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Changing Consultation

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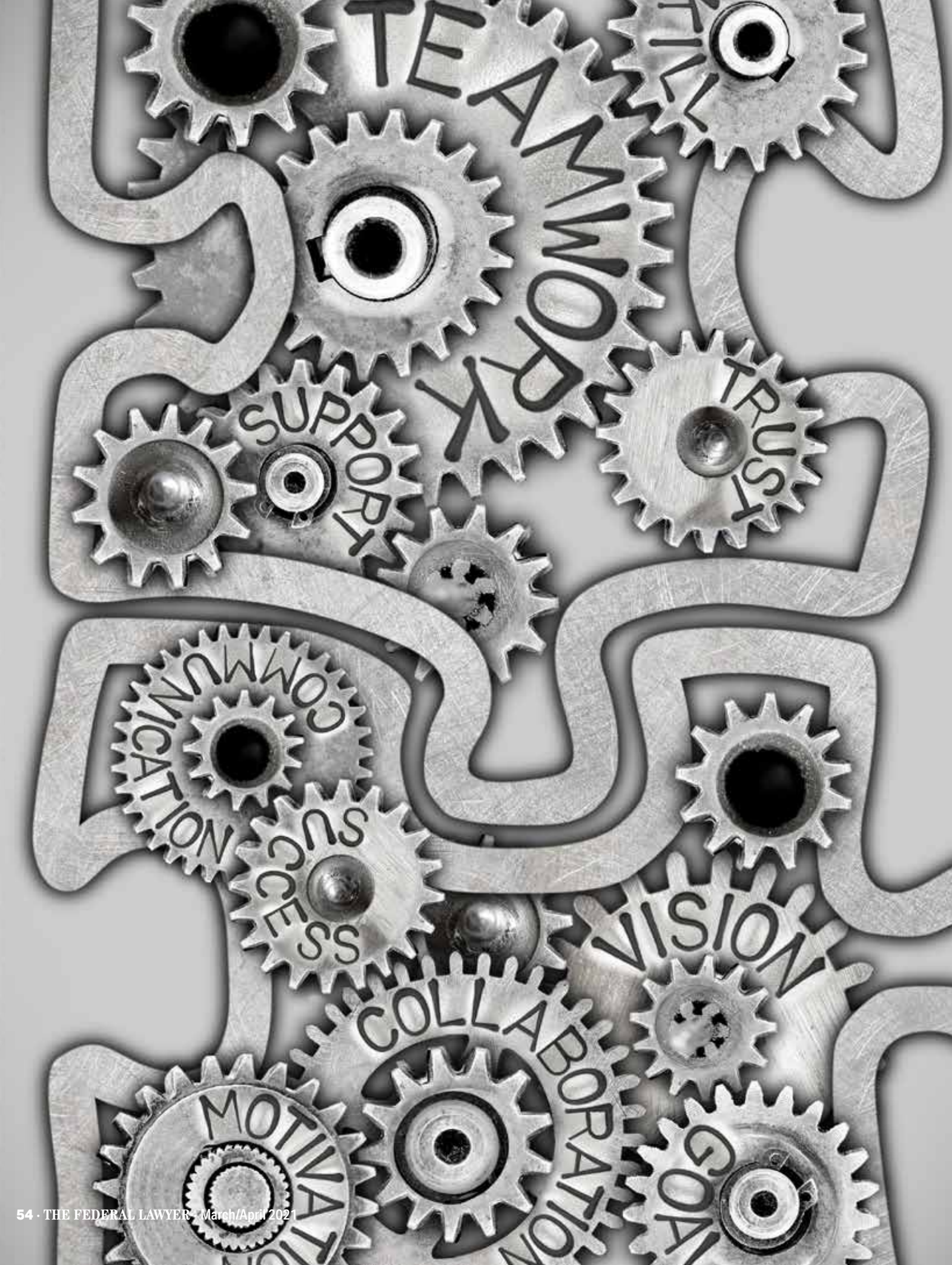
TEAMWORK
SUPPORT
TRUST
COMMUNICATION
SUCCESS
VISION
COLLABORATION
MOTIVATION
GOAL

Changing Consultation

ELIZABETH KRONK WARNER, KATHY LYNN, AND KYLE WHYTE

Examples abound of both historic and modern situations where the federal government and tribes failed to engage in effective consultation. Yet, numerous reasons exist—such as effective management of natural resources and the negative impacts of climate change—for tribes and the federal government to engage in effective consultation. Effective consultation can be met through strong government-to-government relationships between Indian tribes and federal agencies and should be based on respect, mutual understanding, and common goals. This can be accomplished through interactions that will enhance consultation and provide other pathways to achieving a strong government-to-government relationship.[1] To date, however, many within Indian country[2] would argue that effective consultation is not occurring. This may be due in part to a lack of effective guidance on what federal-tribal consultation should look like. Given the existing lack of effective guidance as to what tribal-federal consultation should normatively look like, this article looks to models of cooperative management and collaboration that may serve as useful mechanisms for improving consultation between tribes and the federal government. The article concludes with several discrete recommendations on what should be included in tribal-federal consultations to ensure that legal, moral, and ethical requirements are met.

