guarantee that Federal Agencies Properly Consider Their Concerns*, 85 U. COLO. L. REV. 867, 874–76 (2014) (describing presidential actions between 1994 and 2000 that emphasized the importance of a consultation regime).

> President admonished Congress and federal officials [to] ". . . make it clear that Indians can become independent of [f]ederal control without being cut off from [f]ederal concern and support."[224]

In 1972, the BIA promulgated its "Guidelines for Consultation with Tribal Groups on Personnel Management within the Bureau of Indian Affairs" ("Guidelines"), in response to Nixon's 1970 Special Message.[225] These Guidelines defined consultation as "providing pertinent information to and obtaining the views of tribal governing bodies."[226] Allowing for the BIA to determine the level of tribal consultation depending on the circumstances, the Guidelines proposed that the BIA enter into "agreements with individual tribes to ensure that the parties had a 'clear understanding' of the scope and intensity of tribal consultation."[227]

The Indian Self-Determination and Education Assistance Act of 1975 was:

> [T]he first statute that required consultation with Indian tribes in certain circumstances. The Secretary of [the] Interior and the Secretary of Health, Education, and Welfare were required to consult with "national and regional Indian organizations" while drafting both the initial regulations implementing the provisions of the Act and any future amendments thereto. And Congress required consultation with any Indian tribe that could be impacted by any BIA decision to assist a state in site acquisition, construction, or renovation of a school on or near an Indian reservation.[228]

Further statutes "require[ed] consultation for federal activities that impact Indian historic, cultural, and religious sites," including "the Archeological Resources Protection Act of 1979, the Native American Graves Protection and Repatriation Act of 1990, and the 1992 Amendments to the National Historic Preservation Act."[229] President Clinton's 1994 memorandum, entitled "Government-to-Government Relations with Native American Tribal Governments," stated: "Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with

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[224] Routel & Holth, *supra* note 223, at 436.

[225] *See id.*

[226] *Id.* at 437.

[227] *Id.*

[228] *Id.* at 438.

[229] *Id.* at 439–40; *see, e.g.*, 25 U.S.C. § 3002(b) (2012); Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 4006, 106 Stat. 4600, 4757, 4757 (1992) (codified as amended in scattered sections of 16 U.S.C.).

tribal governments prior to taking actions that affect federally recognized tribal governments."[230]

E.O. 13175, issued by President Clinton in 2000, requires federal agencies to "defer to Indian tribes to establish standards" when formulating or implementing policies and requires that agencies have "an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."[231] This executive order applies both to regulations that "impose[] substantial direct compliance costs on Indian tribal governments" and regulations that preempt tribal law.[232]

There are several notable limitations to the U.S. consultation requirement. First, independent regulatory agencies are merely "encouraged to comply with the provisions of this order," reflecting a limited scope of the order's directive.[233] Second, the administrative limitations imposed in this order only apply "[t]o the extent practicable"[234] and there is no guidance in the language of the order regarding who or what decides the practicability threshold.[235] The consultation requirement, while detailed from a procedural standpoint, is rather unilateral in nature and does not appear to impose any requirements for what constitutes tribal consent or whether tribal consent is even a defining element of tribal consultation.[236] Third, the contemporary consultation regime is also

[230] Routel & Holth, *supra* note 223, at 442; *see also* Eitner, *supra* note 223, at 874–75 ("The Memorandum directed agencies to build 'more effective day-to-day working' relationships with tribal governments that reflect respect for tribes as sovereign nations. Additionally, the Memorandum instructed agencies to conduct 'open and candid' consultations. Importantly, the Memorandum closed with a notice that it was issued only 'to improve the internal management of the executive branch' and did not create a cause of action for tribes to enforce meaningful consultation.").

[231] Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,250 (Nov. 6, 2000); *see also* Memorandum on Tribal Consultation, 74 Fed. Reg. 57,881, 57,881 (Nov. 5, 2009) ("My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175. Accordingly, I hereby direct each agency head to submit to the Director of the Office of Management and Budget (OMB), within 90 days after the date of this memorandum, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175.").

[232] Exec. Order No. 13,175, 65 Fed. Reg. at 67,250.

[233] *Id.* at 67,251.

[234] *Id.* at 67,250.

