

The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion

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The word “consultation” embodies the Obama Administration’s approach to federal Indian policy.¹ So much so that federal agencies are actually engaging in tribal consultations *on tribal consultation*.² Still other federal agencies completely missed the memo on tribal consultation – literally President Obama’s Tribal Consultation Memorandum – and, in specific instances, have failed to meaningfully consult with tribal governments concerning federal activity.³ But the United States’ obligation to consult with tribal governments about any federal matter implicating tribes is not a new mandate. Indeed, the consultation obligation has existed since at least treaty times under the express terms of certain treaties⁴ and age-old international legal norms governing U.S. treaty obligations.⁵ While the obligation is often attributed to President Clinton’s

¹ See generally President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57881 (Nov. 5, 2009) [hereinafter 2009 Presidential Memorandum]. Kudos to Kimberly Teehee (Cherokee), Senior Policy Advisor for Native American Affairs, White House Domestic Policy Council, and Jodi Gillette (Standing Rock Sioux), Deputy Associate Director of the White House’s Office of Intergovernmental Affairs, for spearheading the promulgation of the 2009 Presidential Memorandum. I have already witnessed firsthand how the policy pronounced in the Memorandum has staved off potentially ugly litigation and related fall out between tribal and federal sovereigns and in the process, strengthened tribal-federal relations. In that way, the 2009 Presidential Memorandum may represent one of the Obama Administration’s most important federal Indian policy accomplishments to date.

² Letter from David Hayes, Deputy Secretary, and Larry Echo Hawk, Assistant Secretary – Indian Affairs, United States Department of the Interior, to Tribal Leaders (Nov. 23, 2009), available at <http://www.bia.gov/idc/groups/public/documents/text/idc002746.pdf>.

³ See e.g. *Confederated Tribes and Bands of Yakama Nation v. U.S. Dept. of Agriculture*, No. 10-3050, 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010). Indeed, a year after President Obama issued the 2009 Presidential Memorandum, with much federal and tribal fanfare, several federal agencies have yet to honor the President’s mandate that they provide a written tribal consultation plan within ninety days from the issuance of that Memorandum. Some of those offending agencies include, not surprisingly, those which increasingly commence inquests of tribal governments and enterprises per so-called federal laws of general applicability. See generally cases cited in note 26, *infra*; compendium of “Consultation and Tribal-Federal Relations” materials promulgated pursuant to the 2009 Presidential Memorandum, as assembled by the National Congress of American Indians (NCAI), available at: <http://www.ncai.org/Consultation-and-Tribal-Federa.30.0.html>. The White House and/or NCAI should insist that those offending agencies immediately come into compliance with the 2009 Presidential Memorandum.

⁴ See e.g. Treaty with the Kaskaskia, Peoria, Etc., May 30, 1854, art. 7, 10 Stat. 1082, 1084.

⁵ Restatement (Third) Foreign Relations Law of the United States §§ 325, 337 (1986) [hereinafter Restatement].

Executive Order 13,175, the federal Indian consultation right was affirmed by President Lyndon Johnson as far back as 1968.⁶

The federal duty to consult in Indian Country runs deep. Since 1492, Indian tribal governments within what is now the United States have, as a group, lost up to 98 percent of their aboriginal land base.⁷ As a result, the overwhelming majority of tribal properties of cultural and religious significance are located outside Indian reservations and federal trust lands.⁸ As sovereign nations, tribes have an inherent responsibility to promote and protect the welfare of their people, which includes “the right to protect their cultural and religious properties and the right to be treated with respect by federal agencies.”⁹

In this era of Indian self-determination and self-sufficiency, tribes are increasingly returning to their aboriginal or “ceded” lands or otherwise moving beyond the arbitrary confines of reservation boundaries, to grow their economies. The federal Indian treaty, trust and concomitant consultation obligations extend not only to on-reservation trust resources but to off-reservation tribal economic assets as well.¹⁰ Indeed, because economic success in Indian Country is ultimately tied to cultural empowerment and sovereignty, Indian economies will not progress without the assurance that that treaty and trust resources will be kept intact.¹¹

With that in mind, from 1968 onward, the federal government has increasingly recognized the importance and validity of tribal concerns regarding the protection of both on and off-reservation properties of cultural and religious significance.¹² Since then, an expressed right to “consultation” and a corresponding duty for federal agencies to “consult” has accompanied the recognition of tribal concerns, largely as a shield. Nonetheless, even today – some forty years after the right to consult was formally adopted – “federal agencies have been reluctant to comply” with their duty to implement it.¹³

⁶ See e.g. President Lyndon B. Johnson, Special Message to Congress on the Problems of the American Indian: “The Forgotten American,” 1 Pub. Papers 336 (Mar. 6, 1968) [hereinafter 1968 Johnson Congressional Message].

⁷ Gregory A. Smith, *The Role of Indian Tribes in the Section 106 National Historic Preservation Act Review Process*, SJ053 ALI-ABA 649 (2004).

⁸ John Petoskey, *Indians and the First Amendment*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 221 (Vine Deloria, Jr. ed. 1985).

⁹ Smith, *supra* note 7, at 649.