Note: This article is a revised version of an article by the same name that has been published in the U.C. Davis Law Review.

Legal Claims to Effective Consultation

So, what *does* the law say? This part of the article examines existing federal law applicable to tribal-federal consultation. Ultimately, although federal law calls for consultations between tribes and the federal government, the existing law does not provide enough guidance as to what this consultation should look like.

Federal Trust Relationship

To start, there exists a federal trust relationship between the federal government and federally recognized tribes. It obligates the federal government to provide certain services to tribal members; it is the historical origin of congressional plenary power over Indian affairs; and it requires federal officials to protect tribal resources and tribal sovereignty. In keeping with these responsibilities, this federal trust responsibility calls for consultation between tribes and the federal government, as the trust relationship requires the federal government to act in the best interests of tribes. Further, the trust relationship is arguably the foundation of the duty to consult. Should the federal government breach this trust responsibility, tribes may bring a claim against the federal government, assuming certain criteria are met. Accordingly, in examining the scope of the federal government's duty to consult, consideration of the federal trust relationship and its potential application in this context is helpful. Routel and Holth conclude that this responsibility "imposes a procedural duty on the federal government to consult with federally recognized Indian

tribes. Meaningful consultation with federal officials is necessary to determine what services are most needed for tribal members, to understand how federal and state actions may be encroaching on tribal sovereignty, and to analyze whether a federal project will have an adverse effect on tribal resources."[3]

Today, in determining whether there is an enforceable trust relationship, courts focus their analysis on the amount of control by the federal government over the trust corpus in question. Where the federal government had near complete control over the trust corpus, as in *White Mountain Apache*,[4] the the U.S. Supreme Court found in the Tribe's favor. Therefore, scholars have concluded that "finding a 'network' of statutes to base a breach of trust damages claim depends on: 1) express statutory language supporting a fiduciary relationship; and 2) comprehensive control over government property."[5]

The federal courts have required that a tribe asserting the federal trust responsibility as the basis of its claim against the federal government must first assert a substantive source of law that requires the federal government to act as a fiduciary or undertake certain obligations. Absent such an explicit requirement, neither the government's control nor common law obligations matter in terms of recognizing an enforceable trust relationship against the United States. Furthermore, the federal courts have explained that mere federal oversight does not amount to the necessary day-to-day control over operations typically required for a successful claim based on the federal trust relationship.[6] Also, in determining whether a particular law provides a cause of action, it is not necessary that the law explicitly provide a private right of action. In fact, "[a]ll that's required for a private right of action to exist is a showing the statute at hand 'can fairly be interpreted' to permit it."[7]

Tribal Treaty Rights

Having explored the tribal federal trust relationship, it is helpful to now explore another potential tribal legal claim to effective consultation—tribal treaties and treaty rights. Such analysis is helpful to tribes because of the significance of treaties. Treaty rights are, in many cases, intimately connected to the cultural survival of tribes.[8] As a result, given the importance of these rights, effective consultation may be necessary to protect tribal treaty rights.

Given that tribes possess rights outside of their tribal lands, there is a need for direct interaction between tribes and the federal government to ensure that trust responsibility and treaty rights are upheld. Because over 400 treaties between tribes and the federal government exist, treaties play a significant role in determining the legal rights held by tribes. *Cohen's Handbook of Federal Indian Law*, the seminal treatise on federal Indian law, explains:

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

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

Tribal treaty rights refer to rights that tribes retained following negotiation of a treaty with the United States. Between 1789 and 1871, when treaty making between the federal government and tribes was ended, the federal government and numerous tribes entered into treaties.[9] A treaty between a tribe and the United States "is essentially a contract between two sovereign nations."[10] Such treaties have also been described as "quasi-constitutional" documents.[11]

Despite the strength of potential claims to tribal treaty rights, however, tribal treaties do not speak to how consultations between tribes and other stakeholders should take place. Therefore, even those are relatively robust legal claims available to tribes, such arguments do little to provide guidance as to how such consultations should occur.

Statutory Requirements for Consultation

Another example of legal requirements that impact consultation between tribes and other sovereign governments are statutes. Despite speaking specifically to consultation, these statutes provide little guidance as to what such consultation should look like. Several statutes require some form of consultation between the federal government and relevant tribes. For example, the American Indian Religious Freedom Act (AIRFA) provides that it is the policy of "the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions ... including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."[12] Further, the joint congressional resolution provides that "[t]he President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices." The U.S. Supreme Court, however, held that AIRFA does not create any judicially enforceable rights.[13] Also, in a relevant part in *Havasupai Tribe v. U.S.*, the district court explained that "AIRFA requires a federal agency to ... to consult with Indian organizations in regard to the proposed action. AIRFA does not require Indian traditional religious considerations to always prevail to the exclusion of all else."[14] The finding that AIRFA does not require the federal government to act in a certain way that is protective of American Indian religions has been repeatedly upheld by the federal courts.[15] Additionally, AIRFA is silent as to how consultation is to occur.