[235] *Id.*

[236] *See generally id.* at 67,250–51 (discussing the fact that the procedural requirements are particularly detailed regarding the consultation requirement vis-à-vis direct compliance costs on tribal governments; requiring funds needed for compliance to be provided by the federal government; consultation with tribes at an early stage of the process and an agency statement summarizing tribal concerns as well as the extent to which these concerns have been met; and the agency's position on the necessity of the regulation).

defined, and limited, by statute. In his 2013 statement before the Secretarial Commission on Indian Trust Administration and Reform, Matthew Fletcher promoted the creation of a congressional statute that "would effectively incorporate express Indian and tribal consultation and consent requirements into federal Indian affairs policy."[237] In doing so, he cites to a number of examples of consultation requirements established by Congress.[238] These examples include the Self-Determination Act, the Native American Languages Act, Contract Health Service Administration and Disbursement, Indian Law Enforcement Reform, and the Indian Civil Rights Act Model Code.[239] Fletcher then goes on to cite examples of times in which Congress has "severely undercut the consultation requirement by giving the federal agencies an out if consultation becomes too onerous."[240] In these examples, Fletcher points to the same "practicability" language as that which is present in E.O. 13,175:

> For example, in the Self-Determination Act: "The Secretary is authorized to revise and amend any rules or regulations promulgated pursuant to subsection (a) of this section: [p]rovided, [t]hat prior to any revision or amendment to such rules or regulations the Secretary shall, *to the extent practicable, consult with appropriate national and regional Indian organizations*, and shall publish any proposed revisions in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and receive comments from, other interested parties."[241]

Fletcher then referred to the following statement by Oneida Nation representative Ray Halbritter from a May 17, 2012, Oversight Hearing before the Senate Committee on Indian Affairs as a summary of Fletcher's argument about the incomplete status of the current consultation regime:

> The lifeblood of the unique trust relationship between the United States and Indian tribes is consultation, and the

[237] Matthew L.M. Fletcher, *Statement of Matthew L.M. Fletcher, Michigan State University College of Law and Indigenous Law and Policy Center Before the Secretarial Commission on Indian Trust Administration and Reform* 15 (Mich. State U. Coll. of Law & Indigenous L. & Pol'y Ctr., Research Paper No. 11-10, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262790.

[238] *See id.* at 17–18.

[239] *Id.*

[240] *Id.* at 18.

[241] *Id.*

> pathway to a robust trust relationship is likely through consultation that is redesigned to better meet the needs of both parties to the relationship. Although most modern [p]residents have recognized the need for meaningful government-to-government consultation, consultation continues to be regarded by agencies as burdensome and an impediment to [f]ederal action rather than a mechanism to protect Tribal treaty rights and appropriate [f]ederal decision making. Matters are further complicated when the [f]ederal government blurs the important distinction between [t]ribal consultation and all other communication with non-federal interests, even where consultation with non-tribal parties may be required by law.[242]

Fletcher seems to refer to *consent* separately from his discussion on *consultation*.[243] He identifies six articles in the UNDRIP that expressly demand free, prior, and informed consent, including Articles 10, 11, 19, 28, 29, and 32.[244] He notes a few limited examples of instances in which federal agencies have been required to obtain consent, but he concludes that "the history of American Indian affairs demonstrates conclusively that the federal government's Indian affairs actions take almost no consideration of tribal consent."[245]

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[242] *Id.* at 19.

[243] *See id.* at 20.

[244] *See id.* Fletcher's examples of instances in which consent was required of federal agencies include 25 U.S.C. § 140. *Id.* ("The several appropriations made for millers, blacksmiths, engineers, carpenters, physicians, and other persons, and for various articles provided for by treaty stipulation for the several Indian tribes, may be diverted to other uses for the benefit of said tribes, respectively, within the discretion of the President, and with the *consent* of said tribes, expressed in the usual manner; and he shall cause report to be made to Congress, at its next session thereafter, of his action under this provision."). Additionally, the Indian Child Welfare Act, 25 U.S.C. § 1913(a), provides:

> "Where any parent or Indian custodian voluntarily *consents* to a foster care placement or to termination of parental rights, such *consent* shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the *consent* were fully explained in detail and were fully understood by the parent or Indian custodian."

Id. at 21. Next, Fletcher discusses 25 U.S.C. § 402a, which provides:

> The unallotted irrigable lands on any Indian reservation may be leased for farming purposes for not to exceed ten years with the *consent* of the tribal council, business committee, or other authorized body representative of the Indians, under such rules and regulations as the Secretary of the Interior may prescribe.

