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American Indian Treaties: The Consultation Mandate

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American Indian Treaties: The Consultation Mandate

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STRENGTHENING PARTNERSHIPS BETWEEN INDIGENOUS PEOPLES AND STATES: TREATIES, AGREEMENTS, AND OTHER CONSTRUCTIVE ARRANGEMENTS

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I. Introduction

Article 37 of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") reflects the right of indigenous peoples to the recognition, observance, and enforcement of treaties, agreements, and other constructive arrangements. The United States Constitution makes clear that the treaties entered into between the U.S. ("State") and American Indigenous Nations "shall be the supreme Law of the Land."[2] Yet because the practice of treatying with Indian tribes[3] is now prohibited in the U.S.,[4] tribal governments are forced to seek new and sometime creative methods to effectively implement their historical treaties vis-à-vis the State.[5]

The beginning step of any such process is meaningful consultation, which according to U.S. law means that "prior to taking actions that affect" tribal land, sovereignty, or resources, an agent of the federal government must meet "in advance" with a tribal

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[2] U.S. Const. Art. VI, Cl. 2.

[3] In the U.S., the term "Indian tribe" or "tribal government" is generally defined to mean a tribe, band, or nation recognized by the U.S. and eligible for federal services because of its status as a distinct group of indigenous peoples. *See e.g.* 25 U.S.C. § 450b(e).

[4] Act of March 3, 1871, 16 Stat. 544 (codified at 25 U.S.C. § 71).

[5] Staying consistent with the theme of this seminar, the term "historical treaties" is meant to refer to those agreements effected by concurrence of two-thirds of the U.S. Senate, under Art. II, s 2, cl. 2, of the U.S. Constitution, and the binding result of ratification of a contract effected by legislation passed by the House and the Senate. *See e.g.* Antoine v. Washington, 420 U.S. 194, 198-205 (1975); *see generally* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Study on Treaties, Agreements, and Other Constructive Arrangements Between States and Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1999/20 (June 22, 1999) (prepared by Miguel Alfonso Martínez); Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567 (1995). This definition contrasts with "agreements" and "other constructive arrangements," which are effected by the terms of such documents themselves and made binding by domestic and international law, as discussed below. Crucially, the term "historical" should not be inferred to connote a non-dynamic or non-adaptive application of the treaty terms. *See* William Pentney, *The Interpretive Prism of Section 25*, 22 U. BRIT. COLUM. L. REV. 21 (1988) (noting that the interpretation of historical treaties "requires a liberal and forward-looking interpretation that preserves their capacity for flexibility in meeting new circumstances").

official who possesses "clear authority to present tribal views."[6] Indeed, the State's consultation obligation arises, if not from the express terms of a historical Treaty, from the implicit duty to consult in good faith that is intrinsic in any bilateral agreement between nations.[7] The State-tribal consultation process usually comprises of an in-person meeting, during which the federal agency notifies the tribe of the proposed action and justifies its reasoning.[8] The tribal government may then issue a motion of support for the decision, or reject the decision, pursuant to tribal law or procedure.[9]

Aside from diplomacy, the purpose of such consultation is to determine, from a tribal perspective, how the proposed action will affect the tribe, particularly as to any potential breaches of its historical treaty. In this way, meaningful consultation helps to render a historical treaty a real and enforceable manifestation of tribal sovereignty.

This paper will discuss how the procedural right to tribal consultation – mandated by binding international and domestic U.S. law – can give teeth to substantive indigenous rights not otherwise respected by the State. These include cultural, heritage, and land rights – made mandatory via the UNDRIP and customary international law – and, most importantly, historical Indian treaty rights.

This consultative approach operates in opposition to a previous model where the U.S. took action, asked questions later, and remedied those breaches with compensation. This compensation sometimes ranged into the billions of dollars.[10] Now, subsequent to determining that there is potential for a breach of tribal rights, tribes and States are often entering into working relationships – sometimes organic, sometimes memorialized by agreement or formalized constructive arrangement – that operate to ensure through self-determination that indigenous rights are respected and upheld. More often than not, this results in the proposed governmental action moving forward, but in a way that is void of violations. In short, when employed correctly, the consultation approach mandated by both international and U.S. domestic law, can work for all parties.