¹⁰ See *Confederated Tribes and Bands of the Yakama Nation v. U.S. Dept. of Agriculture*, No. 10-3050, 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010) (on preliminary injunction, observing that a threatened federal undertaking “would immeasurably harm the resources and waterways enjoyed by the Yakama Nation . . . as well as the Yakama Nation’s logging industry.”).

¹¹ See Stephen Cornell & Miriam Jorgensen, *The Nature and Components of Economic Development in Indian Country* (Nat’l Cong. Am. Indians Pol’y Research Center, May 15, 2007), available at <http://nni.arizona.edu/whatwedo/pdfs/CornellJorgensen.pdf>.

¹² See e.g. 1968 Johnson Congressional Message, *supra* note 6; 2009 Presidential Memorandum, *supra* note 1.

¹³ Smith, *supra* note 7, at 649.

Consultation on a government-to-government basis is not only the law, it is a “sound management policy” and, more practically, good governance and business.¹⁴ Tribal opposition to a federally licensed, permitted or stimulus-funded project can cost contractors time and money – a cost that ultimately runs to taxpayers – and may even stop a project dead in its tracks. To reduce these risks, it is extremely important for project managers to be sure that federal agencies “engage in meaningful consultation with concerned tribes and to do so early,”¹⁵ when a project is located near lands owned by an Indian tribe or its members, near an Indian reservation, or in areas where an Indian tribe may have an aboriginal or other traditional or cultural connection, including hunting and fishing rights, usufructuary rights and/or any other “reserved right.”¹⁶ If a federal agency has jurisdiction over a project, be it on- or off-reservation, then federal law *requires* that the agency meaningfully consult with any concerned tribe. By the same token, the United States, before encroaching into tribal governmental or business affairs, should, upon the request of a tribal government, consult.

The federal Indian consultation obligation arises from numerous federal statutes, regulations, and presidential orders; case law; and international legal norms. In these ways, the federal Indian consultation is both a sword and a shield that tribal governments should deploy when necessary to guard and protect their sovereignty. A paper tiger the right is not.

I. Preemptive Consultation

There are two general views of consultation. In the first one – the skeptical view – consultation is a method that perpetuates the betrayal of Indians by federal agencies.¹⁷ In the second one – the optimistic view – the federal government “recognizes the wisdom of considering the unique perspectives of Native Americans during policy debate, and [makes] every effort to incorporate those views and interests in federal planning” and other activities.¹⁸ In order for the second view to become a reality, consultation must be “meaningful.” “Meaningful consultation means tribal consultation **in advance** with the decision maker or with intermediaries with clear authority to present tribal views” to the

¹⁴ SHERRY HUTT & JAIME LAVALLEE, TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 7 (2005), available at http://www.nathpo.org/PDF/Tribal_Consultation.pdf. As noted by one federal attorney: “[E]arly consultation with the public and affected States and Tribes . . . can help save money by identifying important issues and avoiding unnecessary or insufficient analyses. We anticipate cost savings from these initiatives of at least \$9.0 million over the next five years.” *Prepared Testimony of Robert R. Nordhaus, General Counsel, Department of Energy Committee on Energy and Natural Resources Subcommittee on Oversight and Investigations United States Senate*, FED. NEWS. SERV., June 7, 1995.

¹⁵ Dean B. Suagee, *Consulting With Tribes for Off-Reservation Projects*, 25 NAT. RESOURCES & ENV’T 54, 55 (2010).

¹⁶ See generally Michael C. Blumm & Jane G. Steadman, *Indian Treaty Fishing Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation*, 49 NAT. RES. J. 653 (2009).

¹⁷ Christy McCann, *Dammed If You Do, Damned If You Don’t: FERC’s Tribal Consultation Requirement and the Hydropower Re-Licensing at Post Falls Dam*, 41 GONZ. L. REV. 411, 434 (2006).

¹⁸ Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. IND. L. REV. 21, 24 (2000).

agency decision maker.¹⁹ This usually comprises of a **meeting**, during which the federal agency notifies the tribe of the proposed action and justifies its reasoning.²⁰ The tribe may then issue a motion of support for the decision, or reject the decision, **pursuant to tribal law or procedure.**²¹

Although this sounds relatively easy enough, a recent study has found that [M]any “consultations” were in fact merely opportunities for Agencies to inform Tribes of decisions that had been made, or that Agencies believed that consultation obligations could be met by sending a letter to Tribes inviting them to a “consultation” without first providing specific information about the proposed project upon which they could be prepared to comment.²²

To be clear, a boilerplate letter to several tribes, informal communication with a tribal member or staffer, or a single meeting with a tribe, is not meaningful consultation.²³ A federal *fait accompli* is not meaningful consultation.²⁴

Many tribes are realizing that consultation can and should be used as a sword – a kind of preemptive strike that forces federal agencies to consult before taking any legally permissible action even tangentially related to an Indian tribe – as well as a shield to guard from attacks on Indian sovereignty or tribal coffers. As it stands, some of the more intrusive federal agencies – the Internal Revenue Service (IRS), the National Indian Gaming Commission (NIGC) and the Environmental Protection Agency (EPA), to name a few – assume free reign over the promulgation and enforcement of their prerogative in Indian Country. Indeed, because federal laws of general applicability are presumed to apply to tribes, even on trust and reservation land,²⁵ these agencies’ foray into Indian Country has received judicial sanction in most instances.²⁶ However, at each stage of United States incursion, federal law also requires meaningful consultation. It is this aspect of federal law that is often conveniently overlooked.

