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Green Energy in Indian Country as a Double-Edged Sword for Native Americans: Drawing on the Inter-American and Colombian Legal Systems to Redefine the Right to Consultation

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Green Energy in Indian Country as a Double-Edged Sword for Native Americans: Drawing on the Inter- American and Colombian Legal Systems to Redefine the Right to Consultation

*Diana Coronel David**

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INTRODUCTION

Energy is a key component in the redress of climate change evils¹ and the United States has one of the highest per capita energy consumption in the world surpassed only by Canada.² The federal government’s goal is to reduce the country’s dependence on oil and double its wind and solar electricity generation by 2025.³ Renewable energy does not pose the environmental and health concerns associated with traditional energy sources of petroleum, coal, natural gas, and nuclear power.⁴ Hence, it is on the rise as an alternative to these traditional sources.

The development of renewable energy projects is to a great extent tied to Indian Country.⁵ Some estimate that 100 million acres of tribal lands can produce more than four times the electricity needs of the United States.⁶ This is highly important for Indian tribes as an empowering mechanism. Such projects could represent new sources of income for tribes whose traditional subsistence-

¹ Lillian Aponte Miranda, *Introduction to International and Domestic Climate Change Regulation*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 22 (Randall S. Abate & Elizabeth Ann Kronk Warner eds., 2013).

² K.K. DUVIVIER, THE RENEWABLE ENERGY READER 279 (2011).

³ *The All-of-the-above Energy Strategy*, WHITE HOUSE, <http://www.whitehouse.gov/energy/securing-american-energy> (last visited April 11, 2015).

⁴ DUVIVIER, *supra* note 2, at 13-14.

⁵ *Id.* at 387.

⁶ *Id.*

based lifestyles have been impacted by climate change.⁷

Renewable energy projects in Indian Country are not new to the United States.⁸ However, this benign initiative of advancing clean energy projects on tribal land could create a new problem: the violation of tribes' sovereignty and cultural integrity.⁹ Renewable energy projects in Indian Country require the use of the surface and subsurface of tribal lands to undertake the project and interconnect major transmission lines. Thus, these projects carry the risk of affecting historic properties with cultural and spiritual significance.¹⁰

In an attempt to harmonize Native Americans' rights with the national policy of encouraging renewable energy projects, this article focuses on the consultation process as an essential component of the right to self-determination. Consultation should be enhanced to promote recognition of Native Americans as a distinct and sovereign entity. Renewable energy projects could become a double-edged sword for Native Americans because a deficient consultation process would at best inadequately protect their cultural integrity and heritage for future generations. This article explains how the current consultation process is a mere formality without real consideration of the protection of Native Americans' rights. Although the consulting parties, even the tribes, may be accustomed or resigned to this existing reality, it is vital to empower the tribes and provide them with viable means for meaningful consultation or free, prior and informed consent ("FPIC") as an essential dimension of their right of self-determination.

In *Loucks v. Standard Oil Co. of New York*, Justice Cardozo stated: "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."¹¹ Justice Cardozo's reasoning should be present in the minds of officials in all three branches of U.S. government when considering the use of tribal lands for renewable energy projects. International experiences, even of developing countries, could prove useful for the diagnosis of domestic problems and the creation or application of potential solutions. The Inter-American and Colombian legal framework allow the following classification of the right to consultation: 1) mere legal recognition; 2) meaningful consultation; and 3) FPIC. Although the right to consultation is

⁷ Elizabeth Ann Kronk, *Alternative Energy Development in Indian Country: Lighting the Way for the Seventh Generation*, 46 IDAHO L. REV. 449, 458-59 (2010).

⁸ *Id.* at 464.

⁹ "[T]ribal sovereignty ensures that Indian tribes enjoy the same inherent rights of self-government over their members and retained territories as any other nation, except as limited by the doctrine of discovery, treaty-based cessions of authority, or explicit congressional abrogation under the plenary power doctrine." Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 821 (2007).

¹⁰ DUVIVIER, *supra* note 2, at 327.

¹¹ *Loucks v. Standard Oil Co. of New York*, 120 N.E. 198, 201 (N.Y. 1918) (comparing the respective tort recovery statutes in Massachusetts and New York).

legally recognized in the United States, it lacks practical significance because Native Americans are not critically involved in the decision-making process. The United States uses consultation as a mere procedural step without clear guidelines. As a result, Native Americans' rights are undermined. The current procedure creates a government-to-government undertaking defined solely by the agenda of the United States government.