Another example is Section 106 of the National Historic Preservation Act (NHPA), which also requires a consultation process for any "undertakings" by a federal agency, or assisted or licensed by a federal agency, that may have an effect on "any district, site, building, structure, or object" that is on, or is eligible to be included in, the National Register. Like AIRFA, however, the NHPA is also silent as to what the consultation process should look like. Additionally, the NHPA consultation requirement does not trigger an independent cause of action in the federal courts. The Ninth Circuit held that the NHPA creates no private right of action against the federal government.[16]

Although section 106 of the NHPA does require consultation, the legal effect of that requirement seems somewhat uncertain. Courts

are split on how to interpret the requirement. Some courts give the requirement "teeth" by pushing back in the face of inadequate consultation, and others do not. The fact that the statute itself does not specify when and how consultation is required complicates the matter. Also, all of these statutes require consultation when tribal resources are potentially being impacted; they do not require such consultation when tribal sovereignty is allegedly impacted.[17]

In May 1972, the federal government published a policy titled "Guidelines for Consultation with Tribal Groups on Personnel Management Within the Bureau of Indian Affairs." Although the guidelines were specific to consultation, they generally defined consultation as merely "providing pertinent information to and obtaining the views of tribal governing bodies."[18] Accordingly, these guidelines did not provide any information on how tribal-federal consultations should be operationalized nor what constituted normatively good consultations. These guidelines were also limited in that they only applied to Bureau of Indian Affairs personnel matters. In sum, despite statutes and guidelines from the federal government, the question of what good or effective consultation is remains unanswered.

Unlike the federal trust relationship and tribal treaties with the federal government, several federal statutes do require consultation. These statutes, however, fail to outline what such consultation should look like. A legal void therefore remains as to the scope and substance of consultations with tribes.

Executive Order

Like statutes, presidential executive orders may impact the federal requirement to consult with tribes under certain circumstances. But also like statutes, these executive orders fail to provide clear guidance as to what such consultation should look like. President Clinton enacted several executive orders that potentially impact tribal-federal consultations. First, he enacted Executive Order 12895, "Enhancing the Intergovernmental Partnership." This was a mandate imposed on "state, local, and tribal governments" to develop a process that would "provide meaningful and timely input into the development of regulatory proposals containing significant unfunded mandates."[19] In 1994, President Clinton signed a memorandum, *Government to Government Relations with Native American Tribal Governments,* which establishes principles for federal executive departments and agencies to consult with tribal governments before taking actions that affect federally recognized tribal governments, assessing the impact of federal initiatives on tribal trust resources, and ensuring that tribal rights are considered in those initiatives.[20] Executive Order 13007 also created obligations to "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian Religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites."[21]

Consultation obligations are found in several statues as well as Executive Order 13175 (2000), *Consultation and Coordination with Indian Tribal Governments,* which requires federal agencies to "have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This order provided more guidance by requiring the creation of an internal consultation process.[22] These "Executive Orders resulted in a proliferation of internal consultation policies and regulations within federal agencies. Since then, each President has reaffirmed that the federal government has a duty to consult with Indian tribes as necessary to achieve the substantive goals of trust responsibility." Despite this proliferation, however, consultation policies remain vague and ineffective.[23]

President Obama issued a memorandum to executive departments and agencies that formally adopted President Clinton's Executive Order 13175. The memorandum also included a reminder that federal officials "are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications." Further, each agency was required to submit a plan that indicated what steps the agency would take to implement the mandate.[24] Despite these requirements, however, "it [the Memorandum] falls short of initiating meaningful changes to the federal-tribal consultation process." Further, the "Obama Memorandum does not even explain what 'consultation' means or when the consultation right is triggered."[25] So, again, despite executive orders addressing the requirement for tribal-federal consultation, what constitutes effective consultation remains largely undefined. Further, the timing and scope of such consultation also remains vague and ill-defined. And, finally, "[b]oth President Clinton's Executive Order and President Obama's Memorandum recite that their statements are not intended to create substantive or procedural rights enforceable against the United States."[26]

On Jan. 26, 2021, President Biden released a presidential executive memorandum addressing tribal consultation. The memorandum provides that "[i]t is a priority of [the Biden] Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy."[27] The memorandum goes on to specify that the Biden administration will work to ensure that tribal voices are included in federal deliberations, and it directs federal agencies to work to develop plans for how they will incorporate federal directives regarding tribal consultations into their work with tribes. While an encouraging step forward, the memorandum does not provide guidance on how consultations should be conducted.