For example, the IRS, per its written protocols, requires its agents to consult with “tribal official(s) or a designee of the tribal official(s)” for “a discussion of the issues and information needed to complete [an] work assignment,” be it for “educational/outreach

¹⁹ Lower Brule Sioux Tribe v. Deer, 911 F. Supp. 395, 401 (D.S.D. 1995) (citing Hoopa Valley Tribe v. Christie, 812 F.2d 1097 (9th Cir. 1987)) (emphasis added).

²⁰ *Id.*

²¹ *Id.*

²² HUTT & LAVALLEE, *supra* note 14, at 11.

²³ Lower Brule, 911 F. Supp. at 401.

²⁴ *Cf. id.*

²⁵ Under the *Tuscarora-Coeur d'Alene* analysis, statutes that are silent on the issue of applicability to Indian tribes will apply in totality to tribal enterprises unless one of the three following exceptions applies: “(1) the law touches ‘exclusive rights of self-governance in purely intramural matters’; (2) the application of the law to the tribe would ‘abrogate rights guaranteed by Indian treaties’; or (3) there is proof ‘by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations’” *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

²⁶ See e.g. *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Atty. for Western Dist. of Mich.*, 46 F.Supp.2d 689 (W.D. Mich. 1999) (NIGC); *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981) (EPA); *Squire v. Capoeman*, 351 U.S. 1, 6 (1956) (IRS).

endeavor, compliance review, or examination [audit].”²⁷ Likewise, the NIGC’s consultation policy requires it, if not the Commission Chairperson, to consult with a tribe when the agency carries out its “authority and responsibilities under [the Indian Gaming Regulatory Act²⁸] to conduct investigations, take enforcement actions, and render regulatory and quasi-judicial decisions regarding the approval of tribal gaming ordinances and third party management contracts, the suitability of management contractors to participate in Indian gaming, and tribal compliance with the Act.”²⁹ The EPA’s consultation mandates are also numerous, sprinkled throughout the Code of Federal Regulations and the EPA’s own internal regulations.³⁰

In practice, this means that the tribe should not turn over one shred of paper to the IRS or NIGC in response to an information or examination request, or allow federal agents any access to tribal facilities or enterprises, until the federal agency has consulted with the tribe about its efforts at hand. This notion of a pre-inquest government-to-government consultation will likely continue to be conveniently overlooked by federal agencies unless tribes aggressively assert their federal Indian consultation right.³¹

II. Consultation as a Federal Mandate

Numerous federal statutes, presidential orders, and federal agency regulations (codified and otherwise) mandate meaningful consultation with Indian tribes prior to federal action. Although an exhaustive list of these laws and regulations is beyond the scope of this article³² – especially now that the list seems to be growing at an exponential rate³³ – some pertinent illustrations are useful.

In 1971, the Bureau of Indian Affairs (BIA) promulgated an internal document titled: *Guidelines for Consultation with Tribal Groups on Personnel Management Within the Bureau of Indian Affairs*. The guidelines set forth extensive consultation policies and urged Bureau managers to “seek ways in which . . . to accomplish the objectives of the consultation policy.”³⁴ In *Oglala Sioux Tribe of Indians v. Andrus*,³⁵ the Tribe argued that the BIA violated the color and letter of these internal guidelines by failing to

²⁷ INTERNAL REVENUE MANUAL pt. 4.86.1.2, 2007 WL 2643664, (Jan. 1, 2003) (Protocol for Contacting Tribes).

²⁸ 25 U.S.C. §§ 2701-2721. The relevant regulations are at 25 C.F.R. §§ 501-577.

²⁹ National Indian Gaming Commission, Government-to-Government Tribal Consultation Policy, 69 FR 16973-01 (Mar. 31, 2004), § III.G.

³⁰ See Haskew, *supra* note 18, at 39.

³¹ As noted by one tribal attorney, “[i]t is difficult to avoid the conclusion that ‘consultation’ is the latest federal codeword for lip service.” *Id.*, at 73.

³² For lists of these mandates see WILLIAM H. ROGERS, JR., ENV’T. L. INDIAN COUNTRY § 1:16 (2010); Haskew, *supra* note 18, at n.3; THE WHITE HOUSE INDIAN AFFAIRS EXECUTIVE WORKING GROUP, CONSULTATION AND COORDINATION ADVISORY GROUP, LIST OF FEDERAL TRIBAL CONSULTATION STATUTES, ORDERS, REGULATIONS, RULES, POLICIES, MANUALS, PROTOCOLS AND GUIDANCE (2009), available at http://www.achp.gov/docs/fed%20consultation%20authorities%20-09%20ACHP%20version_6-09.pdf.

³³ See Haskew, *supra* note 18, at 22 (noting a “proliferation of tribal consultation requirements in federal statutes and policies”).

³⁴ *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 717 (8th Cir. 1979).