Id. Last, Fletcher discusses 25 U.S.C. § 63, which provides: "The President may, in his discretion, consolidate two or more agencies into one, and where Indians are located on reservations created by [e]xecutive order he may, with the *consent* of the tribes to be affected thereby, expressed in the usual manner, consolidate one or more tribes, and abolish such agencies as are thereby rendered unnecessary." *Id.*

[245] *Id.*

A. A Recent Case Study: The Dakota Access Pipeline

The 1868 Treaty of Fort Laramie established the boundary of the Great Sioux Reservation, an area whose territories have continually diminished in the last century and a half.[246] One of the more recent diminutions occurred in 1958 with the passage of federal Public Law 85-915, through which Congress revoked treaty lands granted to the Standing Rock Sioux Tribe.[247] The law was the culmination of government actions committed in the absence of tribal consultation, beginning with the authorization of the Oahe Dam and Reservoir project in 1944.[248] Construction of the dam by the U.S. Army Corps of Engineers ("Army Corps") began in 1948.[249] The purpose of the dam was to control flooding of the Missouri River, to improve irrigation, and to provide hydroelectric power.[250] In providing these benefits, the dam created Lake Oahe, a reservoir that submerged almost seven hundred miles of tribal lands and displaced thousands of indigenous people.[251] The lands that were flooded in the construction of the Oahe Dam were the indigenous peoples' most fertile and abundant in wildlife.[252] In addition, in displacing indigenous peoples from the Missouri River watershed, the Army Corps failed to relocate Native American graves.[253]

The Oahe Dam was part of the larger Pick-Sloan project, which has been described by the scholar Vine Deloria, Jr. as "the single most destructive act ever perpetuated on any tribe by the United States."[254] The Pick-Sloan Plan, whose primary purpose was flood control, authorized and facilitated the construction of several dams on the main stem.[255] All told, the dams on the Missouri River, tributaries not included, submerged over 356,000 acres of Native

[246] *See History*, STANDING ROCK, http://standingrock.org/history/ (last visited Feb. 21, 2017).

[247] Act of Sept. 2, 1958, Pub. L. No. 85-915, § 1, 72 Stat. 1762, 1762 (providing for acquisition of Standing Rock Reservation lands by the United States).

[248] *See id.*

[249] *See Lake Oahe*, S.D. MO. RIVER TOURISM, http://sdmissouririver.com/follow-the-river/the-four-lakes-and-dams/lake-oahe/ (last visited Feb. 21, 2017).

[250] *See* Peter Capossela, *Impacts of the Army Corps of Engineers' Pick-Sloan Program on the Indian Tribes of the Missouri River Basin*, 30 J. ENVTL. L. & LITIG. 144, 144–45 (2015).

[251] *See* Christina Rose, *Echoes of Oak Flat: 4 Pick Sloan Dams that Submerged Native Lands*, INDIAN COUNTRY MEDIA NETWORK (Sept. 11, 2015), https://indiancountrymedianetwork.com/history/events/echoes-of-oak-flat-4-pick-sloan-dams-that-submerged-native-lands/.

[252] *See* Ojibwa, *Dam Indians: The Missouri River*, NATIVE AM. NETROOTS (Mar. 10, 2010), http://nativeamericannetroots.net/diary/406.

[253] *See* Capossela, *supra* note 250, at 158 & n.115.

[254] *Id.* at 157–58.

[255] *See id.* at 144–45.

American lands and devastated precious resources and historically significant sites.[256] Displaced indigenous peoples relocated to barren lands with inadequate infrastructure, which the Army Corps was required by law to improve but never did.[257] Most affected were the Mandan, Hidatsa, and Arikara Nations; the Standing Rock Sioux Tribe; the Cheyenne River Sioux Tribe; the Crow Creek Sioux Tribe; the Lower Brule Sioux Tribe; the Yankton Sioux Tribe; and the Nebraska Tribe.[258] Though Congress provided monetary compensation to the tribes, the devastating effects of Pick-Sloan persist today in the form of poverty and continued conflicts over tribal lands.[259] Particularly, the tainted history of Lake Oahe has resurfaced in the ongoing Dakota Access Pipeline controversy.[260]

In terms of the pipeline's location and capacity:

> The Dakota Access Pipeline is a 1,168-mile-long pipeline that, if completed, would carry 570,000 barrels of crude oil daily from the Bakken region of North Dakota across four states to refineries in southern Illinois. . . . The pipeline [would] run[] near the Missouri River, upstream of the water supply of numerous tribal nations, and [would] cross[] under the river at Lake Oahe, less than one mile north of the Standing Rock Sioux Reservation.[261]

The pipeline would go across land that was promised to the Great Sioux Nation in the Fort Laramie Treaty of 1851.[262] The pipeline would intersect the treaty reservation and traditional territories of the Great Sioux Nation, lands to which the various modern-day Sioux Tribes continue to have strong cultural, spiritual, and historical ties.[263]

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[256] *See id.* at 145.