Part I of this article provides background information on the Quechan Tribe and introduces the controversy caused by the approval of the Ocotillo Wind Energy Project on lands with profound significance for Native American groups.¹² Part II reviews the American legal framework regarding the right of consultation. Part III examines Colombia's substantive and procedural protections of indigenous rights, and Inter-American case law. Part IV proposes a more beneficial interpretation of current legislation in favor of Native Americans' rights using the trust responsibility doctrine. Part IV also proposes the creation of guidelines to transform the consultation process into a real government-to-government dynamic and to determine when FPIC is applicable as a mechanism distinguishable from consultation. In addition, Part IV shows the benefits of treating Native Americans as essential actors in a strategic partnership aimed to combat climate change and to comply with the national green energy policy in their territories. Finally, Part IV advocates for a higher standard of review for federal or state action affecting Native Americans' rights.

I. UNITED STATES DEPARTMENT OF THE INTERIOR'S FAILURE TO CONSULT THE QUECHAN TRIBE PRIOR TO APPROVING THE OCOTILLO WIND ENERGY PROJECT

A. Background on the Quechan Tribe

The Quechan Tribe (pronounced *Kwuh-tsan*), also known as the Yuma, Yuman, or Kwtsan, is estimated to have existed since 450 AD,¹³ and is composed of roughly 2,500 members.¹⁴ The Tribe is federally recognized¹⁵ and resides in the Fort Yuma-Quechan Reservation,¹⁶ although their traditional

¹² DUVIVIER, *supra* note 2, at 404.

¹³ *A Quechan Historical Sketch*, TLEILAXUEYES, <http://tleilaxueyes.wordpress.com/about/> (last visited April 11, 2015).

¹⁴ *Quechan Tribe Community Profile*, NATIVE PEOPLES TECHNICAL ASSISTANCE OFFICE (NPTAO), <http://www.nptao.arizona.edu/ProtocolPDFs/F%20CP%20Fort%20Yuma%20Quechan.pdf> (last visited April 11, 2015).

¹⁵ STEPHEN L. PEVAR, *THE RIGHTS OF INDIAN AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS* 398 (3d ed. 2002).

¹⁶ *Quechan Tribe*, INTER TRIBAL COUNCIL OF ARIZONA (ITCA), http://itcaonline.com/?page_id=1173 (last visited April 11, 2015).

territories extend beyond the boundaries of the reservation.¹⁷ Established in 1884, the reservation is located along both sides of the Colorado River near Yuma, Arizona, and borders the states of Arizona, California, and Baja California (Mexico).¹⁸

The Quechan Tribe is mainly an agricultural community, deeply connected to the Colorado River.¹⁹ The land surrounding the River provides a link to the Tribe's history, culture, and traditions.²⁰ These lands not only house desert ecosystem, cultural resources, and a national historic trail, but they are also home to sacred Quechan burial grounds.²¹ In addition, the Coyote Mountains are visible from the Quechan site and are part of the Tribe's creation story,²² which has passed down generations through rituals and songs and is still a significant part of its culture today.²³ As one Quechan member said: "Before they wrote the Constitution, before they wrote the Magna Carta, before they came from England with their papers and their Bibles, we already had those songs proclaiming certain areas—what we felt, what we did and what we lived by."²⁴

The Quechan Tribe has fought zealously to prevent private entities from developing resource-intensive projects on culturally sensitive lands.²⁵ Due to the United States' failure to protect the Tribe's cultural heritage under the federal trust responsibility doctrine, the Tribe has been forced to use its own financial means to combat harmful development.²⁶ For example, the Tribe has opposed massive mining projects, and a large oil refinery in the area.²⁷ More recently, the Quechans have opposed the development of large-scale solar and wind energy projects on desert lands to prevent the destruction of their history and culture.²⁸

¹⁷ Declaration of John Bathke in Support of Plaintiff's Motion for Summary Judgment at 4, *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 927 F. Supp. 2d 921 (S.D. Cal. 2013) (No. 3:12CV01167-GPC-PCL), *available at* <http://turtletalk.files.wordpress.com/2013/03/quechan-declaration.pdf>.

¹⁸ NPTAO, *supra* note 14.

¹⁹ ITCA, *supra* note 16.

²⁰ TLEILAXUEYES, *supra* note 13.

²¹ Miriam Raftery, *Tribe Sues to Block Desert Solar Project; Protesters Gather in Ocotillo to Oppose One of World's Largest Solar Projects*, EAST COUNTY MAGAZINE (Nov. 17, 2010), <http://www.eastcountymagazine.org/tribe-sues-block-desert-solar-project-protesters-gather-ocotillo-oppose-one-worlds-largest-solar-pro>.

²² *Id.*; *Coyote Mountains Wilderness Area*, BUREAU OF LAND MGMT., http://www.blm.gov/az/st/en/prog/blm_special_areas/wildareas/coyote.html (last visited April 11, 2015).