³⁵ *Id.*

meaningfully consult before making personnel decisions affecting the Tribe. The court agreed with the Tribe, finding that the BIA's actions indeed deprived the Tribe "of fair notice of the agency's intentions" in violation of "those general principles which govern administrative decisionmaking."³⁶ The court issued an injunction in favor of the Tribe.³⁷

In 1994, President Clinton issued a Presidential Document mandating that every federal agency "consult . . . with tribal governments prior to taking actions that affect federally recognized tribal governments."³⁸ In response, the Secretary of the Interior issued Secretarial Order 3175, and a subsequent Department Manual which required all Interior agencies to "consult with the recognized tribal government with jurisdiction over the trust property" that may be affected.³⁹ In *Lower Brule Sioux*,⁴⁰ the Tribe successfully used this mandate to obtain a writ of mandamus that forced the BIA to "follow its own guidelines and policies, including affording the tribe meaningful prior consultation"⁴¹ Specifically, the court found that, although a federal agency's interpretation of its own policies and regulations is generally given deference, when that interpretation "is plainly inconsistent with the wording of the regulation, or otherwise deprives affected parties of fair notice of the agency's intentions" it cannot stand.⁴² Thus, the court held, because the BIA "violated its obligations of trust and fiduciary obligations" by failing to keep its promises to the Tribe, the BIA acted in an arbitrary and capricious manner in violation of federal law.⁴³

III. Consultation as an Indian Trust Obligation

All federal agencies have a common law trust obligation to consult with tribes, as commanded by the "Indian trust doctrine."⁴⁴ In short, the doctrine was created in a set of three opinions known as the "Marshall Trilogy."⁴⁵ In those cases, Chief Justice John Marshall held that (1) tribes are "domestic dependent nations"; (2) as such, tribal

³⁶ *Id.* at 718, 721.

³⁷ *Id.* at 712-13 (finding that the lower court, upon remand, has the authority to issue the injunctive relief requested).

³⁸ President William J. Clinton, Government-to-Government Relations with Native American Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies, 59 Fed. Reg. 22,951, 22,952 (Apr. 29, 1994). This Memorandum was updated in 1998 with Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998), and later supplanted by Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,251 (Nov. 6, 2000). The Obama Administration has recently issued a Presidential Memorandum that ordered federal agencies to promptly implement President Clinton's 2000 Executive Order. See 2009 Presidential Memorandum, *supra* note 1.

³⁹ Department of the Interior, Departmental Manual: Part 512 American Indian and Alaska Native Programs, *Departmental Responsibilities for Indian Trust Resources* § 2.2 (1995).

⁴⁰ 911 F. Supp. 395.

⁴¹ *Id.* at 402.

⁴² *Id.* at 399 (citing *Oglala Sioux*, 603 F.2d at 718).

⁴³ *Id.* at 400-401.

⁴⁴ Because of the derivation of the doctrine and subsequent case law, the Indian trust doctrine has its own legal filaments and fragments, and works for and cuts against tribal interests. In *U.S. v. Kagama*, 118 U.S. 375 (1886), the Court opted to replace the sovereign-based trust model for a (racist) dependency model that justified nearly total federal authority over tribes, despite any textual basis for the change in federal law. Today, both models are used, usually one for the other at the whim of the Court.

⁴⁵ *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

sovereignty is subject to the overriding sovereignty of the federal government; but (3) the federal government must not haphazardly diminish tribal sovereignty, because “their relationship to the United States resembles that of a ward to his guardian.”⁴⁶ Subsequent court decisions have construed this ward-to-guardian relationship as creating a fiduciary duty as to tribal lands and resources.⁴⁷ Thus, federal actions – as expressed in statutes, treaties, executive orders, and administrative regulations – affecting tribal resources are construed in light of the Indian trust doctrine. If agencies do not comply with these instructions, a trust duty is violated.⁴⁸ Further, absent a direct and express conflict with a statutory provision, the trust doctrine serves as a common law overlay to federal law and regulation.

The fiduciary duty to tribes includes consultation, as “[c]onsultations . . . can roughly be understood as communication by Indian beneficiaries of their desires to the federal trustees who make ultimate determinations about what happens with the lands Indians occupy.”⁴⁹ This duty is triggered when an agency decision impacts the “value, use, or enjoyment” of Indian trust assets.⁵⁰ While the agency-tribal consultation undertaking may appear to be a small cog in the larger fiduciary machine, it is an essential element of a well-functioning trust system. It should not be surprising, then, that in the *Oglala and Lower Brule* cases discussed above, the court found a violation of the federal trust obligation as well as federal mandates.⁵¹ Below are two more examples of how consultation is enforced as a fiduciary duty.

In *Klamath Tribes v. U.S.*,⁵² the Tribes sought an injunction to prevent the U.S. Forest Service from implementing a forest plan and timber sale that, the Tribes argued, would “adversely impact the resources . . . on which the Tribes depend for their subsistence and way of life.”⁵³ The court found that case law, presidential orders, and the agency’s own internal regulations created a “substantive duty” to consult with Indian tribes in any decision-making process that could create adverse effects on tribal resources.⁵⁴ In holding for the Tribes, the court granted an injunction that prevented the U.S. Forest Service from selling timber “without ensuring, in consultation with the Klamath Tribes on a government-to-government basis,” that the Tribes’ resources would be protected.