[257] *See id.*

[258] *See id.* at 155–56. The author wishes to acknowledge that she is a member of the Mandan, Hidatsa, and Arikara Nation, and that her father's childhood home and community was a casualty of the flooding.

[259] *See id.* at 179, 216–17.

[260] *See* Aaron Sidder, *Understanding the Controversy behind the Dakota Access Pipeline: What to Know as Protestors and the Oil Company Continue to Clash,* SMITHSONIAN (Sept. 14, 2016), http://www.smithsonianmag.com/smart-news/understanding-controversy-behind-dakota-access-pipeline-180960450/.

[261] Letter from David Archambault II, Chairman, Standing Rock Sioux Tribe et al., to Emilio Álvarez Icaza Longoria, Exec. Sec'y, Inter-American Comm'n on Human Rights (Dec. 2, 2016), http://www.eenews.net/assets/2016/12/09/document_pm_03.pdf [hereinafter Standing Rock Letter].

[262] *See* Steven Mufson, *A Dakota Pipeline's Last Stand*, WASH. POST (Nov. 25, 2016), https://www.washingtonpost.com/business/economy/a-dakota-pipelines-last-stand/2016/11/25/35a5dd32-b02c-11e6-be1c-8cec35b1ad25_story.html?utm_term=.b678ff2461d3.

[263] *See* 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

> The Standing Rock Sioux Reservation in North Dakota and South Dakota is the sixth largest Indian reservation in the United States. The Standing Rock Sioux Tribe has approximately [eighteen thousand] enrolled members. The Cheyenne River Sioux Reservation is adjacent to the Standing Rock Sioux Reservation to the south. Like Standing Rock, Cheyenne River's eastern border is Lake Oahe. The Cheyenne River Sioux Reservation is the fourth largest Indian reservation in the United States. The Cheyenne River Sioux Tribe has [sixteen thousand] enrolled members. The Yankton Sioux Reservation borders the Missouri River in southern South Dakota. The Yankton Sioux Tribe has approximately [nine thousand] members.[264]

Without an "adequate social, cultural or environmental assessment, . . . on July 25, 2016, the Corps gave multiple domestic authorizations permitting the construction of [the Dakota Access Pipeline]. One such authorization permitted construction beneath the Missouri River at Lake Oahe, while another authorized the discharge of materials and waste into waters throughout the [t]ribes' ancestral lands."[265] The Standing Rock Sioux Tribe filed a lawsuit against the Army Corps in United States district court, alleging that in granting the permit without consulting with the tribal government the agency violated multiple domestic statutes, including the National Environmental Policy Act, the National Historic Preservation Act, the Rivers and Harbors Act, and the Clean Water Act.[266] The Cheyenne River Sioux Tribe, downstream from Standing Rock Reservation, joined the Standing Rock Sioux Tribe in its suit late in August.[267] In September, the Yankton Sioux

(Sept. 23, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/09/why_the_sioux_battle_against_the_dakota_access_pipeline_is_such_a_big_deal.html. The Great Sioux Nation refers to the historical political structure of the indigenous people residing in the Northern Great Plains region of the United States. *See The Sioux*, BUFFALO BILL CTR. WEST, https://centerofthewest.org/explore/plains-indians/paul-dyck-collection-sioux/ (last visited Mar. 3, 2017). As a result of decades of federal policies aimed at breaking up the tribes and bands, "[t]oday, the Sioux maintain many separate tribal governments scattered across several reservations, communities, and reserves in the Dakotas, Nebraska, Minnesota, and Montana . . . ." *Id.*

[264] Standing Rock Letter, *supra* note 261.

[265] *Id.*

[266] *See* Complaint at 2, 17, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 1:16-cv-01534 (D.D.C. July 27, 2016).

[267] *See* Blake Nicholson, *Deadline Looms for Dakota Access Pipeline Protest Camp*, CHI. TRIBUNE (Feb. 20, 2017), http://www.chicagotribune.com/news/nationworld/ct-dakota-access-pipeline-camp-deadline-20170220-story.html; Levi Rickert, *Cheyenne River Sioux Tribe Now Part of Dakota Access Pipeline Lawsuit*, NATIVE NEWS ONLINE (Aug. 22, 2016), http://nativenewsonline.net/currents/cheyenne-river-sioux-tribe-now-part-dakota-access-pipeline-lawsuit/.