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[6] Lower Brule Sioux Tribe v. Deer, 911 F. Supp. 395, 401 (D.S.D. 1995) (citing Hoopa Valley Tribe v. Christie, 812 F.2d 1097 (9th Cir. 1987)) (emphasis added); President William J. Clinton, Government-to-Government Relations with Native American Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies, 59 Fed. Reg. 22,951, 22,952 (Apr. 29, 1994). This Memorandum was updated in 1998 with Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998), and later supplanted by Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,251 (Nov. 6, 2000). The Obama Administration has recently issued a Presidential Memorandum that ordered federal agencies to promptly implement President Clinton's 2000 Executive Order. *See* President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57881 (Nov. 5, 2009). Importantly, federal "actions" include the issuance of a license or permit to a nongovernmental entity, for example. *See e.g.* Confederated Tribes and Bands of Yakama Nation v. U.S. Dept. of Agriculture, No. 10-3050, 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010).

[7] Restatement (Third) Foreign Relations Law of the United States § 325 (1986) [hereinafter Restatement]; *see also generally* Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL INDIAN LAWYER, Fall, 2010.

[8] Lower Brule, 911 F. Supp. at 401.

[9] *Id.*

[10] Cobell v. Salazar, 679 F.3d 909 (D.C. Cir. 2012) ($3.412 billion settlement for mismanagement of tribal assets).

II. The Consultation Right Under the UNDRIP

The duty to consult is "a generally accepted principle in international law."[11] Thus, Article 19 of the UNDRIP requires that States "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain . . . free, prior, and informed consent . . . before adopting and implementing legislative or administrative measures that may affect them." This consultation mandate applies, according to U.N. Special Rapporteur S. James Anaya, "whenever a State decision may affect indigenous peoples in ways not felt by others in society . . . even when the decision may have a broader impact."[12]

The "specific characteristics of the consultation procedure that is required by the duty to consult" will, however, "necessarily vary depending upon the nature of the proposed measure and the scope of its impact on indigenous peoples."[13] As noted by a recent International Law Association report, "it is not possible to conclude that Article 19 may be interpreted as establishing a general right of veto in [favor] of the indigenous communities concerned to block the adoption or implementation of the governmental measures which may affect them *per se*."[14] Rather, the consultation right contemplated by Article 19 only allows a veto right when, after consulting with the affected indigenous community, it becomes clear that a separate and independent right is violated, such as:

- The relocation of indigenous peoples from their lands or territories, prohibited by Article 10;
- The taking of indigenous peoples' cultural, intellectual, religious, or spiritual property, prohibited by Article 11(2);
- The taking of indigenous peoples' lands, territories, and resources, prohibited by Article 28(1); and
- The storage or disposal of hazardous materials in the lands or territories of indigenous peoples, prohibited by Article 29(2).

In general, the rule has been summarized as follows: "although States are not obliged to obtain the consent of indigenous peoples before engaging in whatever kind of activities which may affect them" such consensual obligation does arise at "any time that the lack

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[11] S. James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT'L & COMP. L. 7 (2005).

[12] Special Rapporteur on the Rights of Indigenous Peoples, *Rep. on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. Doc. A/HRC/12/34 (July 15, 2009) [hereinafter Anaya Report of July 15, 2009].

[13] *Id.*

[14] INTERNATIONAL LAW ASSOCIATION, SOCIA CONFERENCE 2012: RIGHTS OF INDIGENOUS PEOPLES 4 (2012), *available at* http://turtletalk.wordpress.com/2012/06/28/international-law-association-committee-draft-report-on-the-rights-of-indigenous-peoples (citing Anaya Report of July 15, 2009).

of such a consent would translate into a violation of the rights of indigenous peoples that States are bound to guarantee and respect."[15]

III. The Consultation Right in Domestic U.S. Law

The United States has similarly interpreted Article 19 of the UNDRIP "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."[16] Interpreting the UNDRIP in this way – arguably consistent with the interpretation of the United Nations – the U.S. is only confirming those consultation rights already mandated by its domestic law.[17]

A. Codified U.S. Law[18]

Section 706 of the Administrative Procedure Act ("APA"),[19] prevents the State and its agencies from acting in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" when executing their duties.[20] A State agency's action will be deemed arbitrary and capricious if the agency has not considered the relevant factors in making decisions.[21] As stated by the U.S. Supreme Court in the leading case:

> Normally, an agency [action] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem,

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[15] *Id.* at 6; *see also* Anaya Report of July 15, 2009, at 16 (noting that Article 19 "of the Declaration should not be regarded as according indigenous peoples a general 'veto power' over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous peoples.").