⁴⁶ Cherokee Nation, 30 U.S. at 17.

⁴⁷ This doctrine extends to all federal agencies (Nance, 645 F. 2d 701), requires “procedural fairness” before the federal government can take actions affecting tribal interests (Morton v. Ruiz, 415 U.S. 199 (1974)), and measures adherence by a fiduciary standard. Seminole Nation v. U.S., 316 U.S. 286 (1942).

⁴⁸ Pit River Tribe v. U.S. Forest Service, 469 F.3d 768, 788 (9th Cir. 2006).

⁴⁹ Haskew, *supra* note 18, at 31.

⁵⁰ U.S. DEP’T OF THE INTERIOR, PROTECTION OF INDIAN TRUST RESOURCES PROCEDURES MANUAL 13 (1996).

⁵¹ See *Oglala Sioux*, 603 F.2d at 721 (the BIA violated “the distinctive obligation of trust incumbent upon the Government”) (internal quotations omitted); *Lower Brule Sioux*, 911 F. Supp. at 400 (“The BIA ignored its own rules and representations and violated its obligations of trust and fiduciary obligations.”).

⁵² No. 96-381-HA, 1996 WL 924509 (D. Or. Oct. 2, 1996).

⁵³ *Id.* at *1.

⁵⁴ *Id.* at *8.

Most recently, in *Confederated Tribes and Bands of the Yakama Nation v. U.S. Dept. of Agriculture*,⁵⁵ the Nation sought an injunction to stop the U.S. Department of Agriculture (USDA) from permitting a low-bid private contractor to move garbage imported from Hawaii over its ceded lands in Washington State. This case is noteworthy because it was one of the first where a tribe took a cumulative approach to enforcing its consultation right, arguing that the USDA's action violated the Treaty With the Yakama of 1855⁵⁶; the National Environmental Protection Act (NEPA)⁵⁷; Section 106 of the National Historic Preservation Act⁵⁸; the American Indian Religious Freedom Act⁵⁹; Presidential Executive Orders 13,175, 13,007, and 12,898; the Administrative Procedures Act (APA)⁶⁰; and federal Indian trust common law.⁶¹ In light of these federal laws, statutes and their implementing federal regulations, the court found that, because the path of the garbage was an "area in which tribal members exercise their 'in common' hunting, gathering, and fishing rights," there were "serious questions about whether [the USDA] adequately consulted with the Yakama Nation as required by . . . federal Indian trust common law."⁶² The court issued the injunction.

It is important that tribes actively and aggressively assert their right to enforce the trust doctrine as a principle of federal restraint by way of meaningful consultation. If tribes are not consulted, "breaches of the trust obligation will become not only routine but seemingly sanctioned."⁶³ On the opposite end of the spectrum, the more that tribes use consultation preemptively the more likely it is that federal agencies will "seemingly sanction" that process – if nothing else out of necessity.

IV. Consultation as an Indian Treaty Obligation

In *Peoria Tribe of Indians of Oklahoma v. United States*,⁶⁴ the Tribe argued that the federal government violated its treaty rights in 1857 when it sold the Tribe's land without meaningful consultation. What made this case unique was a clause in the treaty that read: "it is agreed that the President may, from time to time, *and in consultation with the Indians*, determine how much shall be invested in safe and profitable stocks"⁶⁵ The Court held that because the Tribe was not consulted, the treaty was violated and the

⁵⁵ No. 10-3050, 2010 WL 3434091.

⁵⁶ 12 Stat. 951.

⁵⁷ 42 U.S.C. §§ 4321-4370e.

⁵⁸ 16 U.S.C. §§ 470 *et seq.*

⁵⁹ 42 U.S.C. §§ 1996 *et seq.*

⁶⁰ 5 U.S.C. §§ 551 to 599.

⁶¹ A recent string of cases from the Supreme Court of Canada have found a duty to consult in similar situations arising from the Indian trust common law. See *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 73; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69.

⁶² *Yakama Nation*, 2010 WL 3434091, at *4.

⁶³ Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 749 (1995).

⁶⁴ 390 U.S. 468 (1968).

⁶⁵ Treaty with the Kaskaskia, Peoria, Etc., May 30, 1854, art. 7, 10 Stat. 1082, 1084 (emphasis added).

United States was liable for the difference in price that the Tribe would have received for its property at public auction, plus interest.⁶⁶

In *Peoria Tribe* an explicit consultation clause was included in the treaty. Would it have made a difference if the consultation requirement were not made explicit? Likely not. To begin with, it is clear from the discussion above that meaningful consultation is required when any dispossession of treaty resources is involved.⁶⁷ Such is consistent with the preliminary injunction ruling in *Yakama*, wherein the court also noted that there were “serious questions about whether Defendants adequately consulted with the Yakama Nation as required by its Treaty of 1855” – even though, unlike in *Peoria*, the Yakama Treaty does not expressly require the President to consult the Nation regarding Yakama’s guaranteed hunting, gathering, and fishing rights.⁶⁸ The treaty consultation obligation arises, in part at least, from the implicit duty to consult that is intrinsic in any bilateral agreement between nations. Per *Yakama*, that obligation now sounds in the federal common law.