In sum, although numerous statutes, guidelines, and executive orders speak to tribal-federal consultations, much uncertainty exists as to how consultation should be conducted.[28] This uncertainty is exacerbated by the fact that tribes and the federal government may have different definitions of what constitutes success. Additionally, if the federal government views consultations as purely a procedural requirement, there is an increased likelihood that tribes will be less likely to engage in a mere process of consultation.[29]

Moral Claims to Effective Consultation

Having examined the requirement of consultation between tribes and the federal government from a legal lens and finding it lacking guidance as to what consultation should entail, it is helpful to examine the issue from other perspectives, such as a moral lens. Literatures in ethics and Indigenous studies have a lot to convey about consultation, for consultation can be considered key policy or a requirement of any government system that favors freedom, democracy, and cooperation. From a moral perspective, consultation can be linked to the norm that all parties should have a chance to give their free, prior, and informed consent (FPIC) to the actions of any other party when those actions may impact them (positively or negatively) in some way.[30] In the literature on ethics, "free," "prior," and "informed" consent are taken as being defined in certain ways. While there is a range of legal and other purposes for consultation,

morally speaking, consultation can be understood as one process or strategy for fulfilling the general moral duty of consent.[31]

Emerging Indigenous studies literature pertaining to ethics adds additional moral requirements to these definitions. In the ethics literature, "free" simply means non-coerced or that they are not under external pressure to consent or dissent; "prior" means that the actions have yet to be performed and there is a chance to stop them in advance; and "informed" means that the parties have all the facts and possibilities in front of them when they weigh and deliberate the costs and benefits of consent, or decide to dissent or request more time to form a response. In Indigenous studies that work to define these terms—given the long histories of experiencing domination from states and societies such as the United States—are often modified and strengthened. "Free" can also include that tribes should not be pressured to consent or dissent owing to disadvantages in governance capacities that may have accrued over the years due to the consolidation of U.S. power and control over tribes. "Prior" means that tribes are able to deliberate with, give feedback, and even co-design at the early stages of the design of the actions themselves. "Prior" here means "at conception." "Informed," as is common in the medical ethics literature, must also include culturally relevant means of expression and sufficient time and access to expertise for analysis of any information relevant to consent.[32]

These meanings of FPIC suggest a particular type of conduct for U.S. federal agencies and corporations who are involved in actions that may impact tribes. Processes must be in place at the earliest design phases of the project in question.[33] While unrealistic in some cases, this would mean that as plans are being solidified for a certain action, prior to even a permit application or other advance is made, tribes would be invited to the table. It would also suggest that measures were in place that would ensure that tribes, and all other parties, have the capacities to participate in the consultation process fairly. Finally it would suggest that any information about the costs, benefits, and risks of an action would both be expressed in culturally relevant ways and that tribes would be able to gather their own evidence. Tribal evidence, where appropriate, would be considered as empirically weighted as commonly accepted scientific forms of evidence.[34]

Additionally, FPIC should be viewed in many cases as including a "veto" right. Given that most tribes' formal relationship to or incorporation into the U.S. is not legitimate by their perspectives, tribes often consider themselves ultimately—and factually so—as separate sovereign entities.[35] Though tribes use the "trust" and other language to support their goals and the well-being of their members, many Indigenous persons still firmly ground themselves in the ultimate sovereignty of their peoples. Moreover, given the difference in relative power between the U.S., corporations and many Tribes, tribal communities are often at risk of being exploited. These features, as well as the norm of consent itself, indicate that tribes should be able to veto or dissent to the actions of others that may affect them. Another way of understanding this is that FPIC policies that have restrictions on veto powers must have justifications for why veto power has been restricted. The establishment of those justifications must itself be based on processes that are consensual. The ideal of consent as a moral norm suggests a relationship between the United States, tribes, and other parties that would flow much more like a cooperative partnership than a formal consultation, and where tribes would have veto rights (the right to say "no") to any actions that would impact them. Yet consultation policies and tribal contexts are rarely suited to meet such a version of this norm, even if doing so was the intent of consultation by the United States. Tribes also face some dilemmas when they critique consultation processes.

Indigenous traditions of ethics place a great deal of emphasis on consent and dissent as a cornerstone of political relationships and political decision-making. Haudenosaunee and Anishinaabe peoples are well-known for traditions of treaty-making that prioritized the idea that all parties to the agreement should be able to consent or dissent. The Haudenosaunee *Kaswentha* refers to a philosophy that political agreements between two parties are like two vessels navigating parallel running rivers in a shared ecosystem. In the agreement, each party should maintain its independence and way of life, yet both parties should find beneficial ways to cooperate. In this way of thinking of political agreement, the core of treaty-making is respect for each party's independence, or consent. Haudenosaunee people today continue to use the *Kaswentha* philosophy as the basis for environmental protection and justice. Susan Hill, speaking of treaties and agreements of Haudenosaunee people and colonists, writes that the "relationship was to be as two vessels travelling down a river—the river of life—side by side, never crossing paths, never interfering in the other's internal matters. However, the path between them, symbolized by three rows of white wampum beads in the treaty belt, was to be a constant of respect, trust, and friendship ... Without those three principles, the two vessels could drift apart and potentially be washed onto the bank (or crash into the rocks)." Hill's account of the *kaswentha* embodies strong norms of consent and dissent through concepts of noninterference and independence. Such recognition of the importance of consent requires constant "respect, trust, and friendship," which can be understood as a way to guide consultative processes between sovereigns.