Tribe filed its own lawsuit against the Army Corps and the U.S. Fish and Wildlife Service.[268]

Tribes have long been connected to these lands for multiple reasons:

> The culture and identity of the [t]ribes are deeply connected to the land and waters of their traditional territories. Because of a history of colonization, dispossession, and genocidal government policies, the [t]ribes have lost, or nearly lost, important parts of their land, language, stories, and history. Their connection to sacred, cultural and historical sites associated with their traditional territories is essential to maintaining what remains of their culture and identity.[269]

Because of this deep connection and spiritual relationship, members from the tribes began a prayer camp to protest the pipeline.[270]

> The controversy surrounding [the Dakota Access Pipeline]. . . [drew] thousands of people—members of the [t]ribes and many indigenous and non-indigenous members of civil society not formally associated with the [t]ribes—to the banks of the Missouri River outside of Cannon Ball, North Dakota, near where [the Dakota Access Pipeline] would cross under the river, for prayer and peaceful protest in defense of the lands, resources, cultural property, and waters threatened by [the Dakota Access Pipeline]. Spanning over [seven] months, this gathering . . . [was] the largest gathering of indigenous peoples in the United States in more than [one hundred] years.[271]

In response to the tribes' concerns and public outcry from across the globe, in September 2016 the Army Corps called for a halt on construction of the pipeline on land bordering or beneath Lake Oahe.[272] In December 2016, the Standing Rock, Cheyenne River,

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[268] *See* ICMN Staff, *Yankton Sioux Tribe Sues US Army Corps, USFWS Over Dakota Access*, INDIAN COUNTRY MEDIA NETWORK (Sept. 9, 2016), http://www.indiancountrymedianetwork.com/news/native-news/yankton-sioux-tribe-sues-us-army-corps-usfws-over-dakota-access/.

[269] Standing Rock Letter, *supra* note 261.

[270] *See id.* at 7.

[271] *Id.*

[272] *See* Press Release, U.S. Dep't of Justice, Joint Statement from the Dep't of Justice, the Dep't of the Army & the Dep't of the Interior Regarding *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (Sept. 9, 2016), https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing.

and Yankton Sioux Tribes were granted a thematic hearing before the Inter-American Commission on Human Rights to address concerns over violations of human rights to life, personal integrity, health, property, access to information, public participation in decision-making, and access to justice.[273] Additionally, the tribes requested that the Commission call upon the United States government to adopt precautionary measures to safeguard the rights to culture, personal security, health, and property of the indigenous peoples involved.[274]

On December 4, 2016, the Army Corps announced its decision to deny the final easement necessary for construction pending the development of a comprehensive Environmental Impact Statement, which is to be developed in close collaboration with the tribes.[275] However, on January 20, 2017, Donald Trump was sworn in as the President of the United States.[276] Days after entering office, President Trump issued a presidential memorandum which called on the Army Corps to take expedited action to review and approve requests for approvals to construct the pipeline.[277] On February 7, the Army Corps announced that it will grant the final approval needed to complete construction of the Dakota Access Pipeline, without conducting an Environmental Impact Statement.[278] On February 9, the Cheyenne River Tribe filed a motion for a preliminary injunction to halt construction until the validity of the Army Corps' action could be determined.[279] The Standing Rock Sioux Tribe also challenged the easement on the grounds that the Environmental Impact Statement was wrongfully terminated.[280]

This case represents the contemporary challenges in the United States to realization of FPIC by indigenous peoples, as well to the

[273] *See* Standing Rock Letter, *supra* note 261.

[274] *See id.*

[275] *See* Press Release, U.S. Army, Army Will Not Grant Easement for Dakota Access Pipeline Crossing (Dec. 4, 2016), https://www.army.mil/article/179095/army_will_not_grant_easement_for_dakota_access_pipeline_crossing.

[276] *See Presidential Inauguration 2017*, USA.GOV, https://www.usa.gov/inauguration-2017 (last visited Feb. 25, 2017).

[277] *See* Memorandum on Construction of the Dakota Access Pipeline, 2017 DAILY COMP. PRES. DOC. 67 (Jan. 24, 2017).

[278] *See* Timothy Cama, *Trump Administration Giving Final Green Light to Dakota Access Pipeline*, HILL (Feb. 7, 2017), http://thehill.com/policy/energy-environment/318341-trump-admin-to-approve-dakota-access-oil-pipeline.

[279] *See* Motion for Preliminary Injunction at 1, Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, No. 1:16-cv-1534 (D.D.C. Feb. 9, 2017).