Under principles of international law,⁶⁹ unless otherwise stated, all Treaties invoke mutually binding obligations between parties.⁷⁰ These obligations must be interpreted in “good faith,” in a manner that fulfills the purpose of the treaty at the time of formation.⁷¹ Termination or a change in the scope of a treaty can occur only by consent of the parties or pursuant to the terms of the treaty itself.⁷² If a party wishes to terminate or alter the scope of a treaty responsibility, that party “must notify the other part[y],” and wait for a response.⁷³ The notification should be in writing, signed by competent authority, and “should indicate the measure proposed and the reasons therefore.”⁷⁴ Except in cases of special urgency, the notification should “indicate a period for objections of not less than three months after its receipt.”⁷⁵

This is precisely the type of meaningful consultation that the court ordered in *Lower Brule Sioux Tribe*.⁷⁶ This is no coincidence. It is a foundational principle of

⁶⁶ *Peoria Tribe*, 390 U.S. at 471-73.

⁶⁷ See *Klamath Tribes*, 1996 WL 924509, at *8 (“In practical terms, a procedural duty has arisen from the trust relationship such that the federal government must consult with an Indian Tribe in the decision-making process to avoid adverse effects on treaty resources.”).

⁶⁸ *Yakama Nation*, 2010 WL 3434091, at *4.

⁶⁹ “International law” here meaning international law as it applies to the United States and domestic law that has substantial significance for the international relations of the United States.

⁷⁰ Restatement, *supra* note 5, at § 325.

⁷¹ Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *Vienna Convention*].

⁷² Restatement, *supra* note 5, at § 332.

⁷³ *Id.* at § 337.

⁷⁴ *Id.* (citing Vienna Convention, art. 67)

⁷⁵ *Id.* (citing Vienna Convention, art. 65(2)). Professor James Anaya, United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, has recently promulgated a report on the duty to consult that is very instructive. See Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, U.N. Doc. A/HRC/12/34 (July 15, 2009).

⁷⁶ 911 F. Supp. at 401.

federal Indian law that Treaties be interpreted in a manner that the signatory tribe would have understood them.⁷⁷ The practice of enforcing negotiated arrangements by reference to international law is indeed the very foundation of federal Indian law.⁷⁸ From the beginning, or, at least from the point in time when most Treaties were produced, tribal governments had an expectation of an international – *i.e.*, nation-to-nation – application.⁷⁹ Further, as Treaties are according to the United States Constitution, “the supreme Law of the Land [which] the Judges in every State shall be bound thereby,”⁸⁰ it is not far-fetched to say that tribes expected (and courts are therefore directed to interpret) Treaties to be regarded as supreme law. Tribes should take advantage of this often-overlooked aspect of asserting their *treaty* right to consultation.

As a side note, in the absence of an express treaty consultation right, the minutes from a tribe’s treaty negotiations over 150 years ago may help bolster the federal treaty obligation to consult with the tribal signatory about potential impacts to tribal assets.⁸¹ Perhaps even more profound is the idea that the federal government must follow international legal norms to consult with treaty tribal signatories when an agency action is likely to adversely impact a treaty resource.

V. Enforcing the Federal Indian Consultation Right

The duty to consult is procedural.⁸² This means that consultation requires that the federal government must respect the desires of Native Americans to be involved in decisions that affect them, but does not bind federal agencies to anything resembling a commitment to the application of tribal input. As we have seen, that is not to say, though, that the federal Indian consultation right has no teeth. To the contrary, federal agencies have a duty to *seriously* consider tribal input. A failure to consult or to consider tribal input could put a quick end to a federal undertaking. Consider a few of the following procedural vehicles to enforce the federal Indian consultation right.⁸³

a. The Administrative Procedures Act

Generally, the United States retains its sovereign immunity from suit unless it has expressly waived such immunity.⁸⁴ The APA acts as an express waiver in most suits

⁷⁷ Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970).

⁷⁸ See cases cited in note 30, *supra*.

⁷⁹ See Mikisew Cree First Nation, 2005 S.C.C. 69.

⁸⁰ U.S. Const. Art. VI, Cl. 2.

⁸¹ See *e.g.* Isaac Ingalls Stevens, *A True Copy of the Record of the Official Proceedings at the Council in the Walla Walla Valley*, 1855, 66, 74 (Darrell Scott ed., 1985); Cree v. Flores, 157 F.3d 762 (9th Cir. 1998) (Treaty minutes accurately capture what Governor Stevens and General Joel Palmer told the Yakamas at the Treaty negotiations at the Walla Walla Council in 1855).

⁸² See Klamath Tribes, 1996 WL 924509, at *8.

⁸³ These examples in no way constitute an exhaustive list of potential actions against federal agencies failing to comply with their obligation to meaningfully consult. The examples are meant to be a mere exhibit of the tactics most often used.