Within particular Indigenous peoples, consensus is also privileged as a best practice for how to organize a society. In the Navajo Nation, local leaders were selected by informal consensus. Robert Yazzie (1996-1997) writes that this ensures "everyone can have their say, and when someone is out of line, they get a 'talking to' by a naat'aani [peacemaker/mediator]." Yazzie describes this process as "a circle, where everyone (including a naat'aanii) is an equal. No person is above the other. In this 'horizontal' system, decisions and plans are made through consensus." The Navajo process encourages discussion (long, when needed), the sharing of perspectives, and in-depth learning about the nature of the problem being looked at. Robert Yazzie describes the Navajo restorative justice process:

> For example, to Navajos, the thought that one person has the power to tell another person what to do is alien. The Navajo legal maxim is 'it's up to him,' [*sic*] meaning that every person is responsible for his or her own actions, and not those of another. As another example, Navajos do not believe in coercion. Coercion is an undeniable aspect of a vertical justice system. However, because coercion tends to be authoritarian, it is thus alien to the Navajo egalitarian system .... It is illustrated as a circle where everyone is equal.[36]

These Indigenous North American models of consent fit well with the ethics literature on consent. Shared governance, whether within or between sovereign entities, ought to be consensual. Consultation is a key activity by which consent can occur and be appro-

priately legitimated. Or it can be a space in which dissent and veto can be expressed, and the different parties can begin to learn from each other before returning to the table. The vagueness of U.S. Indian law on consultation actually represents a breakdown in respect for the consent and veto rights of Indigenous peoples. The adequacy of a consultation policy can be judged according to how well it describes a process of consent between parties. The policy cannot be one in which some parties have more time or capacity to deliberate than others, or in which one cultural understanding of consent is dominant. It has to be a policy in which veto rights, even if restricted in various ways, are recognized, honored, and validated with respect.

Beneficial Outcomes Resulting From Effective Consultation

The ethics literature, therefore, provides valuable guidance on what consultation between tribes and the federal government should look like. The effectiveness of consultation between federal agencies and tribes has the potential to lead to tribally led resource management decisions benefiting the tribe, or, alternatively, to have a detrimental impact on the management of tribally valued resources.

Positive examples of effective consultation between tribes and the federal government prove instructive as to what effective consultation can look like and demonstrates how parties can incorporate the principles articulated in the ethics and morality literature. For example, the importance of the government-to-government relationship is emphasized in the 1994 Northwest Forest Plan (NWFP), which addresses management of federal forest land in the Pacific Northwest within the range of the northern spotted owl.[37] The Record of Decision (ROD) for the NWFP recognizes that the implementation of the NWFP may affect tribal treaty rights and trust resources, as restrictions under the NWFP may limit access to tribal cultural resources; calls for consultation on a government-to-government basis with tribal governments when treaty-protected lands or trust resources may be affected.[38]

Agencies managing federal land within the NWFP region are required to monitor the effects of implementation and evaluate the conditions and trends of trust resources identified in treaties with tribes as well as protections for, access to, and use of forest species, resources, and places that are in religious and cultural heritage sites.[39] These monitoring reports have consistently found that, while consultation is recognized in federal law and administrative policy as the primary mechanism for federal agencies to work with tribes when federal action may impact tribal lands and resources, consultation does not always ensure that tribal interests are upheld. In fact, consultation may in some cases be little more than notification of planned federal action.[40] This is evidence of what this article concluded earlier—that although federal law may require consultation in some areas, little guidance is given as to what effective consultation looks like.

The NWFP requires a series of monitoring reports to be conducted every five years to assess a broad spectrum of issues, including populations and habitat of the northern spotted owl and marbled murrelet, late-successional and old growth forests, watershed conditions, socio-economic conditions, and the tribal-federal relationship. As an initial starting point, it is laudable that the NWFP seeks to re-evaluate the tribal-federal relationship. This is consistent with the idea expressed in the ethics and morality literature that relationships should be dynamic partnerships. Since 1999, the USDA Forest Service Regional Ecosystem Office has published these monitoring reports that document the status and trends of these issues over time.

The most recent *Tribal Monitoring Reports* (for the 15-year, 20-year, and forthcoming 25-year reports) have followed a protocol developed by the NWFP Tribal Monitoring Advisory Group to examine consultation processes, the affect of the NWFP on tribal values of interest (including cultural, social, and economic resources), and strategies to strengthen federal-tribal relations. To accomplish this, the monitoring team has reached out to tribal council members and tribal staff from all of the 75 federally recognized tribes with tribal lands and/or territories within the NWFP boundary in Washington, Oregon, and California in order to assess the impacts of the NWFP on tribes. Approximately 1/3 of the tribes within the NWFP region have participated in each of the past three monitoring reports.[41] Pursuant to the interview protocol established by the Tribal Monitoring Advisory Group, the recommendations in the monitoring reports have focused on consultation, tribal rights, and access to cultural resources and improving the compatibility of federal-tribal forest management practices.

