

**EMBRACING ENGAGEMENT: THE CHALLENGES AND
OPPORTUNITIES FOR THE ENERGY INDUSTRY AND TRIBAL
NATIONS ON PROJECTS AFFECTING TRIBAL RIGHTS AND
OFF-RESERVATION LANDS**

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It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional tribal way of life. The record does not leave the impression that the lands of their reservation are the most fertile, the landscape the most beautiful or their homes the most splendid specimens of architecture. But, this is their home—their ancestral home. There, they, their children, and their forebears were born. They, too, have their memories and their loves. Some things are worth more than money and the costs of a new enterprise.¹

INTRODUCTION

Prior to European emigrants' arrival, Indian nations exercised sovereignty over all the lands of this continent. Once the United States government began to exercise its authority and military might, original or aboriginal lands of tribes were reduced to four percent.² The federal government used treaties, executive orders, and statutes to extinguish the original Indian title to land. In exchange for the millions of acres ceded to the United States, the federal government reserved lands—reservations—for tribes' permanent homelands. However, this formal conveyance of lands through treaties did not sever tribes' familial, spiritual, and cultural ties to their original lands.

As part of the treaty process, tribal leaders reserved the right to hunt, fish, and gather on areas located off the reservation of ceded lands. Today, many tribes continue to hold valuable treaty rights and exercise their reserved rights to hunt, fish, and gather on their original land base. Tribal sacred sites, cultural resources, and rights guaranteed by treaties may lie within lands located adjacent to present-day reservation lands. Indian nations are critical stakeholders in oil and gas pipeline projects and activities located near their present-day reservations, ceded lands, and in or near aboriginal lands that were occupied by Indian ancestors prior to the treaty-making era. These lands are still an integral part of the tribes' subsistence activities and spiritual life. Addressing these issues requires special attention to the unique interests and rights of tribes—something that has not always taken place in the federal consultation process.

The aim of this article is fourfold. Part I reviews the litigation resulting from the clash at the Standing Rock Sioux Tribe's Reservation. The clash occurred between the Standing Rock and Cheyenne Sioux tribes and the Houston-based company, Energy Transfer Partners, L.P., and the United

1. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting) (citation omitted).

2. See DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 20 (3d ed. 1993) ("In all, Native American groups hold about 4.2% of the land in the United States.").

States government over an easement crossing treaty lands and the affected tribal resources.³ The aftermath created a great divide between tribal governments, the federal agencies who seek to approve such easements, and the energy companies. Part II discusses the vital treaty rights that are held by Indian tribes and the importance of considering cultural resources in energy-infrastructure projects. In the future, there will be new and renewed rights of way for energy-infrastructure development crossing tribal lands or affecting treaty hunting, fishing, and gathering rights; water resources and habitats; and cultural resources. Part III reviews the implementation of international regimes of conventions, human rights principles, best business practices, and social-corporate-responsibility standards to address energy-industry activities and conduct adversely impacting indigenous peoples and communities. These international regimes serve as a basis for domestic companies engaging with tribal governments.

This article concludes, in Part IV, by recommending that the energy industry engage separately with tribal governments to build relationships prior to any infrastructure development, and proposes standards or norms be incorporated to address the issues raised in the Dakota Access Pipeline (DAPL) controversy and other scenarios involving tribes, the energy industry, and the federal government. There is no doubt that building a bridge between energy developers and tribal governments is a complex undertaking and involves many issues that must be resolved; however, conversations about equity, access, respect, and the shared dignity of all human beings are necessary.

I. STANDOFF AT STANDING ROCK⁴

The Great Sioux Nation (Nation) inhabited an expansive part of the northern Great Plains—stretching from Montana and Wyoming in the west, through the Dakotas and Nebraska, and reaching as far east as Minnesota, Iowa, and Wisconsin.⁵ Over time, treaties, cession agreements, and

3. See generally Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017, 4:28 PM), <https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight> (providing background for the major events in the clash).

4. Walter E. Stern, *Dakota Access Controversy: Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, Policy Review of Federal Government's Tribal Consultation Obligations, and Why This Matters to Us*, MODRALL SPERLING (Nov. 22, 2016), <https://www.modrall.com/2016/11/22/dakota-access-controversy-standing-rock-sioux-tribe-v-u-s-army-corps-of-engineers-policy-review-of-federal-governments-tribal-consultation-obligations-and-why-this-matters-to-us/> [<https://perma.cc/Y6CT-5BGJ>].

5. See Complaint for Declaratory and Injunctive Relief ¶ 8, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101 (D.D.C. 2017) [hereinafter *Standing Rock Complaint*].

congressional laws dramatically reduced the Nation's rights of use and occupancy over the area to which it held aboriginal title.⁶

In the Fort Laramie Treaties of 1851⁷ and 1868,⁸ the Nation ceded to the United States large portions of its aboriginal lands, but negotiated a provision guaranteeing the Nation and its members certain off-reservation rights, such as “the privilege of hunting, fishing, or passing over any of the tracts of country” on lands ceded to the United States.⁹ Following the Fort Laramie Treaties, Congress enacted a number of statutes further reducing the Great Sioux Reservation.¹⁰ The Act of March 2, 1889 divided the 1868 Treaty lands into several small reservations, including the current reservations for the Standing Rock Sioux and Cheyenne River Sioux tribes.¹¹ The Act effectively dissolved the Great Sioux Reservation. Importantly here, the 1889 Act also “preserved all provisions of the Fort Laramie Treaties that were ‘not in conflict’ with the [1889 Act].”¹² The Act also set the eastern boundaries of the Standing Rock and Cheyenne River reservations as “the center of the main channel” of the Missouri River.¹³

In 1944, Congress enacted the Pick–Sloan Flood Control Act authorizing the construction of various dams along the Missouri River.¹⁴ The Pick–Sloan project by the Army Corps of Engineers (Corps) flooded hundreds of thousands of the best Native lands along the Missouri River.¹⁵ Congress also enacted seven statutes authorizing takings of certain tribal lands for specific dam projects.¹⁶ Two of these statutes acquired lands of the Standing Rock and Cheyenne River tribes for the construction of Oahe Dam and the creation of Oahe Lake.¹⁷ The Acts contained important

6. *Id.*

7. *See generally* Treaty of Fort Laramie with Sioux, etc., 11 Stat. 749 (1851) (discussing the territory of the Sioux and Dahcotah Nation).

8. *See generally* Treaty with the Sioux Indians, 15 Stat. 635 (1868) (creating union between the tribes).

9. Treaty of Fort Laramie with Sioux, etc., 11 Stat. 749 (1851).

10. Memorandum from Hilary C. Tompkins, Solicitor, Dep't of the Interior, on Tribal Treaty and Environmental Statutory Implications of the Dakota Access Pipeline to Sec'y of the Dep't of the Interior 6 (Dec. 4, 2016) [hereinafter DOI Solicitor's Dakota Access Memo].

11. Indian Appropriations Act of 1889 (Act of Mar. 2, 1889), ch. 405, 25 Stat. 888.

12. *Id.* at 896.

13. *Id.* at 889.

14. Pick–Sloan Flood Control Act, Pub. L. No. 78-534, 58 Stat. 887 (1944).

15. BYRON DORGAN, PROVIDING FOR COMPENSATION TO THE LOWER BRULE AND CROW CREEK SIOUX TRIBES OF SOUTH DAKOTA FOR DAMAGE TO TRIBAL LAND CAUSED BY PICK-SLOAN PROJECTS ALONG THE MISSOURI RIVER, S. REP. NO. 110–505, at 2 (2008); 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. 143, 156–57 (2015); MICHAEL L. LAWSON, DAMMED INDIANS, THE PICK-SLOAN PLAN AND THE MISSOURI RIVER SIOUX, 1944–1980 29 (Univ. Okla. Press ed., 1982).

16. Act of Dec. 22, 1944, Pub. L. No. 78-534, 58 Stat. 887.

17. Act of Sept. 3, 1954, Pub. L. No. 776, 68 Stat. 1191, 1193–94 (constructing and creating the Cheyenne River Oahe); Act of Sept. 2, 1958, Pub. L. No. 85-915, 72 Stat. 1762.

provisions guaranteeing the Tribes' hunting, fishing, and grazing rights on the taken lands. The Act provides:

After the Oahe Dam gates are closed and the waters of the Missouri River impounded, the said Indian tribe and the members thereof shall be given exclusive permission, without cost, to graze stock on the land between the water level of the reservoir and the exterior boundary of the taking area. The said tribal council and the members of said Indian tribe shall be permitted to have, without cost, access to the shoreline of the reservoir, including permission to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.¹⁸

Despite the passage of congressional acts following the 1868 Fort Laramie Treaty, the Sioux Tribes did not cede their long-standing cultural affiliations to the affected lands. Nor did Congress expressly extinguish any of these treaty rights.¹⁹ Nothing in the takings statutes had any impact on the reservation boundaries of the Standing Rock and Cheyenne River Tribes. This means that the successors to the Great Sioux Nation retain long-standing cultural affiliations in the several states as well as the off-reservation rights reserved by treaty.²⁰ The DAPL crosses the 1851 Treaty Reservation and traditional territories of the tribes, land to which the Tribes continue to have strong cultural, spiritual, and historical ties.²¹

The DAPL transports crude oil from the Bakken region in North Dakota across four states to facilities in Illinois,²² a roughly 1200-mile route that traverses primarily through private lands as well as the 1851 Treaty land and traditional territories of the Tribes.²³ Dakota Access constructed its

18. Act of Sept. 3, 1954, Pub. L. No. 776, 68 Stat. 1191, 1194; *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993); Act of Sept. 2, 1958, Pub. L. No. 85-915, § 10 72 Stat. 1762, 1764.

19. Act of Sept. 2, 1958, Pub. L. No. 85-915, § 10 72 Stat. 1762, 1764.

20. Standing Rock Complaint, *supra* note 5, ¶ 40.

21. *Id.* ¶ 9 (“Since time immemorial, the Tribe’s ancestors lived on the landscape to be crossed by the DAPL. The pipeline crosses areas of great historical and cultural significance to the Tribe, the potential damage or destruction of which greatly injures the Tribe and its members. The pipeline also crosses waters of utmost cultural, spiritual, ecological, and economic significance to the Tribe and its members.”).

22. Hersher, *supra* note 3.

23. ENERGY TRANSFER PARTNERS, DAKOTA ACCESS, CRUDE OIL PIPELINE PROJECT IOWA INFORMATIONAL MEETINGS 5 (2014); *see also* Carly Sue, *Dakota Access Pipeline: What You Need to Know*, Nat’l Geographic: Educ. Blog (Sept. 5, 2016), <https://blog.education.nationalgeographic.com/2016/09/05/dakota-access-pipeline-what-you-need-to-know/> [<https://perma.cc/85RF-BNYK>] (stating the spiritual and cultural importance of the land to the tribes).

pipeline without having the requisite permit under the Missouri River.²⁴ The DAPL, however, crosses federally regulated waters of the United States under the Corps' jurisdiction at least 204 times, each of which the Corps evaluated individually rather than cumulatively as requested by the Tribes.²⁵

The pipeline crosses the Missouri River in two locations directly upstream of the Standing Rock Reservation, and under the river at Lake Oahe.²⁶ During the initial scoping process, the Corps met with the citizens of the City of Bismarck about the proposed location of the pipeline, which was about ten miles northeast of the City.²⁷ Based upon the City's objections, the Corps rerouted it to 0.5 miles north of the Standing Rock Sioux Reservation.²⁸ Dakota Access sought to obtain authorizations through section 404 of the Clean Water Act (CWA), the Mineral Leasing Act, and the Rivers and Harbors Act.²⁹ Dakota Access utilized the Corps' Nationwide Permit 12 (NWP 12) process, which grants an exemption from environmental review required under the CWA by treating the pipeline as a series of small construction sites. A NWP 12 permit authorizes pipeline crossings of regulated waters where the activity is a single and complete project and will disturb no more than a half-acre of waters of the United States.³⁰ The Tribes argued that NEPA should have been applied to the entire pipeline project before issuing any of the Nationwide Permits to Dakota Access.

Given the required Corps approvals, the Corps was obligated to consult with affected tribes in accordance with consultation obligations. This includes those under section 106 of the National Historic Preservation Act (NHPA),³¹ even though the impacted areas were outside existing

24. Rob Capriccioso, *Senators Allege DAPL Builder Didn't Have Permit to Build Under Lake Oahe*, INDIAN COUNTRY TODAY (Apr. 7, 2017), <https://indiancountrymedianetwork.com/news/politics/senators-dapl-builder-no-permit/> [https://perma.cc/2NTF-TGZ3].

25. Stern, *supra* note 4.

26. Gregor Aisch & K.K. Rebecca Lai, *The Conflicts Along 1,172 Miles of the Dakota Access Pipeline*, N.Y. TIMES, <https://www.nytimes.com/interactive/2016/11/23/us/dakota-access-pipeline-protest-map.html> [https://perma.cc/U2SX-RGJX] (last updated Mar. 20, 2017).

27. Amy Dalrymple, *Pipeline Route Plan First Called for Crossing North of Bismarck*, BISMARCK TRIBUNE (Aug. 18, 2016), http://bismarcktribune.com/news/state-and-regional/pipeline-route-plan-first-called-for-crossing-north-of-bismarck/article_64d053e4-8a1a-5198-a1dd-498d386c933c.html [https://perma.cc/9GKD-5PP8].

28. *Id.*

29. Press Release, U.S. Army Corps of Eng'rs, No Decision Yet Regarding Water Crossings for Dakota Access Pipeline (May 3, 2016) (on file with U.S. Army Corps of Engineers); *Dakota Access Pipeline FAQ's*, U.S. ARMY CORPS ENGINEERS, www.usace.army.mil/Dakota-Access-Pipeline/FAQs/ [https://perma.cc/X8SJ-XZEE] (last visited Mar. 22, 2018).

30. U.S. ARMY CORPS OF ENG'RS, 2017 NATIONWIDE PERMITS, GENERAL CONDITIONS, DISTRICT ENGINEER'S DECISION, FURTHER INFORMATION, AND DEFINITIONS 5, 7 (2017).