⁸⁴ United States v. Sherwood, 312 U.S. 584, 586 (1941). Interpretation of these waivers must be strictly construed “in favor of the sovereign,” and “must be unequivocally expressed in statutory text” Lane v. Peña, 518 U.S. 187, 192 (1996).

against federal agencies.⁸⁵ Specifically, the APA provides a limited waiver of sovereign immunity for suits seeking “non-monetary” relief against federal agencies acting in a manner that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” when executing their duties.⁸⁶ An agency’s action will be deemed arbitrary and capricious if the agency has not considered the relevant factors in making decisions.⁸⁷ As stated by the Supreme Court in the leading case:

Normally, an agency [action] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁸⁸

Thus, when federal agencies take action, such as issuing a permit or changing agency regulations, the action must be in compliance with relevant federal law.⁸⁹ Because a majority of the laws applicable to federal agencies do not provide a waiver of sovereign immunity in their own right, suits to enforce these laws must be brought pursuant to the APA.⁹⁰ Federal courts have frequently held that the APA establishes a strong presumption of judicial reviewability of agency action.⁹¹ In most instances, the consultation requirement is enforced pursuant to the APA.

In order to bring suit under the APA, however, a federal agency’s action must be “final.”⁹² To be deemed a “final agency action[,] the action should mark the consummation of the agency’s decision-making process” and “the action must be one by which rights or obligations have been determined or from which legal consequences flow.”⁹³ In many instances it is necessary that no “final agency action” will have amassed at the time that the tribe is requesting preemptive consultation – and the tribe therefore cannot receive instant enforcement of its consultation right via the APA. But when a “final agency action” does accrue, the tribe has the APA. Again, in *Yakama*, the Nation successfully invoked a kaleidoscope of federal statutes and regulations requiring

⁸⁵ APA claims are subject to a six-year statute of limitations. *Hells Canyon Preservation Council v. U.S. Forest Service*, 593 F.3d 923, 931 (9th Cir. 2010).

⁸⁶ *Lester v. U.S.*, 85 Fed.Cl. 742, 746 (2009).

⁸⁷ *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

⁸⁸ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁸⁹ *Chemical Weapons Working Group, Inc. v. U.S. Dept. of the Army*, 111 F.3d 1485 (10th Cir. 1997).

⁹⁰ *See e.g. Greater Yellowstone Coalition v. Kempthorne*, 577 F.Supp.2d 183, 189 (D. D.C. 2008) (“NEPA creates no private right of action and therefore challenges to agency compliance with NEPA must be brought pursuant to the APA”); *U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 235 F.R.D. 521, 528 (D. D.C. 2006) (holding that suits brought to enforce an “agency’s own regulations . . . must be brought pursuant to the APA”).

⁹¹ *See e.g. Spencer Enterprises, Inc. v. U.S.*, 345 F.3d 683 (9th Cir. 2002).

⁹² 5 U.S.C. § 704.

⁹³ *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

consultation vis-à-vis the APA, to prevent Hawaiian garbage from being imported into its treaty-protected ceded lands.⁹⁴

b. Injunction

What makes the APA important is that it gives tribes an “in” for injunctive purposes. Thus, the tribe may petition the court for an injunction against a non-final agency action pursuant to a violation of the APA vis-à-vis the consultation requirements discussed above.⁹⁵ In order to receive an injunction, the tribe must establish: (1) that it is likely to succeed on the merits (i.e. show a violation of the APA once the agency action is “final”), (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction would be in the public interest.⁹⁶ In *Oglala, Klamath, and Yakama* the tribes successfully met this burden, claiming breach of, *inter alia*, the federal Indian consultation right.

c. Writ of Mandamus

Another option is to seek a writ of mandamus against the head of the agency under 28 U.S.C. § 1361. This method is effective, but rarely used. In order to do this, the tribe must show that: “(1) the officer has a clear and nondiscretionary duty to perform the act in question [i.e. to consult], (2) the patent violation of agency authority or manifest infringement of substantial rights, and (3) the tribe has no adequate alternative remedy.”⁹⁷ This option was successfully utilized by the Lower Brule Sioux Tribe in their attempt to force the BIA to consult.⁹⁸

d. Treaty Breach

Per 28 U.S.C. § 1362, federal courts have jurisdiction to hear and decide claims by an Indian tribe against the United States for breach of treaty-guaranteed rights.⁹⁹ In *Yakama*, the Nation pled an independent basis to enjoin the federal Hawaiian garbage undertaking – breach of the Yakama Treaty of 1855.¹⁰⁰ Again, in issuing the injunction,

⁹⁴ Yakama Nation, 2010 WL 3434091.

⁹⁵ See *e.g. id.*

⁹⁶ Winter v. Natural Resources Defense Council, Inc., 129 S.Ct. 365, 374 (2008).

⁹⁷ Oglala Sioux, 603 F.2d at 718, 398.

⁹⁸ See *generally id.*

⁹⁹ Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Flathead Irr. and Power Project, 616 F.Supp. 1292, 1295 (D. Mont. 1985) (citing Gila River Indian Community v. Henningson, Durham and Richardson, 626 F.2d 708, 711 (9th Cir. 1980)). 28 U.S.C. § 1362 provides:

The district courts shall have original jurisdiction of all civil actions, brought by any Indian Tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

See *generally* Confederated Salish and Kootenai Tribes, 616 F.Supp. 1292 (issuing a temporary restraining order against the federal agency for a breach of treaty claim brought pursuant to 28 U.S.C. § 1362).