In all of the tribal monitoring reports, many of the respondents focused on the need for more effective consultation that would move agency practices from merely notifying tribes of proposed actions to engaging tribes to work with federal agencies to develop strategies that would meet tribal cultural resource management objectives. Recommendations to strengthen consultation focused on increasing agency accountability for meeting the federal trust responsibility through staff education and training; developing formal agreements for consultation and government-to-government interactions, such as memorandums of understandings; and ensuring that agency and tribal leadership understand and come to agreement about consultation policies and practices.[42]

The NWFP tribal monitoring reports have also examined the extent to which tribal rights and access to cultural resources have been impacted by the NWFP. The 20-year tribal monitoring report describes some of the ways that tribal rights and access to resources have been impacted by the NWFP, including "road closure, decreased ability to harvest traditional cultural resources, reduced economic opportunities, and limitations on land management."[43] Recommendations to improve tribal rights and access to cultural resources under the NWFP focus on training agency staff across all levels to ensure strong cultural competency in tribal matters, reviewing and updating policies that severely impact tribes' rights to interact with traditional lands and resources, and adopting practices that protect sensitive tribal and traditional knowledge.

The NWFP monitoring reports also look at federal-tribal forest management compatibility. Interviews that took place for the 20-year tribal monitoring report described some ways that federal forest management practices align with tribal values, restoration and protection of fish and wildlife habitat, and the incorporation of tribal forest management practices in agency land management (e.g., prescribed fire). Some of the ways that respondents described incompatibilities in tribal and federal forest management included prioritization of timber and industry over other forest resources and tribal needs, lack of incorporation of traditional knowledge and tribal values into management, an all-or-nothing approach that could deplete ecosystems or impact economies.[44] Recommendations to improve the compatibility of federal-tribal forest management focus on increasing formal consultation and collaborative approaches between federal agencies and tribes to enhance the compatibility of federal-tribal forest management practices. This would increase

opportunities for tribal leadership in land management decisions and leverage opportunities for funding and resources to support tribal natural resource departments.

A 2018 synthesis of science to inform land management within the NWFP area examined strategies to promote tribal ecocultural resource management and effectively engage tribes in forest management and planning. Ensuring effective consultation was among the recommendations included in the report, along with strategies for bolstering federal-tribal collaboration, coordination, and cooperative management of tribally valued cultural resources.[45]

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

Conclusion: Strengthening Federal-Tribal Relationships to Address Climate Change and Fossil Fuel Industries

The government-to-government relationship is a formal mechanism for Indigenous peoples to interact with non-Indigenous entities in order to protect Indigenous cultural connections to the earth, address climate change at multiple scales, and negotiate policies to avoid multiple oppressions. Based on lessons gleaned from these examples, coupled with guidance from the morality and ethics literature, this section describes strategies to strengthen federal-tribal relations and effectiveness of consultation. Such strategies and considerations are incredibly valuable given the absence of effective guidance provided by existing federal law. Importantly, while this analysis focused on climate change and fossil fuel industries, the same considerations about consultation are important for other risks faced in Indian country with the emergence of the energy transition. Previously mentioned cases involving lack of consultation in solar energy and hydropower are illustrative of this need.

1. Establish a common understanding of the role, purpose, and principles of "consultation." Consultation policies are not the sole domain of nontribal agencies—tribes may have their own consultation policies to address the many different policies under which agencies operate, and *both* agencies and tribes can initiate consultation. Agencies and tribes must remain on equal terms through consultation processes so that conflicts are not resolved by a presumption that agencies have the final word over tribes. Ensuring that tribes are treated as equal sovereigns in consultation and can initiate their own consultation processes can lessen some of the powerlessness and lack of respect that many Indigenous peoples face in relations with non-Indigenous nation states. Indigenous traditions of consultation should be considered as among the most important intellectual bases for envisioning roles, purposes, and principles. Consent, in particular, must be discussed as a key guiding norm for consultation.
2. Assess and build knowledge about the federal trust responsibility, government-to-government relationships, and consultation. The extent to which tribal and nontribal partners understand and are responsive to the federal-tribal relationship will directly affect the ability of agencies and tribes to engage meaningfully on climate change and other resource management issues. Research ecologist Frank Lake notes that trust and understanding between tribes and nontribal partners can increase the effectiveness of research and management: "it is imperative that managers and researchers understand and use formal and culturally sensitive approaches for contacting tribal government and community members."[46]
3. Agency climate change policies, research, resources, and plans should directly and meaningfully address issues related to Indigenous communities in the United States. When agency programs and initiatives related to climate change only include tribes as general stakeholders, they may fail to recognize the contributions that Indigenous communities in the United States can offer in addressing climate change, as well as the implications that climate change may have on off-reservation tribal resources and ancestral territory.
4. Recognize the role and protect the use of traditional knowledge in climate change initiatives. Some tribes have adopted their own policies and programs to assess and adapt to climate change impacts on resources of concern, and many of these efforts incorporate the use of traditional knowledge. Traditional knowledge can play an important role in understanding the impacts from climate change and identifying strategies for adaptation. Federal-tribal consultation on climate-change-related issues should involve procedures and agreements when traditional knowledge is involved as well as strategies to ensure the protection of culturally sensitive tribal information from disclosure.[47] This recommendation avoids the cultural imperialism implicit in policies where tribal knowledge is not given a fair seat at the table in terms of informing policy and climate-change-related research.
5. Examine how the impacts of climate change on the quantity and distribution of culturally important species will affect tribal access to and management of these tribal resources on- and off-reservation. Climate change may result in changes to ecological processes as well as the quantity and distribution of species that have cultural and economic importance to tribes.[48] These shifts create the need to examine treaty rights and federal land management obligations in consulting with tribes to assess and plan for the potential socio-economic and ecological impacts from climate change. There is a need to examine how tribal rights and access to culturally important resources (both on- and off-reservation) will be affected by the impacts from climate change. This level of investigation must happen at a local level and through direct consultation and collaboration between tribal and agency leadership and staff to identify strategies to protect tribal access to these resources in the future.
6. Identify resources that strengthen tribal and agency capacity to engage in meaningful consultation and achieve a more robust government-to-government relation. American Indian and Alaska Native tribes are faced with numerous calls for "consultation." Finding the resources and staff to travel, respond to requests for information, or participate in consultations may be problematic and limit tribal capacity to respond to consultation requests. This is particularly important for helping tribes address climate change issues at multiple scales. It will support tribal engagement in consultations with agencies located outside their immediate geographic region. It will also prevent certain forms of powerlessness and marginalization that occur