[16] Press Release, U.S. Dep't of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Dec. 16, 2010), at 5.

[17] The extent of the UNDRIP's duty to consult has been described as mandating

> consultations that are in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures, rather than consultations that are more in the nature of mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process.

Anaya Report of July 15, 2009, at 16. As discussed below and *supra* note 6 and accompanying text, this is consistent with the standard employed by U.S. domestic courts.

[18] The two examples selected are by no means an exhaustive list of the U.S. domestic laws that mandate consultation.

[19] 5 U.S.C. §§ 701-706. Notably, as is the case with most States, *see generally* August Reinisch, *European Court Practice Concerning State Immunity From Enforcement Measures*, 17 EUR. J. INT'L L. 803 (2006); Burkhard Heß, *The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property*, 4 EUR. J. INT'L L. 269 (1993), the U.S. retains its sovereign immunity from suit unless it has expressly waived such immunity. United States v. Sherwood, 312 U.S. 584, 586 (1941). Fortunately, aside from providing a cause of action, a separate provision of the APA acts as an express waiver in most suits against State agencies. Specifically, the APA provides a limited waiver of sovereign immunity for suits seeking "non-monetary" relief against federal agencies. Lester v. U.S., 85 Fed.Cl. 742, 746 (2009).

[20] 5 U.S.C. § 706.

[21] *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

> offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[22]

Thus, when federal agencies take action, such as issuing a permit or changing agency regulations, the action must be in compliance with relevant federal rules and regulations.[23] And because the U.S. has, in numerous instances,[24] issued agency-specific rules and regulations that mandate tribal consultation,[25] U.S. domestic courts have consistently held that action taken without prior consultation will cause injunctive relief to issue, thereby halting such State action.[26]

Section 106 of the National Historic Preservation Act ("NHPA")[27] provides another example of the U.S. domestic consultation mandate. Under the express terms of this law, early consultation with tribes is *required*[28] to be conducted in the following manner:

> Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties. . . . Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty . . . . Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government. . . . Consultation with Indian tribes . . . should be conducted in a manner sensitive to the concerns and needs of the Indian tribe . . . . Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded

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[22] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[23] Chemical Weapons Working Group, Inc. v. U.S. Dept. of the Army, 111 F.3d 1485 (10th Cir. 1997).

[24] Promulgation of these rules and regulations was made mandatory pursuant to the various executive documents cited *supra* at note 6.

[25] These rules and regulations need not be published or even written to be binding on the agency. Wilkinson v. Legal Services Corp., 27 F.Supp.2d 32, 60-61 (D.D.C. 1998); *see also e.g.* Los Coyotes Band of Cahuilla & Cupeno Indians v. Salazar, No. 10-1448, 2011 WL 5118733 (S.D. Cal. Oct. 28, 2011) (granting the tribe's motion for summary judgment for violation of APA Section 706 where a U.S. agency failed to comply with/arbitrarily applied an unwritten "sort of an internal policy"); U.S. v. Leichtfuss, 331 F.Supp. 723 (D.C. Ill. 1971) ("local board memoranda," "information bulletins," and internal "memos" between government agents may be binding).

[26] Oglala Sioux Tribe v. Andrus, 603 F.2d 707, 721 (8th Cir. 1979); Los Coyotes, 2011 WL 5118733; Yankton Sioux Tribe v. Kempthorne, 442 F.Supp.2d 774 (D.S.D. 2006); Winnebago Tribe of Nebraska v. Babbitt, 915 F. Supp. 157 (D.S.D. 1996); Lower Brule, 911 F.Supp. 395.