[280] *See Standing Rock Sioux Tribe Asks Federal Court to Set Aside Trump's Pipeline Reversal; Critical Motion Charges Trump Administration Circumvents Law and Ignores Treaty Rights*, EARTHJUSTICE, http://earthjustice.org/features/faq-standing-rock-litigation (last updated Feb. 14, 2017).

human rights described in the UNDRIP.[281] The U.S. government did not apply the standard of FPIC to meaningfully consult tribal governments and consider the impacts on tribal governments within the meaning of FPIC because if failed to include impact analysis on any tribal lands or reservations despite the proximity of the Standing Rock Sioux, Ft. Berthold, and Cheyenne River Sioux Reservation.[282] Applying the UNDRIP's FPIC standard, a project impacting the lands, territories, and resources of the Tribes should not occur without adequate consultations with, and the free, prior and informed consent of, the indigenous populations concerned.[283]

B. Implications of the Indian Reorganization Act

In 1933, Nathan Margold appointed Felix Cohen and Melvin Siegel to draft the Indian Reorganization Act.[284] A number of external materials may have influenced how the bill was drafted and later amended, though knowledge of the facts surrounding these sources is incomplete. Notable amongst these sources,

[281] A full examination of the facts and issues surrounding the Dakota Access Pipeline conflict is the subject of a forthcoming article by the author.

[282] *See, e.g.*, Letter from Lawrence S. Roberts, Acting Assistant Sec'y—Indian Affairs, Dep't of the Interior, to Brent Cossette, U.S. Army Corps of Eng'rs (Mar. 29, 2016), http://indigenousrising.org/wp-content/uploads/2016/04/DOI-Signed-Standing-Rock-Corps-Letter.pdf [hereinafter DOI Letter]. Three separate federal agencies—the Environmental Protection Agency, the Department of the Interior, and the Advisory Council on Historic Preservation—as well as the Standing Rock Sioux tribal government itself, allege that the Army Corps failed to meaningfully engage the Standing Rock Sioux tribal government at any point in their assessment process leading to the recent authorizations and subsequent construction of the Dakota Access Pipeline. *See* DOI Letter; Letter from Reid J. Nelson, Dir., Advisory Council on Historic Pres., to Lieutenant Gen. Thomas P. Bostick, Commanding Gen. & Chief of Eng'rs, U.S. Army Corps of Eng'rs (May 19, 2016), http://www.achp.gov/docs/nd-sd-ia-il.coe.dakota%20access.con04.19may16.pdf [hereinafter ACHP Letter]; Letter from Philip S. Strobel, Dir., Nat'l Envtl. Policy Act Compliance & Review Program, Envtl. Prot. Agency, to Brent Cossette, U.S. Army Corps of Eng'rs (Mar. 11 2016), http://indigenousrising.org/wp-content/uploads/2016/04/Dakota-Access-2nd-DEA-cmts-3-11-16.pdf [hereinafter EPA Letter]. Each of the three federal agencies wrote separate letters to the Army Corps, and these sources claim that although the Standing Rock Sioux Tribe and others have repeatedly sought consultation with the Army Corps throughout their review process, the Army Corps had yet to meaningfully engage or coordinate with any tribe while carrying out their cultural and environmental impact studies relating to the pipeline. *See* ACHP Letter; DOI Letter; EPA Letter. The Advisory Council on Historic Preservation's letter specifically outlined concerns regarding the Army Corps' lack of consultation with the Standing Rock Sioux Tribe. *See* ACHP Letter. The Environmental Protection Agency and the Department of the Interior's letters also indicated that, in their judgment, the Army Corps failed to meet the government-to-government consultation requirements mandated in the domestic laws of the United States. *See* DOI Letter; EPA Letter.

[283] *See* G.A. Res. 61/295, *supra* note 1, arts. 1, 2, 8, 11, 12, 18, 19, 28, 29, 37, 38.

[284] *See* ELMER R. RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT 192–93 (2000).

though, is the "Tentative Statement of Indian Land Policy" ("Shepard document").[285] This document has no known author but is presumed to have been authored by former BIA forestry expert Ward Shepard.[286] Former BIA Commissioner John Collier had identified Shepard as one of the "chief producers of ideas" for the bill.[287] The Shepard document assumed "the truth of the vacuum theory of Indian political life—that most tribal institutions had disappeared."[288] Author Elmer Rusco describes the crux of the proposal contained in the Shepard document as follows:

> "[Twenty] or more families should be gathered into a small village, with a school and community house, gardens, water supply, etc., and from this center should use their individual allotments or tribal lands, as the case may be." What Shepard had in mind was a program for establishing model communities, created by "expert" Bureau officials. . . . In general, there is nothing in his initial approach that shows an awareness of existing Native American structures or any sense that these should be recognized and strengthened.[289]