when a tribe is not only isolated geographically but also lacks the capacity to travel outside of that region, even when there are willing agency partners located elsewhere. In terms of agency capacity, culturally sensitive training needs to be strengthened, and new relationships need to be facilitated when staff turnover occurs.

7. Find direct pathways to strengthen federal-tribal relations and opportunities for co-management. The management of tribally valued cultural resources will be strengthened by the inclusion of tribal leadership, traditional knowledge, and tribal direction in resource management decisions. Hydrologist Karletta Chief examines various participatory research frameworks and a number of case studies for tribal engagement in water management decisions and finds that tribal engagement is critical to the success of these management decisions: "Because of the deep connection tribes have to the natural environment and tribal specific challenges in water management, the manner of engaging tribal participants, from individuals to communities to nations, is important to the success of the project, goals, and dialogue."[49] Co-management or resource management goals and responsibilities shared by tribes and federal agencies offers a framework for this kind of meaningful tribal engagement by ensuring that tribes are a part of all stages of development, implementation, and monitoring of resource management decisions.

These recommendations, if adopted, will go a long way toward realizing effective tribal consultation.[50] Federal law provides a framework for such consultation to occur, as it provides legal claims, such as the federal trust relationship, treaties, statutes, and executive orders that may lead to consultation occurring. The law ultimately is limited, however, as it does not provide guidance on the scope or operation of such consultation. This is where turning to ethics and morality literature is helpful, as it fills the void left by existing law, and it does so in an effective manner. These strategies, based on lessons learned from the Dakota Access pipeline and NWFP examples, therefore provide a way forward in terms of finding effective consultation mechanisms that are acceptable to both tribes and the federal government. ⊙



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Endnotes

[1]Although this article largely examines the benefits of effective consultation from a tribal perspective, consultation often makes good business sense and will benefit nontribal parties. "The failure of corporations to respect indigenous peoples' right to access, use and protect their sacred sites may result in legal liability, a lengthy lawsuit, loss of permits, licenses or concessions, or a harmed reputation." Stuart R. Butzier & Sarah M. Stevenson, *Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent*, 32 J. Energy & Nat. Res. L., 297, 333 (2014).

[2]*See* 18 U.S.C. § 1151 (defining "Indian country").

[3]Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 Univ. of Mich. J.L. Reform 417, 421-422, 435 (2013).

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

[5]David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., Matthew L.M. Fletcher, Federal Indian Law, 342 (West, 6th ed. 2011).

[6]*Blackfeet Housing v. United States*, 106 Fed. Cl. 142, 151 (Fed. Cl. 2012).

[7]*Fletcher v. United States*, 730 F.3d 1206, 1210-11 (10th Cir. 2013) (internal citation omitted).

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

[9]Cohen's Handbook of Federal Indian Law §§ 1.03, 4.05[2] (Lexis Nexis 2012) (internal citations omitted).

[10]*Washington v. Fishing Vessel Ass'n,* 443 U.S. 658, 675 (1979) (internal citation omitted).

[11]Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 408 (1993) (explaining that tribal treaties are similar to constitutions because they are "fundamental, constitutive document[s].").

[12]42 U.S.C. § 1996.

[13]American Indian Religious Freedom, H.R.J. 738 95th Cong. (1978).

[14]*Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1488 (D. Ariz. 1990). *See also Wilson v. Block*, 708 F.2d 735, 745-746 (D.C. Cir. 1983) (holding that AIFRA does require federal agencies to consult, but that it does not compel agencies to act in a way that is protective of American Indian religious practices).

[15]*Lyng v. Nw. Indian Cemetery*, 485 U.S. 439, 455 (1988) ("[N]owhere in [AIRFA] is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights."); *United States v. Mitchell*, 502 F.3d 931, 949 (9th Cir. 2007).

[16]National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 917, 1096. *But see Boarhead Corp. v. Erickson,* 923 F.2d 1011, 1017 (3rd Cir. 1991); *Vieux Carre Prop. Owners v. Brown,* 875 F.2d 453, 458 (5th Cir. 1989) (both holding that the NHPA impliedly creates a private right of action).

[17]Routel, *supra* note 3, at 441.