[27] 16 U.S.C. § 470 *et seq.*

[28] Te–Moak Tribe v. U.S. Dept. of Interior, 608 F.3d 592, 609 (9th Cir. 2010) (quoting 16 U.S.C. § 470a(d)(1)(A)); *see also* Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior, 755 F.Supp.2d 1104, 1108-1109 (S.D. Cal. 2010) (noting that the consultation requirement of the NHPA "is not an empty formality; rather, it must recognize the government-to-government relationship between the Federal Government and Indian tribes and is to be conducted in a manner sensitive to the concerns and needs of the Indian tribe.").

> lands of Indian tribes . . . and should consider that when complying with the procedures in this part.[29]

Like APA Section 706, domestic U.S. courts have frequently halted State action not in compliance with the consultation provisions of NHPA Section 106.[30]

B. Express Terms of Historical Indian Treaties

Under principles of customary international law, unless otherwise stated, all historical Indian treaties invoke mutually binding obligations between parties.[31] These obligations must be interpreted in "good faith" and in a manner that fulfills the purpose of the historical treaty at the time of formation.[32] Termination or a change in the scope of a historical treaty can occur only by consent of the parties or pursuant to the terms of the treaty itself.[33] Thus, adding a second layer of mandate, some historical treaties themselves – which, by their own terms constitute binding U.S. domestic law[34] – oblige the State to consult with Indian tribes.

In *Peoria Tribe of Indians of Oklahoma v. United States*,[35] for example, the Tribe argued that the federal government violated its Treaty rights in 1857 when it sold the Tribe's land without meaningful consultation. The Peoria Tribe's treaty read: "it is agreed that the President may, from time to time, *and in consultation with the Indians*, determine how much shall be invested in safe and profitable stocks . . . ."[36] On review, the U.S. Supreme Court held that because the Tribe was not consulted, its historical treaty was violated and the United States was liable for the difference in price that the Tribe would have received for its property at public auction, plus interest.[37] Likewise, in *Confederated Tribes and Bands of Yakama Nation v. U.S. Dept. of Agriculture*, a U.S. domestic court recently issued an injunction against the State based on "serious questions about whether Defendants adequately consulted with the Yakama Nation *as required by the Yakama Treaty of 1855*," despite the fact that the Yakama Treaty does not express a "consultation" obligation like the Peoria Tribe's treaty does.[38]

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[29] *Id.* at 1109-10 (S.D. Cal. 2010) (internal citation and quotation omitted); *see also id.* at 1108-1109 (noting that the consultation requirement of the NHPA "is not an empty formality; rather, it must recognize the government-to-government relationship between the Federal Government and Indian tribes and is to be conducted in a manner sensitive to the concerns and needs of the Indian tribe.").

[30] *See e.g.* Te–Moak Tribe, 608 F.3d at 609; Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768 (9th Cir. 2006); Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 805 (9th Cir. 1999); Quechan Tribe, 755 F.Supp.2d 1104; Yakama Nation, 2010 WL 3434091.

[31] Restatement, *supra* note 8, at § 325.

[32] Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

[33] Restatement, *supra* note 8, at § 332.

[34] *See* Reich v. Great Lakes Indian Fish and Wildlife Com'n, 4 F.3d 490, 493 (7th Cir. 1993) ("Indian treaties are deemed the legal equivalent of federal statutes . . . .") (Posner, J.).

[35] 390 U.S. 468 (1968).

[36] Treaty with the Kaskaskia, Peoria, Etc., May 30, 1854, art. 7, 10 Stat. 1082, 1084 (emphasis added).

[37] Peoria Tribe, 390 U.S. at 471-73.

[38] 2010 WL 3434091, at *4 (emphasis added); *see also e.g.* Klamath Tribes v. U.S., No. 96-0381, 1996 WL 924509 (D. Or. Oct, 2, 1996).