According to Rusco, Cohen and Siegel's approach to bill drafting reflected the same basic ideas: "[T]he Cohen-Siegel approach . . . assumed that the central purpose of the land policy was to bring about the organization of Indians into communities, although . . . [t]here was no suggestion of organization at the reservation level; in fact, it was proposed that some communities could be established among 'scattered' Indians . . . ."[290]

Rusco later explains the importance of the "vacuum theory" in drafting the bill:

> A key underlying assumption of the drafters was the vacuum theory. The allotment program and other aspects of governmental policy over several decades, which effectively were part of the forced assimilation ideology dominating Indian policy since 1887, were thought to have destroyed most Indian governments and even a good deal of Indian social structure. Collier certainly knew that Native American societies already had self-governing authority, as

[285] *See id.* at 195.
[286] *See id.* at 194, 195.
[287] *Id.* at 194.
[288] *Id.* at 195.
[289] *Id.* at 196.
[290] *Id.* at 197. This approach was embodied in a "draft-outline of a bill" contained in a memorandum signed by both Siegel and Cohen one day after the Shepard memorandum. *See id.*

> recognized by the courts, but the emphasis was on creating new governments or cooperative organizations rather than on supporting or strengthening existing governments.[291]

The initial congressional hearings on the draft bill exposed some complicated and confusing aspects of the initial draft.[292] At the February 27, 1934, hearing, some congressmen expressed concern as to whether Indians would make decisions in their best interests considering the complex disposition of their land rights under the bill and how to handle the consolidation of Indian communities in areas in which whites had bought valuable tracts of land from Indians and had made investments in that land.[293] A representative of the Crow Indians raised this latter concern, and committee member Hubert H. Peavey made the following statement of optimism that yields some examination concerning the perceived purpose of the bill at the time:

> Mr. Commissioner, it is true, that while the statement of Mr. Yellow Tail to the committee shows many of the obstacles and problems to be overcome in the settlement of these various Indian situations under the terms of this bill, it also presents a very hopeful phase of it in the fact that everything that he has presented to this committee is what is typical of the ordinary white community; and we are expecting and trying by this bill to raise the Indian people up to the level of the white communities in their affairs.[294]

Evidence of later congressional deliberations on an amended version of the bill is evident in a 2014 memorandum to the Secretary of the Interior addressing the meaning of "under federal jurisdiction" under the Indian Reorganization Act.[295] In this memo, it is suggested that in a House committee hearing on May 17, 1934, Collier proposed adding "under federal jurisdiction" after

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[291] *Id.* at 205.

[292] *See, e.g.*, *Readjustment of Indian Affairs: Hearing on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73rd Cong. 126 (1934) [hereinafter *Readjustment of Indian Affairs*]; *see also* THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS 20–23 (Vine Deloria, Jr. ed., 2002) (providing the complete text of the original proposed bill).

[293] *See, e.g.*, *Readjustment of Indian Affairs, supra* note 292, at 126, 127, 134, 136, 137, 138. During the hearing, Collier succinctly explains the basics of the new proposed land ownership regime as follows: "In effect, the allotted Indian, whose land goes into the community, keeps what he has got and gets the additional amount represented by his share in the new land as a member." *Id.* at 128.

[294] *Id.* at 138.

[295] *See* Memorandum from Hilary C. Tompkins, Off. of the Solicitor, to Sec'y of the Interior on the Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act 1 (Mar. 12, 2014), https://solicitor.doi.gov/opinions/M-37029.pdf.

"recognized Indian tribe" in order to appease Senators Thomas and Fraziers' concerns regarding whether Indians such as the Catawbas, who maintained tribal identity but "were not members of tribes and were not enrolled, supervised, or living on a reservation[,]" could be accounted for under the act.[296]

Much of the current discourse related to the Indian Reorganization Act surrounds the 2009 U.S. Supreme Court decision in *Carcieri v. Salazar*.[297] In that case, the Court decided that the Secretary of the Interior would not accept land in trust from an Indian tribe that was not recognized at the time the Indian Reorganization Act was passed.[298] The relevant provision in the Indian Reorganization Act (codified at 25 U.S.C. § 479) allowed the Secretary to accept trust land from any "recognized Indian tribe now under [f]ederal jurisdiction."[299] The Court defined "now" as the time in which the act was passed.[300]

In 2011, the Senate Committee on Indian Affairs held an oversight hearing to discuss the contents and the implications of the *Carcieri* decision.[301] In his opening statement, Hawaiian U.S. Senator Daniel K. Akaka stated that the Supreme Court was wrong in *Carcieri*:

> [A] Supreme Court decision in 2009 narrowly construed the text of the [Indian Reorganization Act] and completely up-ended the status quo, which had existed for [seventy-five] years, contrary to [c]ongressional intent, legislative history, and affirmative actions by the Administration. I have a great deal of respect for the Supreme Court and the hard work that they do. However, when the [C]ourt gets it wrong, it is the responsibility of Congress to fix it. That is why this

[296] *See id.* at 10, 11.