31. 54 U.S.C. § 306108 (2012); *see* 36 C.F.R. § 800.15(f) (2017) (defining consultation as "the process of seeking, discussing, and considering the views of other participants, and

reservation boundaries. The Corps also owed fiduciary duties to the tribes and other tribal governments.³² The trust responsibility itself, apart from any specific treaty, statute, or agreement, creates legally enforceable duties for federal officials in their dealings with Indian tribes.³³ As part of implementing its trust responsibilities to tribal governments under numerous federal laws, executive orders, and guidance documents, federal agencies must consult with tribes when they take actions affecting tribal interests, lands, etc.³⁴

The Corps asserted that the Standing Rock Sioux Tribe was unresponsive to initial requests for comments and that, when the Tribe expressed concerns or opposition, they were included in its decision.³⁵ Standing Rock alleged the opposite and argued that, as a tribal government, they should have been meaningfully engaged in the early stages of the pipeline planning due to the pipeline's close proximity to the Reservation and to locations with cultural, social, and religious significance to the Tribe.³⁶

On July 27, 2016, immediately after the Corps released the final Environmental Assessment and Mitigated Finding of No Significant Impact,³⁷ the Standing Rock Sioux Tribe filed suit in United States District Court for the District of Columbia.³⁸ The complaint alleged two main arguments. First, that in issuing the permit, the Corps failed to comply with

where feasible, seeking agreement with them regarding matters arising in the section 106 process"); 36 C.F.R. § 800.2(a)(4) (requiring consultations "be appropriate to the scale of the undertaking"); 36 C.F.R. § 800.2(c)(2)(ii)(A)–(E) (requiring consultations "commence early in the planning process" and agencies "provide the Indian tribe...a reasonable opportunity to identify its concerns about historic properties, advise on the identification of historic properties and participate in the resolution of adverse effects." Further, agencies must negotiate and reach mutual consent on agreements regarding historic and cultural property issues, and allow tribal governments to participate in the resolution of adverse effects to such resources); Pueblo of Sandia, 50 F.3d 856, 862 (10th Cir. 1995) (holding that the U.S. Forest Service violated the NHPA by failing to take reasonable efforts to identify historic properties).

32. United States v. Mitchell, 463 U.S. 206, 225 (1983).

33. Nw. Sea Farms v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515, 1519–20 (W.D. Wash. 2001) (holding the fiduciary "duty extends to the Corps in the exercise of its permit decisions" in the case of the Dakota Access pipeline); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941); United States v. Creek Nation, 295 U.S. 103, 109 (1935); Shoshone Tribe v. United States, 299 U.S. 476, 498 (1937).

34. Parravano v. Babbitt, 70 F.3d 539, 546 (9th Cir. 1995) ("[The] trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole."); see also Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1491 (1994) (discussing the promise of the trust doctrine to protect tribal interests); Seminole Nation v. United States, 316 U.S. 286, 296–97 (1941) (finding the Supreme Court has consistently recognized that the United States "is something more than a mere contracting party" with Indian tribes and has "charged itself with the moral obligation of the highest responsibility and trust" to those tribes).

35. Standing Rock v. U.S. Corps of Eng'rs, 205 F. Supp. 3d 4, 15, 18 (D.D.C. 2016)

36. *Id.* at 33.

37. U.S. ARMY CORPS OF ENG'RS, DECISION DOCUMENT, NATIONWIDE PERMIT 12 (2012).

38. See generally Standing Rock Complaint, *supra* note 5.

NHPA section 106 and “abdicated its statutory responsibility to ensure that . . . undertakings [such as DAPL] do not harm historically and culturally significant sites.”³⁹ Second, the complaint alleged that in issuing “multiple federal authorizations needed to construct the pipeline in certain designated areas along the pipeline route,” the Corps failed to comply with the NHPA and the National Environmental Policy Act (NEPA).⁴⁰

On September 9, 2016, the district court denied the injunction sought by the Tribe.⁴¹ Hours later, the Department of Justice, the Department of the Army, and the Department of the Interior issued a joint statement following the court’s order and pending appeal.⁴² It stated in part:

The Army will not authorize constructing the Dakota Access pipeline on Corps land bordering or under Lake Oahe until it can determine whether it will need to reconsider any of its previous decisions regarding the Lake Oahe site Therefore, construction of the pipeline on Army Corps land bordering or under Lake Oahe will not go forward at this time. . . . In the interim, we request that the pipeline company voluntarily pause all construction activity within 20 miles east or west of Lake Oahe.⁴³

On December 4, 2016, the U.S. Department of the Interior Solicitor, Hilary Tompkins, submitted an M-opinion analyzing the responsibility of the federal government with regard to the Tribes’ legal rights.⁴⁴ The Interior Solicitor advised the Corps that the environmental assessment and finding of no significant impact for the pipeline did not adequately consider tribal treaty rights and required more than “a dismissive note that a project is situated off-reservation.”⁴⁵ Also in December 2016, after extensive analysis and input from the Tribe and other tribes throughout the United States, the Corps committed to prepare a full Environmental Impact Statement (EIS). The full EIS would address the Tribe’s treaty rights, alternative pipeline routings outside of the Tribe’s treaty areas, and oil-spill risks.⁴⁶

39. *Id.* ¶ 2.

40. *Id.* ¶ 3.

41. Hersher, *supra* note 3.

42. Press Release, Joint Statement, Dep’t of Justice, Dep’t of the Army & 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>.

43. *Id.*

44. DOI Solicitor’s Dakota Access Memo, *supra* note 10, at 1.

45. *Id.* at 22.

46. Plaintiff Standing Rock Sioux Tribe’s Memorandum in Support of Its Motion for Partial Summary Judgment at 1, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs, 239 F. Supp. 3d 77 (D.D.C. 2017) [hereinafter Plaintiff’s Memorandum].

On January 18, 2017, the Corps initiated the preparation of an EIS by publishing a notice of intent and opening public comment.⁴⁷ On January 20, 2017, President Trump issued an Executive Order “expediting environmental reviews and approvals for high priority infrastructure projects”⁴⁸ together with two Presidential Memoranda, including one regarding DAPL.⁴⁹ On February 7, 2017, the Corps abruptly terminated the public comment period and announced that it would grant Dakota Access the easement to cross Lake Oahe.⁵⁰ The termination decision contained no additional analysis of the Tribe’s treaty rights, alternative routes, or oil-spill risks.⁵¹ Rather than taking steps to fulfill its fiduciary duties to the Tribe, the Corps simply dismissed them. On February 7, 2017, the Corps notified members of Congress and others of its “intent to grant an easement” for a term of 30 years under section 185.⁵² The Corps granted the easement, and a few months later the oil began flowing through the Dakota Access pipeline.⁵³

On June 14, 2017, Judge Boasberg issued a 91-page opinion on the parties’ cross-motions for summary judgment.⁵⁴ Judge Boasberg held that the Corps failed to adequately consider under NEPA the impacts of an oil spill on the Standing Rock Sioux Tribe.⁵⁵ Specifically, their treaty hunting and fishing rights, or environmental justice, or the degree to which the DAPL effects are likely to be highly controversial.⁵⁶ The court remanded the matter to the Corps forcing them to address the violations and to reexamine the inadequate sections of its environmental analysis and its

47. Notice of Intent to Prepare an Environmental Impact Statement in Connection with Dakota Access, LLC’s Request for an Easement to Cross Lake Oahe, North Dakota, 82 Fed. Reg. 5543, 5543 (Jan. 18, 2017).

48. Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 24, 2017).

49. *Presidential Memorandum Regarding Construction of the Dakota Access Pipeline* (Jan. 24, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-dakota-access-pipeline> [https://perma.cc/BG5Y-WXEB] [hereinafter *Presidential Memorandum*].

50. Response of Dakota Access, LLC in Opposition to Plaintiff Standing Rock Sioux Tribe’s Motion for Summary Judgement at 14, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 239 F. Supp. 3d 77 (D.D.C. 2017).

51. Plaintiff’s Memorandum, *supra* note 46, at 17.

52. *See, e.g.*, Letter from Paul D. Cramer, Deputy Assistant Sec’y of the Army, Installations, Hous., & P’ship to Raul Grijalva, Ranking Member, House of Rep. Comm. on Nat. Res. (Feb. 7, 2017).

53. Hersher, *supra* note 3; Merrit Kennedy, *Crude Oil Begins to Flow Through Controversial Dakota Access Pipeline*, NPR (June 1, 2017, 5:23 PM), <https://www.npr.org/sections/thetwo-way/2017/06/01/531097758/crude-oil-begins-to-flow-through-controversial-dakota-access-pipeline>.

54. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 120–21 (D.D.C. 2017).

55. *Id.* at 147.

56. *Id.* at 112.

approval of the DAPL.⁵⁷ The court requested additional briefings from the parties on the remedy during the remand to the Corps' review.⁵⁸

With regard to the Fort Laramie Treaty hunting and fishing rights, the court found that the Tribe's Department of Game, Fish, and Wildlife Conservation submitted comments on the Draft Environmental Assessment (EA) and explained that many tribal members rely on fishing and hunting of animals that drink from the Oahe shoreline.⁵⁹ The court noted that the Corps' "cursory nod" failed to acknowledge the potential effects of an oil spill on tribal resources.⁶⁰ The court stated that the Corps to identify the risks of a spill to wild and aquatic life, all resources impacting the Tribe's treaty rights.⁶¹

The court also held that the EA violated Environmental Justice Executive Order 12,898 and NEPA.⁶² The use of a half-mile buffer was not reasonable and too limited because it failed to analyze the oil pipeline impacts on potentially affected minority and low-income populations.⁶³ The half-mile buffer is typically used in transportation projects and natural gas pipelines.⁶⁴ The court notes the Environmental Protection Agency (EPA) advised the Corps that the assessment of the impacts should "correspond to the impacts of the proposed project instead of only the area of construction disturbance," but the Corps did not accept the EPA's advice.⁶⁵ The Corps' limited review would only cover construction impacts, not spill impacts, downstream. The court noted that the EA is "silent" on the cultural practices and social and economic factors of the Tribe; therefore, the EA did not properly consider the environmental-justice implications of the pipeline on the tribal community.⁶⁶

Meanwhile, the litigation continues in federal court. The impact of the DAPL standoff, litigation, and political maneuvering is significant. It has created a ripple effect throughout Indian Country and has deeply affected federal-tribal relations, Native-non-native relations in North Dakota, and tribal-energy industry relations. Tribal opposition to energy-infrastructure development will likely continue in the future as energy rights of way are renewed or new easements are proposed.⁶⁷ Alternatively, tribes and energy

57. *Id.*

58. *Id.* 147–48.

59. *Id.* at 134.

60. *Id.*

61. *Id.* at 147–48.

62. *Id.* at 140.

63. *Id.* at 138–40.

64. *Id.* at 138.

65. *Id.*

66. *Id.* at 140.

67. Heather Saucier, *Protesting Pipelines Is Becoming a Growing 'Industry,'* (Sept. 19, 2017),

companies may seek to resolve their differences in face-to-face engagement and communicate and collaborate on off-reservation matters.

II. PROTECTING THE SOLEMN PROMISES MADE IN TREATIES

This part explains the reserved rights of tribal nations and land ethics. In DAPL, and across the country, tribes seek to protect their land base, tribal sovereignty, and treaty rights because Native peoples have irreplaceable political and territorial histories and cultural identities. Their rural communities have been, and still are, confronted in different degrees by environmentally damaging energy projects for their rich natural resources or as a corridor for transmission of fossil fuels. These projects would not be tolerated in more populated regions. Control over tribal territories and the rights reserved by treaties are key components of tribal self-determination and cultural survival. Recognition and respect for these tribal interests are paramount to begin discussions and potential resolution of disputes with the energy industry.

A. Reserved Treaty Rights

In *Standing Rock Sioux*, the court recognized the Tribe's historic Fort Laramie Treaty rights, determined that the Corps failed to adequately assess the impacts of the DAPL on these vital treaty-reserved rights, and remanded for further assessment by the Corps.⁶⁸ This contemporary judicial review of treaties demonstrates their continued importance in tribal societies and how these bargained-for promises—reserving rights such as water, hunting, fishing, and gathering—impact society's view of oil and gas pipeline construction. Federal law does not permit abrogation of Indian treaty rights, absent express congressional authorization.⁶⁹ Accordingly, energy companies seeking rights of way must not interfere with the off-reservation treaty rights of tribes. It is also incumbent upon the United States in federal agency decision-making to protect or accommodate Indian treaty rights when reviewing applications for easements that seek to either cross treaty-reserved lands or affect treaty-reserved rights.

http://www.rigzone.com/news/oil_gas/a/151792/Protesting_Is_Becoming_A_Growing%20_Industry/?alI=HG2 [https://perma.cc/324R-EM3Q]

68. *Presidential Memorandum*, *supra* note 49; Carla F. Fredericks, *Operationalizing Free, Prior and Informed Consent*, 80 ALBANY L. REV. 429, 472–77 (2017).

69. *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968).

Indian treaty rights to hunt, fish, and gather are property rights protected under federal law.⁷⁰ Treaties are bargained-for agreements entered into between Indian tribes and the United States pursuant to the United States Constitution.⁷¹ This clause grants the President the power to negotiate treaties subject to ratification by two-thirds of the Senate.⁷² Over 700 treaties were negotiated with Indian tribes, and about 400 remain in force today.⁷³ These treaties establish the federal-tribal relationship and reserve and protect numerous tribal rights. Nearly all treaties promised a permanent homeland and federal promises to provide food, clothing, and services to tribes.⁷⁴

In *United States v. Winans*, one of the first treaty fishing cases, the Supreme Court confirmed that hunting, fishing, and gathering rights were vital to tribal life.⁷⁵ The court stated that these activities “were not much less necessary to the existence of the Indians than the atmosphere they breathed.”⁷⁶ In *Winans*, the Court held that tribal members possess an easement of access over privately held land as necessary to the exercise of treaty hunting, fishing, and gathering rights and that an access easement was necessarily implied from the treaties’ specific reservation of fishing rights at usual and accustomed places.⁷⁷ These hunting, fishing, and gathering rights are considered reserved treaty rights and have been consistently protected from shifting patterns of property ownership and development.⁷⁸

The importance of these traditional tribal practices was paramount in treaty negotiations where tribes sought to retain these rights when they signed treaties and agreements ceding ownership to their land to the United States. Indeed, treaties reserving hunting, fishing, and gathering rights over previously owned tribal lands do not constitute a “grant of rights to the Indians, but a grant of right[s] from them,—a reservation of those not granted.”⁷⁹ Treaty-reserved rights on off-reservation lands are similar to easements running with burdened lands and include easements to access

70. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 707–08 (1979) (holding that Indians have the implied rights necessary to exercise a treaty’s explicit or substantive provisions); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight*, 700 F.2d 341, 352 (7th Cir. 1983); see *Menominee*, 391 U.S. at 413 (finding treaty property rights remain unless there is an explicit congressional abrogation).