A cause of action alleging the breach of a tribe's historical treaty will function in form much like APA Section 706 and NHPA Section 106 – where the State has directly breached a tribe's treaty, injunctive relief will be granted.[39] Additionally, and unique to a historical Indian treaty cause of action, compensatory relief may also be warranted.[40]

IV. Putting Consultation to Work

While recognizing that the State's obligation to consult is mandatory[41] under both international and domestic law, as discussed above, this right is purely "procedural."[42] As a procedural right, the State's obligation to consult "does not require the [State] to obtain the appropriate Indian tribes' consent" before taking action[43] – only that it "*seek* the free informed consent of indigenous communities and give primary consideration to their special needs" before doing so.[44]

In the opinion of at least one U.S. scholar, because "there is no duty to be bound by the suggestions of the consultees, . . . [tribal] consultations are ultimately worthless."[45] Is it so? Is the federal Indian consultation mandate "ultimately worthless" in the face of ongoing human rights and historical treaty violations? I argue that it is not.

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[39] Yakama Nation, 2010 WL 3434091.

[40] Peoria Tribe, 390 U.S. at 471-73.

[41] *But see* Gregory A. Smith, *The Role of Indian Tribes in the Section 106 National Historic Preservation Act Review Process*, SJ053 ALI-ABA 649, 649 (2004) (noting that even today in the U.S. – some forty years after the right to consult was formally mandated – "federal agencies have been reluctant to comply" with their duty to implement it). Another set of authors have observed:

> Although [tribal consultation] sounds relatively easy enough, a recent study has found that many "consultations" were in fact merely opportunities for Agencies to inform Tribes of decisions that had been made, or that Agencies believed that consultation obligations could be met by sending a letter to Tribes inviting them to a "consultation" without first providing specific information about the proposed project upon which they could be prepared to comment.

SHERRY HUTT & JAIME LAVALLEE, TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 11 (2005). This failure of the U.S. to follow its own law regarding tribal consultation is a problem that is beyond the scope of this paper. It is noteworthy, however, that U.N. Special Rapporteur S. James Anaya has found that the U.S.'s lack of tribal consultation must be addressed by the State. *See* Press Release, Statement of the United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, Upon Conclusion of his Visit to the United States (May 4, 2012), *available at* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12114&LangID=E.

[42] *See* Klamath Tribes, 1996 WL 924509, at *8 ("In practical terms, a *procedural duty* has arisen from the trust relationship such that the federal government must consult with an Indian Tribe in the decision-making process to avoid adverse effects on treaty resources.") (emphasis added).

[43] Yankton Sioux Tribe v. U.S. Army Corps of Engineers, 209 F.Supp.2d 1008, 1023 (D.S.D. 2002)

[44] Comm. on Econ., Social, and Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social, and Cultural Rights, May 2-20, 2011, U.N. Doc. E/C.12/RUS/CO/5 (May 20, 2011), at para. 7.

[45] Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. IND. L. REV. 21, 28 (2000).

A. Toward a Mutual Understanding of Proposed State Action

Numerous courts have acknowledged that although a State's obligation to consult does not necessarily translate into a tribal government veto right, where the requisite consultation does reveal that a separate historical treaty or other independent human right will be impinged, tribal consent will be required.

In the *Case of the Saramaka People v. Suriname*, for example, the Inter-American Court of Human Rights found that "regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions."[46] This duty to obtain consent stemmed not from UNDRIP Article 19's duty to consult, but, apparently, from some combination of Article 29's prohibition on the storage or disposal of toxic waste within indigenous lands; Article 11's prohibition on taking of indigenous peoples' cultural, intellectual, religious, or spiritual property; and Article 10's prohibition on licensing projects that will result in the relocation of a group from its traditional lands.[47] The importance of the consultation mandate, however, must not be lost – without prior consultation, the State will in most circumstances not be able to determine whether and to what extent the State action would affect indigenous lands. Consultation under Article 19, in other words, is the necessary precursor to any determination of an obligation to acquire tribal consent.[48]

In the historical treaty context, the same conclusion is reached. Historical treaties often contain tribe-specific and precise provisions that require the State to, for example, provide protection to a specific range of natural resources,[49] to invest monies in a certain way,[50] or to prevent State interference with certain economic endeavors.[51] Because the tribe's interpretation of these historical treaty provisions – and thereby to what extent the

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[46] Case of the Saramaka People v. Suriname, Series C No. 172, Judgment of 28 November 2007, at para. 134.