¹⁰⁰ Yakama Nation, 2010 WL 3434091.

the court questioned whether the United States adequately consulted with Yakama as required by the Treaty of 1855, despite the fact that the subject treaty rights to fish, hunt and gather are not expressly tethered to a federal consultation obligation.¹⁰¹ In short, by the mere virtue of having a treaty, an enforceable right to consult when treaty rights are affected can be evoked pursuant to 28 U.S.C. § 1362 and now, the federal common law.¹⁰²

VI. Conclusion

The federal Indian consultation right is quite robust. However, caught up in the feds' own deadlines and priorities, which are often at odds with tribal ways and interests, federal agencies habitually neglect their now obvious duty to consult meaningfully with tribal governments. The net effect of this neglect is negative for both parties; but whereas the cost is pecuniary for federal agencies – not to mention contractors, project managers and American taxpayers – tribes pay in diminished sovereignty or treaty abrogation, if not physical invasion of tribal territory. Any such harm is irreparable.¹⁰³ For these reasons, it is time that tribal governments firmly take the reins and establish a preemptive stance on consultation.

I will end with an example: Say you are a tribal leader or lawyer, and one of the more intrusive federal agencies noted above begins appraising a tribal resource in order to commence a project or enforce a federal law or regulation. The agency clearly has the power to do so, authorized either by preemptive federal law, precedent, or both. At this point, you have two options: (1) Sit back and await the inevitable attack on tribal sovereignty – lamenting the injustice of the federal preemption doctrine and bad court decisions; or (2) Use consultation as a preemptive strike, demanding that the federal agency stop, look, and listen to – *and hear* – tribal concerns. Choose Option 2. It is hard to imagine a downside that would outweigh the upside to invoking your tribes' consultation right.

If asked by United States officials under what authority your tribe demands consultation, point to the agency's own regulations and policies – they should have them per Executive Order 13175.¹⁰⁴ If they do not, or ask you for more, show them federal law

¹⁰¹ *Id.* at *4.

¹⁰² *Id.*

¹⁰³ *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504, 1516 (W.D. Wash. 1988) (A violation or loss of rights guaranteed by Treaty and protected under the Constitution is considered “irreparable in the equitable sense.”) (citing *Los Angeles Memorial Coliseum v. National Football League*, 634 F.3d 1197, 1202 (9th Cir. 1980)); *United States v. Washington*, 384 F.Supp. 312, 404 (W.D.Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1096, substantially *aff'd* sub nom. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (Indian Treaty rights are unique and damages sustained by Treaty Indians are generally unsusceptible of monetary determination).

¹⁰⁴ *See e.g.* National Indian Gaming Commission, Government-to-Government Tribal Consultation Policy, *supra* note 29; INTERNAL REVENUE MANUAL pt. 4.86.1.2, *supra* note 27; Internal Revenue Service, *Consultation Procedures*, <http://www.irs.gov/govt/tribes/article/0,,id=150031,00.html> (last visited Oct. 13, 2010); Env'tl. Prot. Agency, Nat'l Env'tl. Justice Advisory Council, Indig. Peoples Subcomm., Guide on Consultation and Collaboration with Indian Tribal Governments and The Public Participation of Indigenous Groups and Tribal Members in Environmental Decision Making (2000), *available at*

– direct them to your treaty and/or the Indian trust doctrine.¹⁰⁵ If they are still not convinced they owe your tribe a consultation duty, invoke international – nation-to-nation – legal norms.¹⁰⁶ If the federal agency still refuses to consult, it is time to wield your sword, if not your treaty, and seek an injunction or a writ of mandamus in the United States District Court. The Oglala and Lower Brule Sioux, Klamath, Peoria and Yakama Nations have forged your path there.

[http://yosemite.epa.gov/R10/ocrej.nsf/eb1daa9965e73fdf88256b800071a40b/280e766a6452517e882570ad00833d22/\\$FILE/ips_consultation_guide.pdf](http://yosemite.epa.gov/R10/ocrej.nsf/eb1daa9965e73fdf88256b800071a40b/280e766a6452517e882570ad00833d22/$FILE/ips_consultation_guide.pdf).

¹⁰⁵ See *supra* notes 64-81 and accompanying text.

¹⁰⁶ Although discussion is beyond the scope of this article, it is worth noting that the United States has signed and ratified a number of international human rights treaties, including the International Convention of the Elimination of All Forms of Racial Discrimination, and the International Covenant on Civil and Political Rights. Although not a binding Treaty, the United States, as an Organization of American States member state, has also agreed to comply with the American Declaration of the Rights and Duties of Man, observed by the Inter-American Commission. All of these documents have potential to compel government-to-government consultation between tribes and the various federal agencies. See *e.g.* Case of the Saramaka People v. Suriname, 2007 Inter-Am. C.H.R. (ser. C) No. 172 (Nov. 28, 2007). The Declaration on the Rights of Indigenous Peoples, which the Obama Administration is currently considering adopting, also provides an obligation to consult, both “before adopting and implementing legislative or administrative measures that may affect [indigenous peoples],” and “prior to the approval of any project . . . affecting their land.” U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).