71. U.S. CONST., art. II, § 2, cl. 2.

72. *Id.*

73. MATTHEW L.M. FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW 150 (2017).

74. See CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 14–15 (1987) (providing an overview of the promises in treaties).

75. *United States v. Winans*, 198 U.S. 371, 371 (1905).

76. *Id.* at 381.

77. *Id.*

78. *Id.* at 381–82.

79. *Id.* at 381.

hunting, fishing, and gathering sites.⁸⁰ Accordingly, “reserved rights on off-reservation lands do not require the tribe to have title to the underlying land.”⁸¹

Once these off-reservation rights are reserved by treaty or agreement, the rights survive subsequent tribal cession of the land, unless the rights are clearly and plainly extinguished.⁸² These treaty-reserved rights are property rights within the meaning of the Fifth Amendment; Congress and the courts cannot take these rights without providing compensation.⁸³ Treaty language reserving hunting, fishing, and gathering rights are to be construed according to the Indian law canons of construction.⁸⁴ For example, treaties are to be interpreted liberally in favor of Indians, treaty ambiguities are to be resolved in Indians’ favor, and treaties are to be interpreted as Indians would have understood them.⁸⁵

Additionally, aboriginal or original Indian title includes the right to hunt, fish, and gather.⁸⁶ These rights remain in the tribe unless it has been granted to the United States by treaty, abandoned, or extinguished by statute.⁸⁷ The power to extinguish aboriginal title rests exclusively with the United States,⁸⁸ and if title to land is extinguished, the rights to hunt, fish, and gather are extinguished unless reserved by treaty, statute, or executive order.⁸⁹

80. See *id.* (“[The treaties] imposed a servitude upon every piece of land as though described therein.”).

81. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 18.02 (Nell Jessup Newton ed., 2012); see also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (finding that although the Tribe ceded title to their land they did not give up usufructuary rights to hunting, fishing, and gathering); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight*, 700 F.2d 341, 352 (7th Cir. 1983) (“Treaty-recognized rights of use, or usufructuary rights, do not necessarily require that the tribe have title to the land.”); *United States v. Michigan*, 471 F. Supp. 192, 213 (6th Cir. 1979) (discussing reserved fishing rights).

82. *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 197; see Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows, or Grass Grows upon the Earth” – How Long a Time Is That?*, 63 CALIF. L. REV. 601, 637–38 (1975).

83. *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988).

84. *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 194 n.5, 196, 200.

85. *County of Oneida v. Oneida Indian Tribe*, 470 U.S. 226, 247 (1985); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1929); *Jones v. Meehan*, 175 U.S. 1, 10–11 (1899) (“[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.”).

86. *Mitchell v. United States*, 34 U.S. 710, 732–35 (1835) (finding aboriginal or original Indian title refers to land claimed by virtue of possession and tribal exercise of sovereignty). See generally Guy Carlton, *The Law of Native American Hunting, Fishing and Gathering Outside of Reservation Boundaries in the United States and Canada*, 39 CAN.–U.S. L.J. 69, 69 (2015) (discussing aboriginal title as applied to off-reservation hunting, fishing, and gathering rights).

87. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941).

88. *Id.*; see *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 202–03 (explaining that such extinguishment must be clearly expressed in a treaty or statute).

89. See generally *Jones v. Meehan*, 175 U.S. 1 (1899) (expressing that use and conveyance language must be specific in order to continue use of the land in ways prior afforded).

In 1908, in *Winters v. United States*, the Supreme Court held that when the federal government set aside land for the Gros Ventre and Assiniboine Sioux tribes of the Fort Belknap Indian Reservation in Montana, it impliedly reserved sufficient water from the Milk River to fulfill its purpose for creating the Reservation.⁹⁰ The purpose was to provide a permanent tribal homeland with an agricultural economy.⁹¹ Department of Interior's Indian Water Office criteria for Indian Water Rights Settlements recognize that "Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians."⁹²

Since *Winters*, courts addressing tribal-reserved water rights for fisheries have recognized habitat protection as the basis for Indian-reserved water rights.⁹³ In the *United States v. Adair and Colville Confederated Tribes v. Walton (Walton I)* decisions, the Ninth Circuit recognized that the reserved treaty rights to fish on rivers and to gather aquatic plants require the presence of sufficient water to maintain the rivers, lakes, and other waterways upon which the plants and fisheries depend.⁹⁴ These Indian-reserved rights are property rights with a "priority date of time immemorial,"⁹⁵ and thus, are superior in rank to any water rights created under other state or federal law.⁹⁶ Federal and state agencies, as well as private parties, may not interfere with these *in situ* water rights.⁹⁷ Neither states nor private property owners may bar tribal access to areas subject to treaty hunting, fishing, and gathering rights.⁹⁸ This principle also applies to federal agencies.⁹⁹

B. Tribal Land Ethics

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90. *Winters v. United States*, 207 U.S. 564, 577 (1908).
 91. *Id.*
 92. Criteria and Procedures for Indian Water Rights Settlements, 55 Fed. Reg. 9223 (Mar. 12, 1990).
 93. Joint Bd. of Control of Flathead, Mission & Jocko Irrigation Dists. v. United States, 832 F.2d 1127, 1132 (9th Cir. 1987) (reversing the trial court's refusal to issue an injunction to protect tribal water rights for fish); Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1033 (9th Cir. 1985) (holding that the district court acted appropriately in ordering the release of water to protect the fishery habitat); *United States v. Adair*, 723 F.2d 1394, 1415 (9th Cir. 1983).
 94. *Adair*, 723 F.2d at 1415; *Colville Confederated Tribes v. Walton (Walton I)*, 647 F.2d 42, 48 (9th Cir. 1981).
 95. *Adair*, 723 F.2d at 1414.
 96. *Id.* at 1415.
 97. *Id.* at 1418.
 98. *United States v. Winans*, 198 U.S. 371, 381-82 (1905).
 99. *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553, 553-54, 556 (D. Or. 1977) (discussing that the Army Corps of Engineers may not construct a dam that will destroy fishing stations without express authorization by Congress).

In addition to treaty rights and water and habitat protection, tribes have legitimate ties to water and land resources that are part of their traditions. For some tribal peoples, their creation stories are tied to large water bodies, rivers, or lands.¹⁰⁰ Thus, there is a special relationship with water and it is sacred to them. For example,

[w]hen [tribal people] say “water is life,” they are speaking in terms of their Creation story, where they originated, and thus give respect and reverence to their place of origin. They also mean that water is a living being or spirit that has healing powers. Finally, they know that all human and non-human beings must have water to survive.¹⁰¹

The Dakota, Lakota, and Nakota speaking people involved in the DAPL dispute have strongly voiced opposition to the DAPL because of the risk of it polluting water sources critically tied to their cultures and their very being.¹⁰² Tribes have vastly different traditional perspectives about land than the majority of society.¹⁰³ The tribal ethic is grounded in a deep respect for all of nature.¹⁰⁴ Tribal ceremonies renew the Earth, so in turn the Earth will continue to support tribes.¹⁰⁵ Great respect for the creation, and all those beings that are part of the creation, reaffirms the relationship between humans and the creation. Annual ceremonies, therefore, are practiced at areas that may occur off-reservation where the tribal people emerged from the land or water.¹⁰⁶ This deep relationship with ancestral homelands for religious communion, identity, and family ties continues to sustain tribal communities.¹⁰⁷ The many landscapes located on aboriginal lands are the holy lands of tribes.¹⁰⁸ Accordingly, tribal people have a spiritual duty to protect these holy lands and safeguard the relationship between the people and Earth, its creator, for future generations.¹⁰⁹

100. For example, as a member of the Shoshone-Bannock Tribes, the author knows her Tribal origin story is tied to water, and many tribes have similar creation stories connected to the Earth, sky, or waters of the universe.

101. Jeanette Wolfley, *Biagaweit: Securing Water from the Mighty River in the Snake River Basin Adjudication*, 52 IDAHO L. REV. 313, 316 (2016).

102. Standing Rock Complaint, *supra* note 5, ¶ 9.

103. See Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 46 U. MICH. J.L. REFORM 417, 419 (2013) (discussing the impacts a lack of consultation can have on a tribe).

104. Elizabeth Ann Kronk Warner, *Working to Protect the Seventh Generation: Indigenous People as Agents of Change*, 13 SANTA CLARA J. INT'L L. 273, 278 (2015).

105. See generally *id.* (discussing how all honored areas are subject to ceremonies).

106. *Id.*

107. See generally Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 228 (1996) (discussing the significance of the land to American Indian nations).

108. *Id.*

109. *Id.*

For centuries, native peoples inhabited and flourished in their aboriginal and cultural landscapes where creation stories formed their very being and natural world. The mountains, foothills, canyons and meadows provided shelter from winter storms and summer heat, sustained herds of game animals, plants and medicines, and served as places for tribal gatherings, and religious celebrations. These were the landscapes that had been shaped by thousands of years of native use and habitation.¹¹⁰

The continuing link between the tribal communities and their holy lands is critical to Native people's continuing political and social wellbeing, cultural identity, and tribal sovereignty. Tribes "have a special relationship with their land and water[,] which they see as imbued with a spirituality and sacredness not generally understood by others."¹¹¹ The land and water for them is more than just a habitat or political boundary; it is the basis of the tribes' origin, social organization, economic system, and cultural identification. And it is threats to the land and water, and thereby to tribal lifestyle, that prompts and guides the tribal efforts to protect and preserve the water for present and future generations.

Today, Native people face many challenges to protect and preserve their spiritual traditions. The traditions of laws, customs, and languages play a critical role in tribal ways of life. Without this basic understanding and respect for these tribal traditions, there is nothing that the written law can do to preserve tribal histories, oral literatures, sciences, artistic traditions, or their very being.

For indigenous tribal people of the United States, creation stories, songs, prayers, and traditional ecological knowledge and wisdom teach them to visualize and understand the connections between the physical environment, the spiritual values that create and bind a tribal community, and the social welfare of the community.¹¹² Tribal people are taught a system of values that induce a profound attitude of respect for the natural forces that give life to the complex world of which they are but a small part.¹¹³ This traditional ecological knowledge held by indigenous peoples of the United States will continue to be the beacon for tribal ways of life and will guide tribal peoples into the next century.

110. Jeanette Wolfley, *Reclaiming a Presence in Ancestral Lands: The Return of Native Peoples to the National Parks*, 56 NAT. RES. J. 55, 55 (2016).

111. Wolfley, *supra* note 101, at 316.

112. Jeanette Wolfley, *Ecological Risk Assessment and Management: Their Failure to Value Indigenous Traditional Ecological Knowledge and Protect Tribal Homelands*, 22 AM. INDIAN CULTURE AND RES. J. 151, 152 (1998).

113. *Id.* at 159–60.

The protection of tribal treaty-reserved rights is a vital concern of tribes across the United States. The solemn promises to protect these rights by the United States is even more important today because of the increase in oil and gas production and the shipping of oil and gas across tribal lands. Tribes, as witnessed in the DAPL conflict, will not sacrifice their treaty rights, which secured the right to hunt, fish, gather, protect water habitats, and preserve water resources for cultural vitality. They will fulfill their responsibility to steward the land and water for future generations.

III. THE ENERGY INDUSTRY'S SOCIAL RESPONSIBILITIES

So, what value would there be for the energy industry to engage with and adopt voluntary principles of discourse with tribal governments? There are several reasons companies should seek such engagement. The decision to do so supports respect for tribal sovereignty, promotes overall engagement and cooperation, and encourages community collaboration for other potential projects.¹¹⁴ While tribes do not expect a corporation to owe loyalty to these tribal values, corporations have good reason to consider these issues. From an industry perspective, active engagement may decrease future litigation risks, expedite projects, reduce costs, and address the negative public perception of industry not considering public or tribal interests.¹¹⁵ Certainly, conflict with communities increases reputation and legal risks for industry companies. Reputation is an energy industry company's lifeblood because it is the key to attracting quality partners, gaining the opportunity to extract and distinguish one company from another, generating revenue, and paying dividends to its stockholders.¹¹⁶ Media reports, lawsuits, and activist campaigns bring international attention to the negative effects of a company's projects and can taint reputations.

The DAPL is a prime example of the adverse consequences that can result from not engaging tribal communities and the public. The nine-month standoff attended by thousands of protestors at the rural tribal community and the litigation by the Standing Rock and Cheyenne River Sioux tribes brought international attention to the Dakota Access project.¹¹⁷ During this

114. David M. Schraver & David H. Tennant, *Indian Tribal Sovereignty*, 75 ALBANY L. REV. 133, 174 (2012).

115. See SHIFT & INST. FOR HUMAN RIGHTS & BUS., OIL AND GAS SECTOR GUIDE ON IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 8 (2013).

116. See generally David B. Spence, *Corporate Social Responsibility in the Oil and Gas Industry: The Importance of Reputational Risk*, 86 CHI.-KENT L. REV. 59 (2011) (discussing examples of corporate liability and the impacts a negative reputation can have on a business).