[47] *See generally* INTERNATIONAL LAW ASSOCIATION, *supra* note 15, at 5-6.

[48] As noted by U.N. Special Rapporteur S. James Anaya,

> Necessarily, the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent. . . . These principles are designed to build dialogue in which both States and indigenous peoples are to work in good faith towards consensus and try in earnest to arrive at a mutually satisfactory agreement. . . . [T]he duty of States to consult with indigenous peoples and related principles have emerged to reverse historical patterns of imposed decisions and conditions of life that have threatened the survival of indigenous peoples.

Anaya Report of July 15, 2009, at 17.

[49] *See e.g.* Winters v. U.S., 207 U.S. 564 (1908); U.S. v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974); U.S. v. State of Washington, No. CV 9213RSM, 2007 WL 2437166 (W.D. Wash. Aug. 22, 2007).

[50] *See e.g.* Peoria Tribe, 390 U.S. at 471-72; Shoshone Indian Tribe of Wind River Reservation v. U.S., 364 F.3d 1339 (Fed. Cir. 2004).

[51] *See e.g.* U.S. v. Smiskin, 487 F.3d 1260 (9th Cir. 2007).

proposed action might breach that treaty – controls this analysis,[52] in order to determine whether and to what extent the State action would affect these treaty provisions it is imperative, necessarily, that tribes be adequately consulted when there is any chance that the proposed action will affect a historical treaty right.

In this way, through consultation, a mutual understanding regarding State action can be achieved. This is the first step to forming agreements and constructive arrangements that will allow State action to take place without violating human rights and historical Indian treaties.

B. A Case Study on Working Relationships: Agreements and Constructive Arrangements in the United States

In *United States v. Winans*,[53] the U.S. Supreme Court ruled that the Treaty With the Yakama[54] guaranteed the tribe "the right of taking fish at all usual and accustomed places" and the right "of erecting temporary buildings for curing them."[55] The Court also made clear that tribe's fishing rights in its usual and accustomed places were not diminished by private ownership of those lands. According to the Court, the treaty "imposed a servitude upon every piece of land as though described therein."[56] In the next installment of the treaty fishing rights saga, a lower federal court held that the "usual and accustomed fishing places" of the numerous treaty tribes were located at any fishing area where the tribes in 1855 – the year that the tribes had signed their historic treaties – had traditionally fished.[57] The U.S. Supreme Court later held that under these treaties the tribes were entitled to up to fifty percent of the available fish.[58]

In the most recent installment of the ongoing *U.S. v. Washington* litigation, known as the "culvert case," a U.S. federal court determined that habitat protection was included as an aspect of numerous Western Washington tribes' treaty rights.[59] The court found that the treaties impose upon the State a duty to ensure that it and its subordinate governments refrain from building or maintaining culverts that block the passage of fish "upstream or down, to or from" tribal usual and accustomed fishing areas.[60]

U.S. domestic courts' unequivocal recognition of these historical treaty rights mean that the State is now mandated to consult with tribal governments whenever there is any chance that a proposed action will affect a tribe's right to take fish at all usual and accustomed places, erecting temporary buildings for curing fish, or the availability of fish

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[52] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999); Tulee v. Washington, 315 U.S. 681, 684-85 (1942).
[53] 198 U.S. 371 (1905).
[54] 12 Stat. 951 (1855).
[55] *Id.* at 381.
[56] *Id.*
[57] U.S. v. Washington, 384 F. Supp. 312.
[58] Washington v. Fishing Vessel Assn., 443 U.S. 658, 685-87 (1979).
[59] 2007 WL 2437166.
[60] *Id.* at *10.

– hatchery or otherwise.[61] As a result of these requisite consultations, numerous agreements and constructive arrangements have been implemented between tribes in the State. These formal relationships operate to ensure, through self-determination, that historical Indian treaty obligations are fulfilled.