[18]*Ogala Sioux Tribe of Indians v. Andrus,* 603 F.2d 707, 717 (8th Cir. 1979).

[19]Exec. Order No. 12875, 58 Fed. Reg. 58093 (Oct. 26, 1993).

[20]Government-to-Government Relations With Native American Tribal Governments, 59 Fed. Reg. 22,951 (May 4, 1994).

[21]Exec. Order No. 13007, 61 Fed. Reg. 26771 (May 24, 1996).

[22]Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000).

[23]Routel, *supra* note 3, at 443-444.
[24]President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57881 (Nov. 5, 2009).
[25]Routel, *supra* note 3, at 447-48.
[26]Butzier, *supra* note 1, at 316.
[27]The White house, Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/.
[28]Notably, case law does little to remedy this uncertainty. "[T]he case law at least tends to show the tentative and slippery nature of consultation requirements: courts are split on whether or not they exist and split again as to whether those found have been violated or not." 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, 54-55 (2000).
[29]*Id.* at 25, 28.
[30]United Nations Human Rights, The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions (2013), https://www.ohchr.org/documents/issues/ipeoples/undripmanualfornhris.pdf.
[31]Kristin Shrader-Frechette, Environmental Justice: Creating Equality, Reclaiming Democracy (2002); Iris Marion Young, Inclusion and Democracy 304 (2002).
[32]Food and Agriculture Organization of the United Nations, Free Prior and Informed Consent 15-16 (2016), http://www.fao.org/3/i6190e/i6190e.pdf; Tom L. Beauchamp & James F. Childress, Principles of Biomedical Ethics (Oxford Univ. Press 2009).
[33]Beauchamp & Childress, *supra* note 32.
[34]Id.; Kristen Shrader-Frechette, *Analyzing Public Participation in Risk Analysis: How the Wolves of Environmental Injustice Hide in the Sheep's Clothing of Science,* 3 Environmental Justice 119 (2010); Kristen Shrader-Frechette, Risk and Rationality: Philosophical Foundations for Populist Reforms (1991); Mary Arquette, et al., *Holistic risk-based environmental decision making: a Native perspective,* 110 Environmental Health Perspectives 259 (2002); Nicholas J. Reo, et al., F*actors That Support Indigenous Involvement in Multi-actor Environmental Stewardship,* 13 AlterNative 58 (2017).
[35]Murray Lee, *What is Tribal Sovereignty?*, Partnership with Native Americans (Sept. 9, 2014), http://blog.nativepartnership.org/what-is-tribal-sovereignty/.
[36]Robert Yazzie, *Hozho Nahasdlii—We Are Now in Good Relations: Navajo Restorative Justice.* Univ. of St. Thomas L. Rev. 117 (1996).
[37]*Northwest Forest Plan*, Regional Ecosystem Office, https://www.fs.fed.us/r6/reo/.
[38]*Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl,* Forest Serv. & Bureau of Land Mgmt., https://www.fs.fed.us/r6/reo/nwfp/documents/reports/newroda.pdf.
[39]U.S. Department of Agriculture Forest Service Regional Ecosystem Office, 1994.
[40]U.S. Department of Agriculture, Northwest Forest Plan—the First 15 Years 1994-2008: Effectiveness of the Federal-Tribal Relationship (2011), https://www.fs.fed.us/r6/reo/monitoring/downloads/tribal/Nwfp15yrMonitoringReportTribal.pdf.
[41]Id.; Kristen Vinyeta & Kathy Lynn, *Strengthening the Federal-Tribal Relationship: A Report on Monitoring Consultation under the Northwest Forest Plan,* U.S. Department of Agriculture (May 2015), https://www.fs.fed.us/r6/reo/monitoring/downloads/tribal/Nwfp20yrMonitoringReportTribal.pdf.
[42]Gary Harris, et al., *Effectiveness of the Federal-Tribal Relationship* (2011); Vinyeta, *supra* note 41.
[43]Vinyeta, *supra* note 41, at 29.
[44]*Id.*
[45]Jonathan Long et al., *Chapter 11: Tribal ecocultural resources and engagement, in* Synthesis of Science to Inform Land Management With the Northwest Forest Plan Area (2018).
[46]Frank K. Lake et al., *Returning Fire to the Land—Celebrating Traditional Knowledge and Fire*, 115 J. For. 343, 349 (2017).
[47]Terry Williams & Preston Hardison, *Culture, law, risk and governance: contexts of traditional knowledge in climate change adaption, in* Climate Change and Indigenous People in the United States 23 (2013).
[48]Karletta Chief et al., *Indigenous experiences in the U.S. with climate change and environmental stewardship in the Anthropocene, in* Forest conservation and management in the Anthropocene: Conference proceedings 161 (2014).
[49]Karletta Chief et al., *Engaging Southwestern Tribes in Sustainable Water Resources Topics and Management*, 8 Water 350 (2016).
[50]These recommendations are made from the perspective of a nontribal entity consulting with a tribe. Tribes interested in improving consultations with nontribal entities may want to adopt their own tribal consultation provisions. Butzier, *supra* note 1, at 323.