117. Complaint of Energy Transfer Equity ¶ 10, *Energy Transfer Equity v. Greenpeace Int'l. et al.*, No. 1:17-cv-00173-CSM (D.N.D. Aug. 22, 2017).

period, three international banks divested their money from the DAPL project, and U.S. cities closed their accounts in banks supporting the company.¹¹⁸ Energy Transfer Partners has felt the sting of this publicity and loss of revenue, so much so that Energy Transfer Partners has filed a \$300 million Racketeer Influenced and Corrupt Organization lawsuit in the federal court of North Dakota against Greenpeace and other environmental groups for their activism against the DAPL project.¹¹⁹ The 187-page complaint alleges the environmental groups tainted its reputation causing it to lose billions of dollars.¹²⁰ The aftermath of such controversies necessitates public relations campaigns to repair the damage, which are expensive endeavors that take up significant managerial time.¹²¹

Finally, companies that make enemies out of the populations affected by their projects experience higher corporate and political risks.¹²² The disruption or loss of a project may reduce a company's profitability, asset values, and stock price. Well-diversified companies also suffer, due to the ripple effects such events can have on a company's reputation.¹²³

In addition to ruining a company's reputation, tribal and community opposition can cause significant other risks including: (1) reduced access to capital; (2) increased construction costs and delays; (3) reduced access to critical project labor and material inputs; (4) operational delays and increased production costs; (5) reduced demand for products (particularly name-brand consumer items); and (6) increased costs of post-hoc mitigation of environmental and social impacts.¹²⁴ "Moreover, community resistance can have adverse impacts on corporate operations beyond the scope of an individual project, including negative impacts on stock prices, brands, and reputations, and greater difficulty in securing financing, insurance, and community cooperation in future projects."¹²⁵

Involving tribal communities in an engagement process can produce significant benefits for a company, the region, and the environment. Tribal support can save time, which can yield significant monetary benefits. For a

118. Bill Chappell, *2 Cities to Pull More than \$3 Billion from Wells Fargo over Dakota Access Pipeline*, NPR (Feb. 8, 2017, 2:18 PM), <http://www.npr.org/sections/thetwo-way/2017/02/08/514133514/two-cities-vote-to-pull-more-than-3-billion-from-wells-fargo-over-dakota-pipeline> [<https://perma.cc/P4P7-WKZQ>] (reporting that Norway's DNB Bank, Dutch company ING, and BNP Paribas of France divested their money from the DAPL project, and the cities of Seattle, Los Angeles, San Francisco, Davis, and Santa Monica closed their accounts with Wells Fargo Bank.).

119. Complaint of Energy Transfer Equity, *supra* note 117, ¶ 388.

120. *Id.* ¶ 1.

121. Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69, 73 (2008).

122. *Id.*

123. *Id.*

124. STEVEN HERZ ET AL., DEVELOPMENT WITHOUT CONFLICT, THE BUSINESS CASE FOR COMMUNITY CONSENT 13 (2007).

125. *Id.*

large-scale infrastructure pipeline project, the total costs of engaging the affected tribal communities and gaining their consent are likely to be extremely small relative to the total project costs.¹²⁶ Moreover, a proven track record of harmonious tribal community relations can make future interactions with communities much easier and can help an energy company navigate other projects.

Reducing a community's feelings of disempowerment and economic distress can also alleviate community opposition. A 2000 study by the World Bank Group called "Voices of the Poor" found that the poor feel that their voices are not heard and that they have no control over the events that have the greatest impact on their lives.¹²⁷ The study documented that when communities feel excluded from participating in decision-making processes and have grievances regarding energy-industry projects, they may oppose projects that are detrimental to all stakeholders.¹²⁸ Thus, while energy-industry companies must address the negative impacts of their own operations, they also must address certain features of the communities in which they operate if they wish to avoid community opposition in the future. The risk the industry faces is a more organized and more mobilized opposition, which will make it arduous for corporations to meet their responsibilities to their shareholders.

Beginning in the 1990s, as a part of risk management, numerous corporate-social-responsibility principles, standards, best business practices, and human rights mechanisms have been employed by oil and gas companies in their international work with indigenous peoples and governments who did not have well-developed legal regimes.¹²⁹ The energy industry and other multi-national corporations

have been the subject of widespread criticism for human rights abuses they are alleged to have committed or to have had the ability to prevent. From remote indigenous communities in Nigeria, the Far East and Colombia to the streets of Seattle, Quebec City and Genoa, voices calling for corporate accountability have grown more persistent.¹³⁰

126. *Id.*

127. DEEPA NARAYAN ET AL., VOICES OF THE POOR: CAN ANYONE HEAR US? 229 (2000).

128. *See id.* at 15 (discussing poverty related studies).

129. *See, e.g.*, Spence, *supra* note 116, at 76–78 (explaining the trend toward socially responsible business practices).

130. Bennett Freeman et al., *A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 HASTINGS INT'L & COMP. L. REV. 423, 424 (2001).

Today, international energy industry companies call upon a range of corporate social responsibility initiatives, standards, and tools to help them manage community relations responsibly. Many major companies have codes of conduct in place. The current wave of corporate responsibility focuses on engagement of affected communities and stakeholders.¹³¹ The mechanisms developed in the international arena in response to international non-governmental organizations, indigenous peoples, and governments are explored to consider their application to energy companies in the United States that affect tribal nations.

A. Corporate Social Responsibility

Corporate social responsibility (CSR) is gaining more support in the business world.¹³² CSR is based on the idea that companies owe duties to communities and stakeholders beyond those enshrined in the law.¹³³ “The word ‘responsibility’ implies a duty to someone or something; the use of the word ‘social’ as a modifier implies that companies owe duties to society at large.”¹³⁴ CSR is not new. Firms have always given company money to charitable organizations. Indeed, charitable philanthropy was the first wave of CSR methods.¹³⁵ For more than two decades now, heavily-regulated companies have explored ways in which they could move beyond compliance, particularly with respect to the environmental impacts of their actions. The second generation of CSR has called for social engagement of local communities and building relationships with countries and corporations.¹³⁶ CSR assists in moving away from opposition and toward constructive engagement. CSR enables the parties to discuss and resolve a wide variety of issues beyond the environment, such as human rights violations, cultural rights, land issues, and general societal impacts.

A variety of joint initiatives addressing human rights issues in the business context have emerged, including the United Nations Global Compact.¹³⁷ In an address to the World Economic Forum on January 31,

131. See generally GLOBAL REPORTING INITIATIVE, THE EARTH CHARTER, GRI AND THE GLOBAL COMPACT: GUIDANCE TO USERS ON THE SYNERGIES IN APPLICATION AND REPORTING (2008) (discussing principles for strategic community investment).

132. See, e.g., PAC. CONT'L, THE IMPORTANCE OF CORPORATE SOCIAL RESPONSIBILITY 2 (2013) (describing the benefits of CSR practices).

133. See *id.* (emphasizing that the long-term health of a company relies on a focus of people, planet, and profit).

134. Spence, *supra* note 116 at 62.

135. *Id.*

136. See generally Doreen McBarnet, *The New Corporate Accountability: Corporate Social Responsibility Beyond Law, Through Law*, FOR LAW IN THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 9–58 (McBarnet, et al. eds. 2007).

137. *Our Mission*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission> [<https://perma.cc/H8CM-ZB8M>] (last visited Mar. 24, 2018).

1999, U.N. Secretary-General Kofi Annan extended an invitation to business leaders to join the Global Compact.¹³⁸ The Global Compact brought companies together with U.N. agencies, governments, labor, and civil society to support ten principles in the areas of human rights, labor, the environment, and anti-corruption.¹³⁹

Through policy dialogues, mutual learning, engagement, and collective action, this initiative seeks to advance responsible corporate citizenship so that business can be part of the solution to the challenges of globalization.¹⁴⁰ In practice, this means making sure that a company identifies, prevents, mitigates, and accounts for any negative impacts it may have on society and the environment. This establishes a culture of integrity and compliance. Despite nearly 9,000 companies and 4,000 non-businesses, and other stakeholders operating in more than 70 countries, it is important to keep in mind that commitments to the Global Compact's Principles are non-binding.¹⁴¹ Therefore, to be effective, they must rely on public accountability, transparency, and the enlightened self-interest of companies.¹⁴² Even though each principle is followed by implementation recommendations, opponents find them inconsequential, even misleading, because they lack proper enforcement mechanisms and are too general to generate accountability. Again, the lack of independent monitoring and enforcement via sanctions highlight the limited ambition, and therefore, impact, of this initiative in protecting against corporate abuse of human rights. The United Nations expressly acknowledges that it has neither the mandate, nor the capacity, to monitor and verify corporate practices.¹⁴³

138. The U.N. Glob. Compact Office, *The Global Compact Leaders Summit*, 2 (Oct. 2004).

139. *The Ten Principles of the UN Global Compact*, U.N. GLOBAL COMPACT <https://www.unglobalcompact.org/what-is-gc/mission/principles> [https://perma.cc/9EGA-ZBAJ] (last visited Mar. 30, 2018) (showing that the U.N. Global Compact's ten principles are derived from the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the U.N. Convention Against Corruption); see also David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 14 VA. J. INT'L L. 931, 951, 972 (2004) (stating the focus of the ten principles highlighted in the U.N. Global Compact).

140. See generally The U.N. Glob. Compact Office, *After the Signature: A Guide to Engagement in the United Nations Global Compact* 13, 17, 26 (Jan. 2012) (discussing sector-wide business initiatives on human rights).

141. *Our Participants*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/participants/> [https://perma.cc/SMJ8-X4LA] (listing those entities participating in the Global Compact); Kinley & Tadaki, *supra* note 139, at 951.

142. The U.N. Glob. Compact Office & Secretariat of the Org. for Econ. Co-operation & Dev., *The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and Distinctive Contributions* 3, 6 (Apr. 26, 2005).

143. Joshua Karliner et al., *The United Nations Sits in Suspicious Company*, N.Y. TIMES (Aug. 10, 2000), <http://www.nytimes.com/2000/08/10/opinion/the-united-nations-sits-in-suspicious-company.html> [https://perma.cc/EKM4-S23G].

Further, there is some concern as to the credibility of the Global Compact given that it is quite possible for corporations to continue to violate human rights while enjoying the status of signatory to the Global Compact.¹⁴⁴ Some have argued that “the Global Compact is little more than an instrument of rhetoric. It has indeed raised awareness of the issues involved, both within the corporate world and the UN itself, which is an important first step, but it is no more than that.”¹⁴⁵

No United States oil and gas company, and only one mining company, Newmont Mining Group, has adopted the Global Compact principles.¹⁴⁶ Why is it the United States energy industry has chosen not to embrace any of the United Nations principles, particularly principles 7–9, which encourage businesses to: (7) support a precautionary approach to environmental challenges; (8) undertake initiatives to promote greater environmental responsibility; and (9) encourage the development and diffusion of environmentally friendly technologies.¹⁴⁷ After all, these are non-binding voluntary principles that would support an energy industry’s commitment to social responsibility, concern for the environment, and enhance a company’s reputation. Perhaps, it has to do with the United Nations’ overarching goals of global sustainability, climate-change initiatives, promoting low-carbon emissions, and their link to the Global Compact principles for businesses being greener in the future.¹⁴⁸

Certainly, some energy companies in the United States would prefer to do business as usual and not concern themselves with such initiatives. Indeed, the current Administration does not recognize climate change and is unwilling to sign the Paris Agreement to begin addressing the dire environmental issues facing the world.¹⁴⁹ Unfortunately, it appears that until the United States government fully recognizes the adverse impacts of the energy industry on the atmosphere and other natural resources, energy companies are unlikely to embrace the Global Compact principles.

The United Nations further sought to impose human rights norms into corporate-business practices when it adopted the United Nations Norms on Responsibilities of Transactional Corporations and Other Business

144. *Id.*; Danny Kennedy, *Rio Tinto: Global Compact Violator*, GLOBAL POL’Y F., (July 13, 2001), <https://www.globalpolicy.org/component/content/article/225/32159.html> [<https://www.globalpolicy.org/component/content/article/225/32159.html>]; Kinley & Tadaki, *supra* note 139, at 951.

145. Kinley & Tadaki, *supra* note 139, at 951.

146. *Our Participants*, *supra* note 141.

147. The Ten Principles of the UN Global Compact, *supra* note 139.

148. G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015).

149. Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html> [<https://perma.cc/G2JQ-CMFL>].

Enterprises with Regard to Human Rights (Norms).¹⁵⁰ “The Norms represent a landmark step in holding businesses accountable for their human rights abuses and constitute a succinct, but comprehensive, restatement of the international legal principles applicable to businesses with regard to human rights, humanitarian law, international labor law, environmental law, consumer law, anticorruption law, and so forth.”¹⁵¹ The Norms provide more clarity and credibility than competing and vague voluntary codes by detailing specific obligations *vis-à-vis* rights to equal opportunity, non-discriminatory treatment, security of persons, and labor.¹⁵² The Norms are the first non-voluntary initiative accepted at the international level that go beyond the voluntary guidelines found in the UN Global Compact.¹⁵³ “The Norms have been welcomed by many nongovernmental organizations (NGOs) and others who would like to use the Norms to begin holding large businesses accountable for their human rights violations.”¹⁵⁴ The Norms call upon businesses to adopt their substance as the minimum standards for the company’s own codes of conduct or internal rules of operation and to adopt mechanisms for creating accountability within the company.¹⁵⁵

Businesses must also engage in periodic assessments and the preparation of impact statements. Assessments and impact statements must take into account comments made by stakeholders, and the results of any such assessments must be made available to all relevant stakeholders.¹⁵⁶ In addition, businesses are charged with assessing the human rights impacts of major new projects, and where an assessment shows inadequate compliance with the Norms, the Commentary requires the business to include a plan of action for reparation and redress.¹⁵⁷

Another initiative that expands the reach of human rights commitments beyond the corporation itself is the International Financial Corporation’s

150. Subcomm. on the Promotion & Protection of Human Rights, U.N. Econ. & Soc. Council (ESCOR), Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003). See generally *Business for Humanitarian Action*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/take-action/action/humanitarian> [<https://perma.cc/E8WH-TU9U>] (last visited Mar. 30, 2018) (discussing an action plan to integrate humanitarian efforts into business plans).

151. David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’L L. 901, 901 (2003).

152. *Id.* at 903–07.

153. *Id.* at 903.

154. *Id.*

155. *Id.* at 915–17.

156. *Id.* at 917.