The case of the Suiattle River offers but one example.[62] In 2003, 2006, and 2007 the Suiattle River flooded, causing severe damage to State roads.[63] The Suiattle River is a usual and accustomed fishing area of the Sauk-Suiattle Indian Tribes, and provides fish and other treaty-protected resources to the Swinomish Tribe, the Lummi Nation, the Samish Indian Nation, the Stillaguamish Indian Tribe, the Tulalip Tribes, and the Upper Skagit Tribe. In 2010, the State sought to repair the damaged roads. In doing so, the State, as mandated by federal and international law, consulted with those tribes in effort to develop a road repair design that would avoid impact to their historical treaty rights. The result of the tribal consultations was the development a three-year partnership project between the State and the Sauk-Suiattle and Swinomish Indian Tribes. The project would upgrade and decommission approximately 18 miles of forest roads in the Suiattle River basin.

In May of 2010, the State-tribal cooperative removed the first of many culverts from the Suiattle River and its tributaries.[64] The culvert had provided State vehicle access across a creek, but it was a barrier to resident fish species and prevented upstream passage. Numerous similar culverts in the Suiattle River basin are currently being removed. The project will also fulfill the tribal and State co-managers' plan to control fish-harming sediment in the Suiattle River basin.[65] In short, through tribal consultation, a working relationship between the State and the tribes has created a cooperative arrangement that will prevent fish habitat from being further degraded by sediment loads and culverts on State roads, while at the same time fulfilling the State's goal of road maintenance.[66]

Importantly – although it has not occurred in any of the working relationships that I am aware of – were the State to unilaterally determine not to fulfill its obligations pursuant to the ensuing partnership project, UNDRIP Article 37 would serve to render such agreement or cooperative arrangement enforceable under international law. Further, as

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[61] *See* U.S. v. Washington, 759 F.2d 1353, 1358-60 (9th Cir. 1985) (confirming that the historical treaty right to take fish includes "artificial" hatchery fish, even though those fish did not exist at treaty times).

[62] *See generally* U.S. DEPARTMENT OF TRANSPORTATION, SUIATTLE RIVER ROAD PROJECT: ENVIRONMENTAL ASSESSMENT WA FS ERFO 071-2023 (2012), *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5358548.pdf.

[63] The roads were maintained by the U.S. Forest Service, and regulated by the U.S. Department of Transpiration. *Id.*

[64] Press Release, Northwest Indian Fisheries Commission, Tribes Remove Fish-Blocking Culvert From Suiattle River Tributary (May 27, 2010), *available at* http://nwifc.org/2010/05/tribes-remove-fish-blocking-culvert-from-suiattle-river-tributary.

[65] "Sediment degrades salmon habitat by smothering spawning gravel, which reduces survival of salmon fry. It also can reduce the quantity and quality of rearing habitat." *Id.*

[66] Similar culvert case studies are readily available. *See generally* U.S. Forest Service, FishXing: Culvert Case Studies, http://stream.fs.fed.us/fishxing/all.html (last visited July 9, 2012) (numerous culvert removing cooperative projects between the U.S. Forest Service and Indian tribes)

discussed above, it is very likely that the APA would create a similar domestic cause of action – possibly even for enforcement of the obligations set forth in the UNDRIP.[67]

V. Conclusion

Far from "ultimately worthless," the American Indian consultation mandate operates to determine, from a tribal perspective, how a proposed action will affect a tribe, particularly as to any potential breaches of its historical treaty. In this way, meaningful consultation helps to render a historical treaty a real and enforceable assertion of tribal sovereignty. As exhibited by the case of the Suiattle River, and many other stories like it,[68] meaningful consultation not only acts to inform the State of the impropriety of its proposed action, but in many instances results in working relationships, agreements, and constructive arrangements with tribal governments. Like the historical treaty that these relationships operate to protect, the agreements and constructive arrangements themselves are enforceable under both U.S. domestic and international law.

[67] *See* cases cited *supra* note 26; *see also generally* Gabriel S. Galanda, *Deploying the U.N. Indigenous Rights Declaration in the Courts of the Conqueror*, INDIAN COUNTRY TODAY, Jan. 27, 2012, *available at* http://indiancountrytodaymedianetwork.com/ict_sbc/domestic-enforcement-of-undrip (discussing how the UNDRIP can be enforced domestically in the U.S. under the APA).

[68] *See supra* note 67.