[297] Carcieri v. Salazar, 555 U.S. 379 (2009); *see, e.g.*, Scott A. Taylor, *Taxation in Indian Country after* Carcieri v. Salazar, 36 WM. MITCHELL. L. REV. 590, 591 (2010) (discussing the potential tax implications of the decisions); *see also* Amanda D. Hettler, Note, *Beyond a* Carcieri *Fix: The Need for Broader Reform of the Land-into-Trust Process of the Indian Reorganization Act of 1934*, 96 IOWA L. REV. 1377, 1380 (2011) (discussing the inefficient administration of the processes by which land can be taken into trust for Indians through both pre-*Carcieri* and post-*Carcieri* administrative frameworks).

[298] *See Carcieri*, 555 U.S. at 395.

[299] *Id.* at 382 (quoting 25 U.S.C. § 479 (2012) ("The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.")).

[300] *See Carcieri*, 555 U.S. at 395.

[301] *See The Indian Reorganization Act—75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 2 (2011).

> [c]ommittee at its first business meeting in the 112th Congress passed a *Carcieri* fix out of [c]ommittee. My *Carcieri* fix bill does nothing more than to simply restore the status quo that existed for [seventy-five] years and affirms the original intent of the Indian Reorganization Act to restore tribal homelands and empower tribal governments to exercise self-determination.[302]

Professor G. William Rice proposes a two-part fix to the *Carcieri* decision:

> The first section requires implementation of the original intent of the [Indian Reorganization Act] in that lands acquired by federally incorporated tribes would be nontaxable Indian country when acquired within a reservation or former reservation at the behest of the tribes. In addition, the tribe, not the Secretary of the Interior, would have management and operational control over said properties subject only to the limited restrictions stated in the statutory language or those set out in the applicable charter with the consent of the tribe.[303]

Rice refers heavily to the UNDRIP in framing the proposed *Carcieri* fix, particularly with regard to how Rice feels the term "Indian" should be defined.[304] Rice also purports "to achieve a basic level of compliance with at least some of the standards set out in the [d]raft [d]eclaration with respect to the rights of [i]ndigenous peoples to land, territory, and resources" in his proposed fix.[305]

IX. CONCLUSION

A tribal FPIC law and protocol may serve as a self-determined model to actualize indigenous rights as described in the UNDRP

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[302] *Id.* at 1–2; *see also* Rob Capriccioso, *So Close! How the Senate Almost Passed a Clean* Carcieri *Fix*, INDIAN COUNTRY TODAY MEDIA NETWORK (Sept. 19, 2013), http://indiancountrytodaymedianetwork.com/2013/09/19/how-clean-carcieri-fix-almost-passed-senate-151346 (providing an in-depth discussion of the congressional fate of Akaka's proposed *Carcieri* "fix"); Paul Moorehead, *The 'Carcieri' Fix Bills Need to Do More*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 30, 2014), http://indiancountrytodaymedianetwork.com/2014/07/30/carcieri-fix-bills-need-do-more ("Eighty years later, Indian tribes continue to grapple with the same problems, only made worse by decades of further land fractionation and a legal regime of Indian land management that has failed to adapt to changing circumstances on the ground in tribal communities.").

[303] G. William Rice, *The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples, and a Proposed* Carcieri *"Fix": Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 594 (2009).

[304] *See generally id.* at 598 (invoking Articles 9 and 33 of the UNDRIP).

[305] *Id.* at 608 (referring to the draft declaration).

regarding the development or use of culture, lands, territories, and resources, and would serve to tribally implement concepts of the UNDRIP, moving away from the outmoded domestic processes of consultation and the Indian Reorganization Act. Indigenous peoples in the U.S. have a unique opportunity under *Montana* to develop and implement their own FPIC protocol in order to assert their human rights, and a model under United States law for Indian tribes to assert their sovereign and human rights without waiting for member state implementation may serve as a starting point for indigenous peoples globally to actualize the same.