157. Sub-Comm’n, Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2, ¶ 16(h) (2003).

Equator Principles (Principles).¹⁵⁸ In 2006, a coalition of more than forty of the world's largest private-sector financial institutions, the so-called Equator Principles Banks, agreed to harmonize their environmental and social policies with the International Finance Corporation's policies.¹⁵⁹ The Principles are an industry-wide framework for addressing environmental and social risks in project financing. Today, 92 financial institutions in 37 countries have adopted the Principles.¹⁶⁰ The Principles require developers to prepare assessments addressing involuntary resettlement, the impact on indigenous peoples and communities, human health, pollution, and socioeconomic factors.¹⁶¹ The developers then fully incorporate their results into project decisions by crafting management plans.¹⁶² The Principles also contemplate mitigation, monitoring, baseline studies, participation of affected parties (including indigenous peoples and local NGOs, in the design, review, and implementation of the project), and consideration of environmentally and socially preferable alternatives.¹⁶³ Finally, recognizing that "good stakeholder relations are a prerequisite for good risk management,"¹⁶⁴ the World Bank Group also began requiring project sponsors to engage in "meaningful stakeholder participation" processes in 1992.¹⁶⁵

The United States should adopt and utilize the Equator Principles when reviewing the various pipeline project plans of energy companies that impact tribal communities in this country. Only five United States banks have adopted the principles.¹⁶⁶ Under the Principles, banks and other financial businesses would require the energy industry to prepare assessments on their potential impacts on tribal communities, human health, pollution, and social factors as part of their finance package.¹⁶⁷ The Principles require energy companies to consider a myriad of studies,

158. See, e.g., ALLEN ARTHUR ROBINSON, *THE EQUATOR PRINCIPLES—GUIDELINES FOR RESPONSIBLE PROJECT FINANCING 1–4* (2005) (outlining various banks' commitments to social and environmental responsibility).

159. David B. Hunter, *Civil Society Networks and the Development of Environmental Standards at International Financial Institutions*, 8 *CHI. J. INT'L L.*, 437, 450 (2008).

160. *EP Association Members & Reporting*, EQUATOR PRINCIPLES, <http://www.equator-principles.com/index.php/members-reporting> [https://perma.cc/E7SC-JPWV] (last visited Mar. 30, 2018).

161. EQUATOR PRINCIPLES FIN. INSTS., *THE EQUATOR PRINCIPLES* 5, 20 (2013).

162. *Id.* at 7.

163. See generally *id.*

164. Laplante & Spears, *supra* note 121, at 69, 82 (2008).

165. *Id.*

166. *EP Association Members & Reporting*, *supra* note 160 (referencing Bank of America Corporation, Citigroup, Inc., Ex-Im Bank, JP Morgan Chase & Co., and Wells Fargo Bank, N.A., as the five banks who have adopted principles).

167. See EQUATOR PRINCIPLES FIN. INSTS., *supra* note 161, at 2 (stating that participating banks will not finance projects that do not adhere to the Equator Principles).

mitigation, and engage in meaningful stakeholder participation processes.¹⁶⁸ Three international financial institutions, Norway's DNB Bank, Dutch company ING, and BNP Paribas of France are all Principle Banks. These banks divested their money in the Energy Transfer Partners DAPL project, perhaps based on their commitment to social responsibility and their concerns regarding the adverse impacts to the tribal communities.¹⁶⁹ On the other hand, Wells Fargo, a United States bank that has adopted the Principles, refused to divest despite requests to do so by cities and the public.¹⁷⁰ This shows that the Principles are discretionary in nature and each financial institution, based on its own standards of social responsibility, may interpret the principles differently.

B. Good Business Principles and Standards

Many international energy corporations pledge to hold themselves to certain global minimum environmental standards, such as the ISO 14000 environmental management system.¹⁷¹ ISO 14000 is one of several standards established by the International Organization for Standardization, a private standards setting organization for business operations.¹⁷²

The actual environmental standards of ISO 14000 deal with how a company manages the environment inside its facilities and the immediate outside environment. However, the standards also call for analysis of the entire life cycle of a product, from raw material to eventual disposal. These standards do not mandate a particular level of pollution or performance, but focus on awareness of the processes and procedures that can affect the environment.¹⁷³

168. See Laplante & Spears, *supra* note 121, at 82 (discussing various efforts by the World Bank Group and the Equator Principles Banks to apply social and environmental responsibility standards to the energy sector).

169. See generally *EP Association Members & Reporting*, *supra* note 160 (providing information and reports on international institutions' investments).

170. *10 Banks Financing Dakota Access Pipeline Decline Meeting with Tribal Leaders*, FRIENDS EARTH (Jan. 10, 2017), <https://foe.org/2017-01-10-banks-financing-dakota-access-pipeline-decline-meeting-with-tribal-leaders/> [<https://perma.cc/6TU9-N7P6>].

171. See generally INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, <http://www.iso.org> [<https://perma.cc/UFM5-CNWP>] (listing international standards) (last visited Mar. 31, 2018).

172. OFFICE OF RESEARCH & DEV. & OFFICE OF POLLUTION PREVENTION & TOXICS, ENVTL. PROT. AGENCY, EPA/625/F-97/004, EPA STANDARDS NETWORK FACT SHEET: ISO 14000: INTERNATIONAL ENVIRONMENTAL MANAGEMENT STANDARDS 1 (1998).

173. Sino-Swedish Corp. Soc. Responsibility Cooperation, *ISO 14000 Overview*, SINO-SWEDISH CORP. SOC. RESP. WEBSITE (May 14, 2009, 2:57 PM), <http://csr2.mofcom.gov.cn/article/policies/intl/201408/20140800712476.shtml> [<https://perma.cc/FPH4-N4BQ>].

In short, the standards are intended to assist organizations with managing the environmental effects of their business practices. “It should be noted that adherence to the ISO 14000 standards does not in any way release a company from any national or local regulations regarding specific performance issues regarding the environment.”¹⁷⁴

A recent 2007 standard, ISO 26000, which focuses on social responsibility, “assists organizations in contributing to sustainable development.”¹⁷⁵

It is intended to encourage any organization to go beyond legal compliance, recognizing that compliance with law is a fundamental duty of any organization and an essential part of their social responsibility. It is intended to promote common understanding in the field of social responsibility, and to complement other instruments and initiatives for social responsibility, not to replace them.¹⁷⁶

ISO 26000 defines “social responsibility” as the responsibility of organizations for their impact on society and the environment, as evidenced through transparent and ethical behavior that:

- (1) Contribute[s] to sustainable development, including health and welfare of society;
- (2) Takes into account the expectations of stakeholders;
- (3) Is in compliance with applicable law and consistent with international norms of behavior; and
- (4) Is integrated throughout the organization and practices in its relationships.¹⁷⁷

Energy-industry trade associations also have developed guidelines for their members.¹⁷⁸ The International Council on Mining and Metals instituted a Sustainable Development Framework and has issued numerous

174. *Id.*

175. *ISO 26000:2010: Guidance on Social Responsibility*, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, <https://www.iso.org/standard/42546.html> [<https://perma.cc/RTG5-2NAY>] (last visited Mar. 31, 2018).

176. *Id.*

177. *ISO 26000: Guidance on Social Responsibility*, TÜVRHEINLAND, https://www.tuv.com/media/india/informationcenter_1/systems/Corporate_Social_Responsibility.pdf [<https://perma.cc/4ZAG-S9GF>] (last visited Mar. 31, 2018).

178. *See generally* INT’L COUNCIL ON MINING & METALS, GOOD PRACTICE GUIDE: INDIGENOUS PEOPLES AND MINING 3 (2d ed. 2015) (compiling a collection of sources and toolkits for businesses to use when interacting with indigenous peoples).

toolkits, guidance, and position publications on mining indigenous peoples' issues, human rights, community conflicts, and more.¹⁷⁹ These toolkits are good foundation documents for engagement with tribal governments too.

C. Free, Prior, Informed Consent

The principle that indigenous communities should have the opportunity to grant or withhold their Free, Prior, and Informed Consent (FPIC) to mining or other projects located on their lands, or that impact the resources upon which they depend, is now considered to be an internationally guaranteed human right of indigenous peoples.¹⁸⁰ This principle has increasingly become recognized in national laws, international norms, and voluntary best practice standards and guidelines.¹⁸¹ The legitimacy and practical benefits of the community right to FPIC have been recognized in a number of international conventions and standard-setting exercises, voluntary sectoral guidelines, and national laws.¹⁸² For the most part, these focus on the rights of indigenous communities—due to their unique circumstances and special status in international law. For example, ILO Convention 169 provides that indigenous and tribal peoples “shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.”¹⁸³ Similarly, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) provides:

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 . . . [including the right to require that states] obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other

179. *Id.*

180. FOOD & AGRIC. ORG. OF THE U.N., FREE PRIOR AND INFORMED CONSENT: AN INDIGENOUS PEOPLES' RIGHT AND A GOOD PRACTICE FOR LOCAL COMMUNITIES 32, 49 (2016).

181. WORLD COMM'N ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING 216–219 (2000). *See generally* EXTRACTIVE INDUS. REVIEW, STRIKING A BETTER BALANCE—THE WORLD BANK GROUP AND EXTRACTIVE INDUSTRIES 19 (2003) (discussing efforts to require FPIC in extractive-industry practices); MINING, MINERALS AND SUSTAINABLE DEV. (MMSD) PROJECT, BREAKING NEW GROUND 25 (2002) (suggesting that human rights require prior informed consent freely given and arrived at democratically with respect for cultural diversity).

182. Parshuram Tamang, Indigenous Expert, Permanent Forum on Indigenous Issues, An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices ¶¶ 17–19 (Jan. 17, 2005).

183. INDIGENOUS & TRIBAL PEOPLES CONVENTION, No. 169, art. 7, (ILO 1989).

resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.¹⁸⁴

Other human rights conventions, such as the Convention on the Elimination of Racial Discrimination, the International Covenant on Civil and Political Rights, and the Convention on Biological Diversity, have been interpreted to require that the rights of communities to FPIC be recognized and implemented.¹⁸⁵ In addition, the UN Sub-Commission on the Promotion and Protection of Human Rights' Norms on Transnational Corporations states that:

Transnational corporations and other business enterprises shall respect the rights of local communities affected by their activities and the rights of indigenous peoples and communities consistent with international human rights standards They shall also respect the principle of free, prior, and informed consent of the indigenous peoples and communities to be affected by their development projects.¹⁸⁶

At the core of the recognition of indigenous land rights in the UNDRIP is the acknowledgement that, for many indigenous peoples, territory is more than a physical possession and that “deep connections with particular lands are a constitutive aspect of indigenous cultures.”¹⁸⁷ Land rights, thus, intersect with cultural rights and with material well-being of indigenous peoples. Accordingly, the UNDRIP recognizes the rights of indigenous peoples in the natural world—that is, their distinctive spiritual relationship with their traditional territories; lands; waters; historical, cultural, and religious places; plants; medicines; and habitats.¹⁸⁸

In 2013, the International Council on Mining and Metals committed its members to an FPIC process in which “indigenous peoples can give or withhold their consent to a project, through a process that strives to be consistent with their traditional decision-making processes while respecting

184. G.A. Res. 61/295, art. 32, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

185. See, e.g., G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art. 2 (Dec. 21, 1965) (guaranteeing racial minorities full and equal enjoyment of human rights).

186. Sub-Comm'n, Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2, ¶ 10(c) (2003).

187. Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 211 (2014).

188. G.A. Res. 61/295, *supra* note 184 arts. 11, 12, 24, 25.

internationally recognized human rights.”¹⁸⁹ The right of FPIC has been incorporated into the Performance Standard on Indigenous People of the World Bank International Finance Corporation (IFC); consequently, compliance with FPIC is a condition for IFC investment in mining projects.¹⁹⁰ The IFC Performance Standards have been adopted by about eighty of the world’s largest banks in the Principles.¹⁹¹ As such, compliance with FPIC has also become a condition of commercial loans to mining projects. Thus, change is rapidly advancing in both the practical and the legal context for decision-making about mining on the traditional territories of indigenous peoples.

Scholars have advocated for the principles of FPIC requiring that local tribal communities be informed about development projects in a timely manner and given the opportunity to approve or reject a project prior to the commencement of operations.¹⁹² This includes participation in setting the terms and conditions that address the economic, social, and environmental impacts of all phases of mining and post-mining operations.¹⁹³

FPIC differs importantly from consultation in the way decision-making is exercised. Whereas, in the international setting, consultation processes require only that energy-industry companies hear the views of those potentially affected by a project and take them into account when engaging in decision-making processes, consent processes require that host communities actually participate in decision-making processes.¹⁹⁴ Consent processes give affected communities the leverage to negotiate mutually acceptable agreements under which projects may proceed, thereby ensuring that projects stand a better chance of producing results that benefit them.

189. *Indigenous Peoples and Mining Position Statement*, INT’L COUNCIL ON MINING & METALS (May 2013), <https://www.icmm.com/en-gb/about-us/member-commitments/position-statements/indigenous-peoples-and-mining-position-statement> [<https://perma.cc/M4S2-VDCJ>].

190. Laplante & Spears, *supra* note 121, at 79; *see also* INT’L FIN. CORP. WORLD BANK GRP., IFC PERFORMANCE STANDARDS ON ENVIRONMENTAL & SOCIAL SUSTAINABILITY 14 (2012) (describing the eight performance standards that a client must meet for IFC investment, one of which requires clients follow FPIC standards).

191. *Equator Principles Financial Institutions*, INT’L FIN. CORP. http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/company-resources/sustainable-finance/equator+principles+financial+institutions [<https://perma.cc/N2XJ-KJFS>] (last visited Mar. 31, 2018).

192. *See* Seigfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 108 (1999) (arguing for informed participation of the indigenous people and identifying local preferences through direct consultation and incorporation of indigenous knowledge into project approaches); Akilah Jenga Kinnison, *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, 1301 (2011) (arguing that self-determination translates “to ‘free and informed consent prior to the approval of any project affecting [indigenous] lands or territories or other resources’”).

193. Laplante & Spears, *supra* note 121, at 87.

194. *Id.*

In the United States, tribal nations possess rights that go beyond the principles of FPIC for on-reservation projects because tribes have authority over their territories.¹⁹⁵ However, the United States should use FPIC to address the oil and gas development impacting off-reservation rights and cultural resources. A major distinction between tribes in the United States and other indigenous peoples is that tribes are governments possessing certain inherent powers to make decisions regarding their territories.¹⁹⁶ Indian tribes are “unique aggregations possessing attributes of sovereignty over both their members and their territory.”¹⁹⁷ In this respect, they continue to hold their “natural rights” to sovereign authority on areas where it has not been relinquished.¹⁹⁸ The inherent authority of tribes pre-exists that of the federal government or any state. Most tribes have developed governmental structures that reflect the history, experience, culture, and wishes of the unique people and community it serves.¹⁹⁹ Tribal governments control and regulate the activities within their territories and are in a better position to engage with the energy industry, which many natural-resource rich tribes have dealt with for decades.²⁰⁰ Congress has also enacted many laws supporting the self-determination of tribes in making their own decisions regarding natural resource development on their reservations.²⁰¹

A number of basic principles of engagement have been developed by countries and the mining industry to guide the process of engagement with indigenous peoples and using the principles of FPIC.²⁰² These principles

195. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 1 (1831) (recognizing tribes as distinct sovereign nations with authority over their own territories); see also *Worcester v. Georgia*, 31 U.S. 515, 530 (1832) (acknowledging a tribe’s sovereign right to govern).

196. Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065, 1068–69 (2008); see *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 155 (1982) (noting federal laws regulating the leasing of tribal lands require consent by the tribal governments prior to development of their lands for coal mining, oil and gas extraction, etc.).

197. *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

198. *Id.*

199. Annette Alvarez, *Native American Tribes and Economic Development*, URBANLAND (Apr. 19, 2011), <https://urbanland.uli.org/development-business/native-american-tribes-and-economic-development/> [https://perma.cc/A5J8-4DMH]; MAURA GROGAN ET AL., REVENUE WATCH INST., NATIVE AMERICAN LANDS AND NATURAL RESOURCE DEVELOPMENT 43 (June 15, 2011).

200. *FPIC: The Right to Decide* AMAZON WATCH (Feb. 2011), <http://amazonwatch.org/news/2011/0202-fpic-the-right-to-decide> [https://perma.cc/AW4Z-7NCH].

201. See Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 TULSA L.J. 541 (1994) (discussing the history of mineral law); *Indian Mineral Development Act of 1982*, 25 U.S.C. §§ 2101–2108 (2012) (“Any Indian tribe . . . may enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement . . .”); 25 U.S.C. § 3502 (requiring the Secretary to assist consenting Indian tribes to create tribal energy-resource agreements).

202. ALISTER THORPE ET AL., *ENGAGING FIRST PEOPLES: A REVIEW OF GOVERNMENT ENGAGEMENT METHODS FOR DEVELOPING HEALTH POLICY* 8 (2016); see MINISTERIAL COUNCIL ON

and other corporate social responsibilities are a good starting point—the international energy industry has adopted many of them.²⁰³ These practices and standards, pushed by NGOs, the United Nations, and countries and indigenous peoples, have made energy companies better.²⁰⁴ United States energy industries and tribes can learn from these many positive corporate social practices and begin implementing them in the United States.

Although not all of the international standards and principles are applicable to the unique interests of tribal nations in the United States, they provide a comprehensive scheme of what could be in the United States. First, the energy industry and its shareholders in the international arena seem to embrace the “big picture” of their responsibilities to societies, cultures, and lands, even though most energy and mining operations are not located in their countries.²⁰⁵ Second, they recognize the consequences of their actions, from the financing of projects to environmental degradation, human rights violations, and indigenous people’s basic rights far beyond their borders. Third, through corporate codes, policies, and internal procedures, international companies seek transparency, accountability, and social responsibility. Finally, the new wave of corporate responsibility is moving toward direct engagement with indigenous peoples, no doubt as a result of the recognition and adoption of FPIC principles.²⁰⁶

IV. TOWARD TRIBAL-INDUSTRY ENGAGEMENT

Do the international standards, and corporate-social-responsibility approaches effectively confront the challenges of the energy industry’s presence in Indian country? As noted above, the international energy industry began with adopting financial and corporate standards, and they are currently seeking direct engagement with indigenous populations whose territories may be impacted.²⁰⁷ This proactive engagement scheme seems to fit best for tribes that have the authority to negotiate and reach agreements without any federal government approvals. Any engagement process, either

MINERAL & PETROLEUM RESOURCES, PRINCIPLES FOR ENGAGEMENT WITH COMMUNITIES AND STAKEHOLDERS 11–12 (2005) (discussing how to engage with communities and stakeholders).

203. INT’L COUNCIL ON MINING & METALS, *supra* note 178, at 2.

204. *See generally id.* (showing positive effects of the basic principles of engagement).

205. Committee on Legal Affairs, *On Corporate Social Responsibility: Accountable, Transparent and Responsible Business Behaviour and Sustainable Growth*, at 10, 2012/2098 (INI) (Jan. 28, 2013).

206. *See* INT’L COUNCIL ON MINING & METALS, *supra* note 178, at 28 (discussing international and legal frameworks that require FPIC).

207. Stephanie Axmann et al. *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Canada—Implementation Status Update*, MCCARTHY TETRAULT: CAN. ERA PERSP. (Aug. 8, 2017) <https://www.canadianeraperspectives.com/2017/08/united-nations-declaration-on-the-rights-of-indigenous-peoples-undrip-in-canada-implementation-status-update/> [<https://perma.cc/9H7N-VMWF>].

in parallel or separate from the established federal consultation process, would not relieve the federal government of its trust obligations to tribes; nor would it negate the federal agencies duties to consult under established laws, regulations, and executive orders.²⁰⁸

Given the federal agencies' difficulties in implementing the consultation process with tribal governments, Section A below proposes that the industry must begin engaging with tribes when seeking to build energy transmission projects crossing tribal lands or affecting treaty-reserved rights. Section A begins with a discussion of the limits of the federal consultation process, followed with an example of an energy company, the El Paso Corporation (and other companies), that successfully engaged with tribes on an interstate pipeline crossing the Rocky Mountains to the Pacific coast. The discussion demonstrates that companies can manage risks and avoid project delays and costs by working with tribes. Section B proposes and explores best practices that can be taken from the Ruby Project that should be adopted by the energy companies in engagement. This section specifically discusses principles to guide engagement with tribal communities. Tribal-industry engagement has the potential to address the complex and dynamic root causes of community concerns, if undertaken in an organized, respectful manner, and builds positive long-lasting relationships. Several key areas are discussed and, admittedly, there are other issues that may arise during the engagement process. Of course, any initiatives that a corporation may take would be voluntary in nature outside of the federal legal regime without consequences, unless the project is located on reservation.²⁰⁹ Developing methods or guidelines of engagement with tribal communities about the social, economic, and cultural benefits and costs, in addition to the environmental effects of their projects, are long overdue.²¹⁰

A. The Limits of Federal Consultation

In the United States, “[t]here is a long list of congressional acts, executive orders, and administrative rules that require consultations with tribes, and some require consent before any federal action can be

208. See THORPE, *supra* note 202, at 25–28 (analyzing different national and state requirements to consult with indigenous peoples in Australia).

209. RACHEL DAVIS & DANIEL FRANKS, COSTS OF COMPANY-COMMUNITY CONFLICT IN THE EXTRACTIVE SECTOR 25 (2014).

210. *Id.*; see also James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Extractive Industries Operating Within or near Indigenous Territories*, ¶¶ 74–75, U.N. Doc. A/HRC/18/35 (July 11, 2011) (acknowledging the need for guidelines governing the extractive industry's engagement with indigenous peoples).

undertaken.”²¹¹ Numerous laws require Indian nations be notified, consulted, and apprised of the impacts on their treaty rights, lands, and cultural resources.²¹² Despite these laws and policies, tribes have time and time again criticized the federal agencies for not implementing the consultation policies and laws.²¹³ The agency-by-agency and statute-by-statute approach to tribal consultation does not ensure that agencies will adequately consider tribal interests during the course of any particular consultation.²¹⁴ Moreover, there remains no mandated process of how federal agencies are to conduct consultations with Indian tribes,²¹⁵ and while Congress has enacted several statutes requiring consultation, none provide an actual definition of “consultation.”²¹⁶ Thus, while it may be popular to talk about the merits and value of “tribal consultation,” the term itself remains ill-defined and elusive.²¹⁷ “A recent study of the consultation process conducted under the National Historic Properties Act concluded that many consultation sessions were, in fact, merely opportunities for agencies to inform tribes of decisions that had already been made.”²¹⁸ In the absence of clear statutory or executive guidance, it is not surprising that broad differences in the interpretation of the consultation requirement exist among federal agencies.

In October 2016, during the Dakota Access pipeline protests and tribal challenges, and with the overwhelming tribal support across Indian country, the Department of the Interior, the Department of the Army, and the Department of Justice sought comments from tribal governments on

211. Jeanette Wolfley, Address at 63rd Annual Rocky Mtn. Min. Law Inst. 1B, *The Black Snake: The Dakota Access Pipeline Project, Federal Consultation & the Energy Industry's Role* (2017) (forthcoming 2018) (on file with author); *see also* Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000) (establishing tribal consultation requirements); Exec. Order No. 12,875, 58 Fed. Reg. 58,903 (Oct. 26, 1993) (discussing the federal government's commitment to working with state, local, and tribal government); Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 22 n.3 (2000) (providing examples of rules that require consultations with tribes).

212. *See, e.g.*, 25 U.S.C. § 3003 (2012) (requiring tribal notification and consultation for impacts on indigenous gravesites); *see also* 16 U.S.C. § 470ii(a) (requiring tribal consultation as a part of intergovernmental coordination).

213. Colette Routela & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 444 (2013); *see* Wolfley, *supra* note 211 (discussing the inadequacies of the federal consultation process and recommendations from tribal leaders for changes in the laws and policies).

214. Michael Eitner, *Meaningful Consultation with Tribal Governments: A Uniform Standard to Guarantee that Federal Agencies Properly Consider Their Concerns*, 85 U. COLO. L. REV. 867, 885 (2014).

215. Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37, 60 (2015).

216. Routela & Holth, *supra* note 213, at 453.

217. *Id.*

218. *Id.* at 461.

consultation regarding energy-infrastructure development.²¹⁹ The response of tribes was comprehensive, with many tribes participating and providing input in the seven listening sessions held throughout Indian country.²²⁰ Additionally, fifty-nine tribes and eight organizations submitted written comments to the questions posed by the three federal departments.²²¹

Significantly, the consultation process does not control or mandate the energy industry to engage with tribal governments. When collaborating with tribal governments, energy companies can choose to be complicit or proactive in the permitting and federal consultation process. Indeed, the consultation process is a government-to-government process designed to compel great involvement in agency decision-making by the tribal nations potentially affected by the agencies' actions or rulemaking.²²²

Voluntary engagement would represent a model of the willingness and the ability of companies and tribes to address, and ultimately forge consensus on, a complex and sensitive set of issues. This exercise will be especially valuable if it encourages others to engage in dialogue on an issue-by-issue, sector-by-sector basis, with or without beginning as a government-convened process or ultimately taking the form of voluntary principles. There are many opportunities to engage, and much is at stake, including basic human rights, preservation of land, sovereignty of tribes, and building a constituency for social responsibility and human rights in the energy-industry community. At stake is avoiding community opposition to energy projects and damage to the energy industry's reputation so that it may expand trade and increase sustainable investment and growth. At stake is a chance to build a consensus for approaches to support cooperation, communication, and resolution to many issues associated with the energy industry and tribal communities. With so much at stake, tribes and the energy industry should seek opportunities to find common ground or at least mechanisms to assist in resolving the myriad of issues.

B. The Ruby Project: A Case in Contrast

219. Letter from Lawrence S. Roberts, Principal Deputy Assistant Sec'y for Indian Aff., to Tribal Leaders (Oct. 11, 2016) (showing the due date for the written comments was Nov. 30, 2016), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/idc2-047219.pdf> [<https://perma.cc/6RZS-V84D>].

220. See generally *Tribal Input on Federal Infrastructure Decisions*, U.S. DEP'T INTERIOR, INDIAN AFF., <https://www.bia.gov/as-ia/raca/tribal-input-federal-infrastructure-decisions> [<https://perma.cc/YDR4-HGQG>] (last visited Apr. 10, 2018) (providing transcribed conversations with the tribes about pipeline concerns and impacts).

221. U.S. DEP'T OF THE INTERIOR, ET AL., *IMPROVING TRIBAL INVOLVEMENT IN FEDERAL INFRASTRUCTURE DECISIONS 2* (2017).

222. Routela & Holth, *supra* note 213, at 456.

The Ruby pipeline project, impacting thirty-two tribal nations, stands in direct contrast to the DAPL situation and is presented as a model for tribal-energy industry engagement. The pipeline constructed by the El Paso Corporation (El Paso) between 2007 and 2011, known as the Ruby Project, is a 680-mile, 42-inch interstate pipeline delivering natural gas from Opal, Wyoming, to Malin, Oregon.²²³ The four-year Ruby Project crossed Wyoming, Utah, Nevada, and Oregon, as well as aboriginal lands of thirty-two Indian tribes.²²⁴ Like DAPL, the pipeline project affected the off-reservation rights of the tribes, including sensitive cultural resource areas, and shows that collaboration, communication, and engagement can work between Indian nations and the energy industry.

Prior to construction, El Paso held numerous public meetings and meetings with tribes.²²⁵ El Paso entered into funding agreements that allowed tribes “to retain their own legal and ethnographic experts to document cultural resources for federal consultation purposes.”²²⁶ “The tribes also worked with [El Paso] to create a tribal monitoring program, paid for by the company, which trained more than 100 tribal members to assist archaeological teams prior to, during, and after construction.”²²⁷ At the tribes’ request, “the Ruby pipeline was rerouted—including more than 900 ‘micro-reroutes’ to avoid culturally important sites—at a total cost of approximately \$11 million.”²²⁸ Plants that were utilized by the tribes were “harvested for seeds and preserved in greenhouses prior to ground-disturbing activity and replanted post-construction in the reclaimed right of way.”²²⁹ The company “also worked with tribes to develop a tribal employment program.”²³⁰

Because skilled pipeline construction jobs typically require union membership, El Paso supported tribes’ requests to pay union dues and apprenticeships for tribal members seeking work on the project. A later internal review by the company found that such reroutes and tribal capacity-building measures saved the company at least

223. Press Release, Kinder Morgan, Inc., El Paso Corporation Places Ruby Pipeline in Service (July 28, 2011) (on file with the *Vermont Journal of Environmental Law*).

224. *Id.*

225. Letter from David Lester, Exec. Dir., Council of Energy Res. Tribes, to Kimberly D. Bose, Sec’y, Fed. Energy Regulatory Comm’n (Aug. 4, 2009).

226. Troy Eid, *Working Effectively with Tribes on Energy Projects*, NORTH AM. SHALE (Sept. 6, 2017), <http://northamericanshalemagazine.com/articles/2055/working-effectively-with-tribes-on-energy-projects> [<https://perma.cc/W7U3-EE4L>].

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

\$250 million in avoided project delay costs from potential tribal litigation and protests.²³¹

In addition to the engagement with tribal nations, El Paso entered into agreements with the Western Watersheds Project and Oregon Natural Desert Association to establish a sagebrush-habitat conservation fund, \$15 million over ten years, to buy and retire federal grazing permits from ranchers willing to sell.²³² Reserving the areas would preserve the sage grouse and pronghorn antelope.²³³ It would also promote restoration activities, fence removal, weed control, and land acquisition.²³⁴ El Paso entered into similar agreements establishing endowments with the Public Lands Council and the National Cattleman's Beef Association to preserve the public lands for grazing.²³⁵

Some other energy companies have embraced engagement with tribes for rights of way crossing on- and off-reservation lands, without any federal or state laws requiring them to do so.²³⁶ For example, NextEra Energy Resources, a wind and solar project developer, reaches out to tribes without any federal law requirements to do so and most tribes are very receptive. And, NextEra representatives report that following the DAPL, they have received "immediate responses" from tribes in the Dakotas when contacted about potential rights of way near reservation lands.²³⁷ NextEra seeks to develop a positive, open, and honest relationship with each tribal nation.²³⁸ The Dominion Resources Services company states they have established relationships with federally and state-recognized tribes in the southeast United States for pipelines and have established these engagements outside of the NEPA section 106 process.²³⁹ They regularly have in-person meetings for meaningful communications with tribal communities and send out construction teams to talk with tribal governments about restoration

231. *Id.*

232. Press Release, W. Watersheds Project, et al., W. Watersheds Project, Or. Nat. Desert Ass'n & Ruby Pipeline Agree to Establish Conservation Funds (July 15, 2010) (on file with the *Vermont Journal of Environmental Law*).

233. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT: RUBY PIPELINE PROJECT 14–16 (2013).

234. *Id.*

235. Christy Hemken, *El Paso, PLC Create Public Lands Management Endowment*, WYO. LIVESTOCK ROUNDUP, [http://www.wylnet.net/the-roundup/archives/283-energy/oil-and-gas/2781-el-paso-plc-create-public-lands-management-endowment?tmpl \[https://perma.cc/ASM2-XAR5\]](http://www.wylnet.net/the-roundup/archives/283-energy/oil-and-gas/2781-el-paso-plc-create-public-lands-management-endowment?tmpl [https://perma.cc/ASM2-XAR5]) (last visited Apr. 11, 2018).

236. Tim Vollmann, *Exploration and Development Agreements on Indian Lands*, 50 ROCKY MTN. MIN. L. INST. 12–21 (2004).

237. Carolyn Stewart, Dir., Tribal Relations, NextEra Energy Res., Effective Engagement with Tribes (Oct. 2, 2017).

238. *Id.*

239. Molly Plautz, External Affairs Manager, Dominion Res. Servs., Energy Development and Tribal Engagement—A Panel Discussion (Oct. 3, 2017).

projects in the pre-filing of the application phase. When they begin to meet with state officials, they also seek to meet with tribal officials about projects.²⁴⁰ They report tribes are receptive and wish to talk outside the federal consultation process. Enbridge Energy notes that, through outreach; community involvement; and looking for opportunities to work with tribal employment rights offices, tribally run companies, and community relations offices, the company has built meaningful relationships.²⁴¹ They also state that some tribes may hesitate to meet with the company, but that companies must work through such barriers by listening respectfully, answering questions directly, and being transparent.²⁴²

C. Engagement

The term “engagement” refers to the interactions that occur between an energy company and tribal communities. It includes a broad set of activities, ranging from the simple provision of information to active dialogue and partnering. It is a primary activity that needs to take place in a sustained manner across the project life cycle—from initial contact before exploration of the easement through granting of the permit. At a minimum, engagement must aim to ensure tribal people are fully informed and comprehend the full range of social and environmental impacts that can result from a pipeline transmitting oil or gas. Also, companies must understand, recognize, and respect the rights, aspirations and concerns of tribal communities. A basic understanding can inform the design and implementation of restoration or avoidance strategies to protect vital resources and treaty rights.

When engaging with indigenous communities, industries should adopt a long-term approach to planning and funding that focuses on achieving sustainable outcomes. This type of engagement is responsive to human rights and changing needs and aspirations of tribal communities. Understanding the visions, values, histories, and current priorities shared internally, and their role in tribal decision-making is critical to such engagement. Equally important is understanding the timelines required to reach responsible and effective decisions by tribes and companies. Effective engagement among tribes and energy companies requires participants who

240. *Id.*

241. Arshia Javaherian, Senior Legal Counsel, Energy Development and Tribal Engagement—A Panel Discussion (Oct. 3, 2017); ENBRIDGE INC., 2016 ANNUAL REPORT 9 (2016).

242. Arshia Javaherian, Senior Legal Counsel, Energy Development and Tribal Engagement—A Panel Discussion (Oct. 3, 2017) (explaining that hesitation may be due to the fact that companies contact tribes even though there may not be a federal permit application or undertaking requiring federal consultation and a misunderstanding of the differences between consultation and engagement).

can speak for the range of economic, social, environmental, and governance issues requiring discussion and resolution when proposed energy projects are on traditional territories. Engagement also takes a long-term commitment, assigned staff, and financial resources.

The challenge facing companies, however, is turning these principles into best practices and effective actions to engage with tribal communities. The remainder of this part discusses selected general actions, conduct, and practices that energy companies should consider adopting and utilizing when engaging with tribal communities. To start, one must remember that there are 567 tribes in the United States, and each has its own unique histories, values, cultures, and governmental structures.²⁴³ The suggested best practices encourage communication and engagement to address and resolve issues arising out of the controversies involving tribal nations' interests, treaty rights, and land and cultural resource preservation concerns.

D. Due Diligence

Energy companies must implement due diligence beginning with an understanding of the tribal community and its context. Despite numerous tribal commonalities, each tribe is unique. The energy company must ascertain the specific tribal context at the earliest stage of a project or permit renewal. Obtaining baseline information about a tribe(s) is particularly important. Companies should focus on the following key characteristics of the local reservation and off-reservation territory:

- (1) Demographic information to understand tribal identities and internal clan relationships to be used for monitoring change within a community during engagement and project development;
- (2) Land ownership and tenure from a legal and customary perspective, and any conflicts about tenure within clan families. Companies can access information revealing overlapping tribal ownership claims to land through government documents, and independent inquiry from local experts;
- (3) Reviewing treaties, statutes, and agreements relating to the tribe and its territory; most importantly, companies should focus on identifying any off-reservation treaty rights and connections to hunting, fishing, and gathering areas;
- (4) Identify tribal cultural connections and the locations of plants, medicines, sacred sites, and water areas by seeking out, consulting with, and gathering testimony from respected elders or tribal cultural committees whom the community holds confidence in;

243. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915–20 (Jan. 10, 2017).

- (5) Compile and analyze subsistence data on how the community meets its basic food needs through hunting, fishing, and gathering;
- (6) Obtain information about the ethnic composition and relations in the area, as well as the history of migration and relocation of the tribe;
- (7) Understand current conflicts and general relations between local and regional governments and tribal communities, and historical grievances with energy industries in the region;
- (8) Gain a good, clear understanding of the tribal government structure, its decision-making processes, its community stakeholders, and its general governmental infrastructure.

E. Beginning Engagement

Foremost, companies should seek to engage in parallel conversations with tribal governments while the federal agency is undertaking consultation efforts; or, as discussed earlier, some companies may choose to engage with tribes even if no federal consultation requirement exists. Ideally, such engagement should begin prior to any federal consultation. Importantly, companies must recognize that it is difficult to build any relationship during periods of opposition to a pipeline, which means that there must be a relationship built ahead of time. The decision to engage early in the development process supports respect for tribal sovereignty, promotes overall engagement and cooperation, and encourages community collaboration for other potential projects.

Energy representatives should recognize that engagement must begin early, before considering plans and before the formal federal consultation begins. The quality of initial contact between industry personnel and tribal government officials in a prospective oil and gas project, or right of way, can set the tenor for the whole project. Project staff and contractors must be well prepared, sensitive to the tribal culture, and respectful and open in their approach; this can provide the foundation for a solid and productive relationship. Difficulties are likely to arise if companies: (1) enter into a specific tribal area without first seeking permission to do so; (2) do not engage broadly or fail to adequately explain what they are doing and why; (3) do not allow sufficient time for the community to consider a proposal and make a decision; or (4) disregard, or are ignorant of, local tribal customs. Hiring a tribal member with good local knowledge as a liaison or adviser between the tribe and industry will help resolve miscommunications and bring an understanding of cultural values.

Companies can avoid many of these problems if they consult with the tribal community, its office of public relations, or administrator at the outset on how to engage the tribe's government. Industry must understand and

respect local entry protocols and seek permission to enter the community or access traditional lands. Additionally, industry must ensure that all company representatives (including third-party subcontractors and agents) are familiar with local customs, history and legal status, and understand the need for cultural and spiritual rights. It is wise for senior company managers to be present at initial meetings to meet with the tribal leadership to demonstrate and build respect, long-term trust, and community relationships. Tribal leaders wish to meet with company decision-makers who can provide information, answer questions directly, negotiate and resolve disputes, and take the time to travel to the tribal community. Listen. Listen. Listen. Company representatives must recognize and hear the tribal history of its relationship with energy companies or the federal government. History is important to tribal people; thus, when discussing historic abuses against the tribal community by others, company representatives must listen respectfully. Acknowledging and recognizing the tribal perspective is key.

F. Dialogue

Industry must be willing to commit to open and transparent communication and engagement from the beginning and have a considered approach in place. However, they must recognize that the tribal communication process may be different than the corporate process. Thus, one of the first challenges of an effective dialogue is to clearly define the lines of communication and protocol with tribal officials. For example, a company should seriously consider a tribe's requests to reroute pipelines in order to save time and money in the long term. Early engagement can enable companies to make rerouting decisions.²⁴⁴ Listen to the tribal leadership to fully understand their interests. Industry representatives should not assume that they know what the tribe is going to say, want, or ask of the company.

Industry decisions affect the cultural and spiritual beliefs and social fabric of a tribal community because such decisions impact communal rights to live on, use, harvest, and conserve lands both on- and off reservation or off-reservation treaty-reserved rights. Tribal members have a legitimate stake in the decisions affecting the environment, land, and treaty rights.²⁴⁵ Accordingly, industry should also maximize opportunities to meet

244. See, e.g., Amy Dalrymple, *Attorney Encourages Consultation with Tribes on Pipelines*, BISMARCK TRIB. (July 19, 2017), http://bismarcktribune.com/news/state-and-regional/attorney-encourages-consultation-with-tribes-on-pipelines/article_789e3d5c-8ad5-5988-b6f9-51bca8b72204.html [<https://perma.cc/UM6V-9FLL>] (providing an example of a company that saved money on litigation costs by engaging the tribe early and rerouting the pipeline accordingly).

245. Jeanette Wolfley, *Tribal Environmental Programs: Providing Meaningful Involvement and Fair Treatment*, 29 J. ENVTL. L. & LITIG. 389, 402 (2014).

and communicate with the tribal members and stakeholders to hear their comments and provide information and feedback. Industry should ensure company representatives take part in community meetings and that they are accessible to communities and stakeholders. Hosting a workshop for tribal leadership, and perhaps a separate one with tribal members, providing information, and explaining the proposed project is critically important. At this early stage, tribes can raise questions and express their concerns and interests before making key decisions.

Industry representatives must be willing to actively listen to tribal leadership and community members. Tribal leadership and community members may not automatically trust companies given the conflicts and reputation of the energy industry. It is therefore imperative that representatives respond to the issues of each community and stakeholder group and be sensitive to their concerns. As part of the communication process, industry should determine and use the right channels of communication to ensure the method of communication is appropriate to the relevant tribal communities and stakeholders. For example, most tribal people are very visual learners; they like power points, diagrams, and documents that they may take with them to review.²⁴⁶ Furthermore, words and language are very important to tribal people. Using very direct language (instead of vague, noncommittal language and elaborate words) is best. Industry may wish to identify appropriate tribal individuals and contacts to review documents before a meeting or hire a person to interpret in the tribal language. Industry should provide accurate and timely information to build and maintain honest working relationships.

Energy companies must provide some process of accountability through full disclosure to the tribes of the proposed project. Transparency is critical. Companies must provide information about the project, its risks, and its impacts on the community and environment in easily understandable forms and media. Tribal governments and community interest groups should receive this information directly so that they may review and disseminate to their reservation residents and members.

Continual dialogue and a willingness to hold tribal meetings as they arise are essential. A company may consider forming a team of individuals including tribal representatives to respond to questions, provide updates on the project, and alleviate community concerns.

G. Managing Workforce and Contractor Behavior

246. Melanie Price et al., *The Learning Styles of Native American Students and Implications for Classroom Practice*, in *IMAGES, IMAGINATIONS, AND BEYOND, PROCEEDINGS OF THE EIGHTH NATIVE AMERICAN SYMPOSIUM* 36, 37 (Mark B. Spencer ed., 2010).

Companies should be responsible for their employees and contractors conducting work on or near tribal communities. It is a common occurrence near oil and gas infrastructure projects to have camps of male employees for long periods of time.²⁴⁷ The National Indigenous Women's Resource Center's amicus brief in the DAPL case set forth the violence, drug and alcohol abuses, and child and women trafficking documented by state, tribal, and federal officials."²⁴⁸ The amicus brief cites a 2013 Department of Justice (DOJ) Office of Violence Against Women (OVW) report explaining the relationship between the oil industry and crimes and violence against women and children:

Because of recent oil development, the [Bakken] region faces a massive influx of itinerant workers[,] and [consequently,] local law enforcement and victim advocates report a sharp increase in sexual assaults, domestic violence, sexual trafficking, drug use, theft, and other crimes, coupled with difficulty in providing law enforcement and emergency services in the many remote and sometimes unmapped "man camps" of workers.²⁴⁹

The developers of oil and gas on or near reservations must recognize the increased levels of violence Native women and children are likely to face. Native women suffer sexual violence at the highest rate of any ethnic group in the United States.²⁵⁰ Non-Indian offenders are overwhelmingly the perpetrators of these offenses.²⁵¹ Such actions violate the public interest, threaten tribal sovereignty, and undermines the integrity of the United States' trust relationship with tribal nations. Tribal communities are particularly vulnerable because they lack authority to prosecute non-Indian workers or employees in their judicial system, and instead must rely on the state or federal governments to take prosecutorial action.²⁵²

247. Brief for National Indigenous Women's Resource Center as Amici Curiae Supporting Plaintiffs at 10, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4 (D.D.C. 2016); see also Sarah Deer, *Relocation Revisited: Sex Trafficking of Native Women in the United States*, 36 WM. MITCHELL L. REV. 621, 680–81 (2010) (arguing that this is at least partly a result of jurisdictional limitations).

248. Brief for National Indigenous Women's Resource Center as Amici Curiae Supporting Plaintiffs at 1, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4 (D.D.C. 2016).

249. *Id.* at 10.

250. See STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992–2002 7 (2004).

251. *Id.* at 9.

252. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210, 212 (1978) (holding tribes could no longer exercise criminal jurisdiction over non-Indians who commit crimes on tribal lands); see also 25 U.S.C. § 1301(2) (stating Indian tribes can "exercise criminal jurisdiction over all Indians").

Such inappropriate behavior by employees or contractors can cause long-term social harm to a tribal community and company's tribal relations. In some instances, such events may lead to a project not going ahead or being shut down. Often companies do not take responsibility for contractors or employees. Companies often argue that they cannot control such activities or that subcontracts do not cover disciplinary actions and that it is better left for governments to take criminal actions. As part of engaging with tribal governments, industry must make a commitment and take responsibility to ensure that employees and contractors behave appropriately within or near tribal communities. Such measures should include: (1) expanding their use of background checks within the hiring process; (2) establishing policies and standards of conduct for workers on or near reservation communities; (3) holding training sessions and communicating the standards of conduct; (4) taking strict disciplinary action where there are significant breaches of these standards up to, and including, dismissal and termination of contracts; (5) reporting criminal behavior to the appropriate authorities; and (6) providing financial support to victim services, women's shelters, or community organizations that provide aid and assist in developing solutions to human trafficking. Industry must also ensure that contracts with employees, subcontractors, agents, and joint venture partners contain appropriate provisions to govern the parties' conduct.

H. Cultural Resources Management and Preservation

The natural environment is of central importance to many tribal people, not only because they often depend wholly or partly on it for their livelihoods, but also because it has strong cultural, and often spiritual, significance. Additionally, "[m]any tribes identify their origin as distinct people with a particular geographic site, such as a river, mountain, or valley, which becomes a central feature of the tribe's cultural worldview, traditions and customs."²⁵³ For these reasons, when projects adversely impact the environment, they may also be impacting tribal peoples' cultural rights and interests. The history of tribal removal from original ancestral lands has resulted in sacred sites and cultural resources located off-reservation, which has made it difficult for tribes to protect and enhance the tangible and intangible aspects of cultural heritage. Tangible aspects include such things as a spring, butte, sacred mountain, and other sites of significance. Intangible cultural resources include things such as traditional practices around governance, ceremonies, spiritual practices, and traditional knowledge.

253. Wolfley, *supra* note 110, at 55.

There is a wealth of federal statutes and policies encouraging the protection and preservation of tribal lands, including all of its natural and cultural attributes.²⁵⁴ In the DAPL litigation, the tribal parties argued that the federal government failed to protect these valuable tribal resources, thereby adversely impacting religious freedom rights.²⁵⁵ Companies can minimize such disputes with tribes through the engagement process by first recognizing that there may be off-reservation sites and cultural resources used by present-day tribal people. Industry representatives should visit impacted sites or areas identified by tribal elders, cultural committees, or spiritual leaders. Working with and utilizing the knowledge of tribal cultural committees for project sites will go a long way toward building trust and respect for the cultural values of tribes. Companies should consider paying for ethnographic studies for interested tribes and supporting their experts to assist in identifying cultural resources.

The Ruby Project paid for ethnographic studies used in the federal consultation process.²⁵⁶ Other energy companies have established agreements setting out protocols, points of contact, surveys, and resource monitoring.²⁵⁷ The use of tribal elders in such studies will serve companies well. They often do not hold degrees, but they have respect and trust within the tribal community and possess generations of knowledge of the natural landscape and the many sacred sites and resources of the landscape.²⁵⁸ The basis for the wisdom and knowledge that indigenous people possess of the ecosystems and their homelands rests on millennia of observation, habitation, and experience, all utilizing a balance of human interaction and intervention with the environment. “It is the traditional ecological knowledge—an interactive natural-world science—which has preserved many tribal homelands in pristine condition and protected the many medicines and foods for generations.”²⁵⁹

Respect for the oral traditions of the tribe by industry is very important. An outside contracted anthropologist or archeologist may know the book-

254. See, e.g., 42 U.S.C. § 1996 (2012) (stating that it is federal policy to protect Native American sacred sites and traditional forms of worship); Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996) (directing federal agencies, “to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites, by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.”); 25 U.S.C. §§ 3001–13 (protecting tribal remains).

255. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 239 F. Supp. 3d 77, 88 (D.D.C. 2017).

256. *Eid*, *supra* note 226.

257. See, e.g., Joe Morey, *LCO Tribe Renews Enbridge Pipeline Easement for \$70 Million over 25 Years* (Oct. 17, 2017), <https://drydenwire.com/news/lco-tribe-renews-enbridge-pipeline-easement-for-70-million-over-25-years/> [<https://perma.cc/JG62-7MY4>] (explaining methods Enbridge Energy used to come to mutually beneficial resolution).

258. See Wolfley, *supra* note 112, at 161 (recognizing the knowledge of tribal elders).

259. *Id.* at 152.

learned history of the tribe, but does not really know the soul of the community, the sacred sites, and their cultural significance. The tribal community must determine the meaning and value of traditional cultural properties because it is their oral traditions and practices that give them import. Again, an established relationship prior to any sacred site identification builds familiarity, trust, and cooperation.

Companies should work with tribes to prepare cultural resource management plans at the outset of projects, or when planning expansions. Industry may do this primarily to meet environmental assessment requirements, but companies should undertake this planning voluntarily too. Such a process assists in identifying sensitive cultural areas and also helps assess the needs or interests of the tribe in protecting and preserving areas. For example, native plants used in tribal ceremonies may be located off-reservation where a pipeline is proposed. As part of engagement, the company may agree to reroute around the area or provide a way to transplant the native plants to an on-reservation location for the tribe. This would be truly beneficial to the tribal community because the loss of plants and resources have a ripple effect on the cultural traditions of tribes, such as loss of words for the plant, ceremonial uses, songs, and caretaker roles.

Other tribal cultural projects may include: (1) funding the recording of languages, stories and songs, which aim to revitalize a tribal language; (2) helping to establish a cultural center or museum that can serve as a place for communities to meet for cultural activities or as a repository for cultural items used by the community; (3) supporting cultural workshops to maintain or stimulate traditional skills and arts to young people; (4) sponsoring tribal powwows or festivals to promote traditional dance and ceremonies; (5) helping to generate a market for traditional arts and crafts; and (6) supporting language preservation projects. Tribes highly value all of these cultural projects.

I. Identifying, Planning, and Monitoring

Including representatives from a tribal community in environmental assessment groups is vital because it demonstrates the willingness of companies to include the community's perspective about the myriad of impacts, and, in doing so, helps incorporate traditional knowledge into environmental impact assessments. Also, including tribal members, tribal environmental departments, and land use committees on environmental monitoring committees and involving them in the collection and analysis of monitoring data supports transparency and disclosure principles. Participatory monitoring can be an important trust-building exercise. For

example, during the pipeline proposal period, the company should hire tribal monitors to survey the right of way and continue to monitor it during the construction process. Such monitoring will ensure compliance with the protection of cultural and other resources. Hiring tribal monitors for rights-of-way construction to monitor for cultural resources or human remains is important. The Ruby Project successfully used this action.²⁶⁰ Companies have a real opportunity to assist tribal communities in ways that the federal government may not assess or propose in its environmental assessments or environmental impact statements.

There are also many opportunities to involve tribes in environmental protection, rehabilitation, and restoration. Examples include gathering seeds of native plants for use in rehabilitation, fire management, and wildlife management. A reclamation project on reservation land may be helpful to a tribe that does not have the funding to establish such a project. Reclaiming a habitat or wetlands area, or repairing a degraded area used by elders or youth, may prove valuable. Many tribes have well-developed wildlife and fishery departments that can assist in developing restoration projects.²⁶¹ Contracting with tribal construction companies and hiring tribal workers for welding, electrical, pipefitting, heavy operating, and laborer positions for off-reservation projects brings badly needed income and employment to tribal communities.

J. Free, Prior, Informed Consent

As discussed earlier in Part III, section C, social engagement and the principle of free, prior and informed consent (FPIC) for mining projects around the world are a necessary part of doing business. Reaching FPIC between industry and tribal governments, including all or some of the issues discussed in this part, ensures that a company will manage the environmental, cultural, and social impacts to the highest business standards. Companies should consider FPIC standards for projects located off-reservation in aboriginal or ceded territory too, and they should document any agreements with the tribal government.

260. A. David Lester, *CERT and the Ruby Pipeline Project: Working Together to Enhance Tribal Sovereignty*, INDIAN COUNTRY TODAY (Nov. 1, 2010), <https://indiancountrymedianetwork.com/news/lester-cert-and-the-ruby-pipeline-project-working-together-to-enhance-tribal-sovereignty/> [https://perma.cc/P2F3-CS2Q].

261. Press Release, U.S. Fish & Wildlife Serv., *The Importance of Native American Tribes and Their Lands to Conservation Recognized with Nearly \$5 Million in Wildlife Grants to 29 Tribes Will Further Tribal-Federal-State Partnerships and Restoration of Key Habitat for Hundreds of Species* (Mar. 25, 2016) (on file with the *Vermont Journal of Environmental Law*).

In the international arena, scholars argue that, where activities directly impact indigenous peoples' right to "use, enjoy, control, and develop their traditional lands," there is a norm developing that recognizes and requires full consent, rather than just meaningful consultation.²⁶² FPIC would be an additional requirement as part of the general federal consultation standard. For example, a project impacting the lands, territories, and resources of the tribes should not occur without adequate tribal consultation and FPIC. As in, the international setting adoption of the standard by federal agencies would greatly assist tribes in protecting and preserving their interests.

The power to withhold consent is necessary to enforce other important tribal rights beyond rights of consultation and participation. This is particularly true in the context of projects that implicate tribal rights due to their ability to threaten indigenous peoples' physical and cultural survival. For instance, the ability to withhold consent allows communities to enforce their community property rights, protect their sacred landscapes, and maintain their culture and relationship with the land. Professor Laplante argues that energy industries can diffuse costly opposition to projects by engaging in community "consent processes."²⁶³ Additionally, acquiring consent from a tribe in an engagement process can give the project stability, avoid costly litigation, and harm its reputation. Former Special Rapporteur Anaya has stated: "[T]he principles of consultation and consent are aimed at avoiding the imposition of the will of one party over the other, and . . . instead striving for mutual understanding and consensual decision-making."²⁶⁴

The challenge is convincing the federal government to change its policy of consultation to include FPIC principles. Presently, the United States struggles with fulfilling its obligations of consultation, and it seems the status quo will likely remain unless tribes can effectively mount a campaign to incorporate FPIC in the federal process.²⁶⁵ Alternatively, Congress may be willing to amend its laws to incorporate the FPIC principles.

Of course, in the engagement process, tribes and the energy industry are free to apply the FPIC principles and reach agreements. In fact, all the different practices discussed in this part implement the principles because each aspect of dialogue, information sharing, reaching agreement on

262. Lillian A. Miranda, *The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law*, 11 LEWIS & CLARK L. REV. 135, 151–53 (2007).

263. Laplante & Spears, *supra* note 121, at 88.

264. James Anaya (Special Rapporteur on the Situation of Human Rights & Fundamental Freedom of Indigenous Peoples), *Promotion & Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 49, U.N. Doc. A/HRC/12/34 (July 15, 2009).

265. See Kinnison, *supra* note 192, at 1325 (noting the rejection of FPIC rights in the U.N. Declaration over concerns of self-determination).

meeting protocols, and engaging tribal leaders and tribal members in working with the company on restoring and identifying culturally significant areas are all parts of the FPIC principles. Certainly, entering into a memorandum of agreement regarding projects, protocol, and meetings would enhance the initial and ongoing relationship between a company and a tribe.

K. Agreements

Any agreement should be a flexible instrument that provides a framework for governing the ongoing and long-term relationship between an oil and gas project and tribes. The willingness of all parties to change and improve the agreement as circumstances require must characterize the relationship. Accordingly, these kinds of agreements usually contain commitments from parties to work together to ensure mutual benefit and change and to improve the agreement as needed. The success of an agreement also depends on a company's ability to properly implement and monitor the agreement. To assist this process, companies and tribes may develop a committee to oversee the agreement's implementation and undertake regular meetings and reporting.

There are no hard and fast rules about what should be in an agreement. This will depend on the context, the goals and aspirations of the parties to the agreement, and what they see as fair and reasonable. However, it is possible to give some examples on what the options, risks, and potential benefits are with different approaches. The types of issues agreements can address include: (1) company support (not necessarily financial) in the development and implementation of community projects and initiatives; (2) employment and contracting (supplying goods and services) opportunities; (3) monitoring restoration projects; (4) environmental, social, health and cultural impact management; (5) protocols for communication including points of contact, scheduling of meetings, and information sharing; and (6) any provisions relating to the tribal community's use of off-reservation lands.

Additionally, agreements should outline the role and responsibilities of the company and the tribal government, mechanisms for implementing and monitoring agreements, project budgets, and mechanisms for resolving community concerns or grievances.

CONCLUSION

The increased opposition to oil and gas pipelines, and other energy-industry projects located near Indian reservations or lands on which tribes

have treaty-reserved hunting, fishing, and gathering rights, has gained international attention. The recent DAPL controversy at the Standing Rock Sioux Reservation has raised many political, social, environmental, and tribal-sovereignty issues as well as the role of the federal government in adequately protecting rights of tribes and communities. We now stand at a crossroads. This article urges oil and gas companies to seize the opportunity to engage with tribal governments, as the international energy industry is doing with indigenous peoples, to resolve historic conflicts, protect human rights, respect self-determination, and share in the responsibility for its activities impacting communities.