²³ Raftery, *supra* note 21.

²⁴ *Id.*

²⁵ Declaration of John Bathke in Support of Plaintiff's Motion for Summary Judgment at 5, *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 927 F. Supp. 2d 921 (S.D. Cal. 2013) (No. 3:12CV01167-GPC-PCL), *available at* <http://turtletalk.files.wordpress.com/2013/03/quechan-declaration.pdf>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 6.

However, the Tribe has not always been successful in its oppositions. Under the Obama administration, multiple projects have been approved on Quechan Traditional Lands at the discretion of the Bureau of Land Management ("BLM"): two regularly processed projects, a 500kV transmission line, and three fast-track renewable energy projects.²⁹ Five more fast-track projects are currently in the application phase.³⁰

B. Project's Approval

The Ocotillo Wind Energy Facility Project ("Project" or "project"), is located next to the Coyote Mountains, which are sacred to not only the Quechan but also the Kumeyay and Cocopah Tribes.³¹ The project affects other sacred places including Sugarloaf Mountain, the archeological site "Indian Hills," and the viewshed between these areas.³² On October 9, 2009, developer Ocotillo Express, LLP ("Ocotillo") applied to BLM and Imperial County to construct and operate a wind energy facility on public land within the California Dessert Conservation Area.³³ The Acting Field Manager of BLM wrote a letter to the Quechan Tribe informing them of Ocotillo's right-of-way application to conduct wind testing and to develop a wind energy project on their lands.³⁴ The news generated strong opposition in the Quechan Tribe.³⁵ In July 2010, BLM sent the Tribe an update on the project and extended an invitation to engage in government-to-government consultation.³⁶ One month later, Ocotillo's archaeological consultant issued the inventory research design and work plan for the project, which stated that all significant prehistoric and historic resources in the Project area had been surveyed.³⁷ In September 2010, federal and state officials, including BLM, executed a "Programmatic Agreement" to manage the project notwithstanding the opposition of the Quechan Tribe.³⁸

In July 2010, BLM requested that the Quechan Tribe designate a member to serve as the authorized representative of the Tribe for a government-to-government consultation, a request BLM reiterated in January 2011.³⁹ In March 2011, BLM sent another letter to the Quechan Tribe inviting them to engage in

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 7.

³² *Id.*

³³ *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 927 F. Supp. 2d 921, 927 (S.D. Cal. 2013).

³⁴ *Id.* at 931.

³⁵ DUVIVIER, *supra* note 2, at 404.

³⁶ *Quechan Tribe of Fort Yuma Indian Reservation*, 927 F. Supp. 2d at 931.

³⁷ *Id.* at 929.

³⁸ DUVIVIER, *supra* note 2, at 404.

³⁹ *Quechan Tribe of Fort Yuma Indian Reservation*, 927 F. Supp. 2d at 931.

government-to-government consultation.⁴⁰ The Ocotillo's archeological consultant, Tierra Environmental Services, Inc., then issued the "Historical Resources Evaluation and Impact Analysis" in May 2011.⁴¹

From August to November 2011, BLM sent letters to the Quechan Tribe inviting government-to-government consultation.⁴² In the October letter, BLM also sent abundant information on Historical Resources Evaluation and Impact Analysis, which contained a survey of significant prehistoric and historic resources in the project area.⁴³ From June to December 16, 2011, BLM also sent emails to tribal officials requesting government-to-government consultation.⁴⁴

Finally, on January 12, 2012, BLM wrote to a council member who was also the liaison to the Quechan Culture Committee, with the purpose of engaging the Quechans in government-to-government consultation.⁴⁵ In the letter, BLM discussed its efforts to establish the consultation, provided ways in which the Quechan Tribe could contact BLM's Field Manager, and provided the Associate Manager's contact information as an alternate method to contact BLM.⁴⁶ Within two weeks, the Quechans responded and met with BLM representatives on January 31, 2012.⁴⁷

In February 2012, the Department of the Interior ("DOI") presented a Final Environmental Impact Statement Report analyzing the effect of the 12,484-acre right-of-way over public land in favor of Ocotillo to build 155 wind turbine generators.⁴⁸ On February 27, 2012, BLM sent a letter inviting the Quechan Tribe to a specific section 106-consultation meeting to discuss the Project and a revised draft of a Memorandum of Agreement ("MOA").⁴⁹ In this last letter, BLM explained that the meeting would discuss changes to the MOA and give the Tribe an opportunity to provide input and ask questions.⁵⁰ For the same purpose, BLM and the Tribal Council also met on February 22, March 21, and April 18, 2012.⁵¹

On May 8, 2012, the California State Historic Preservation Office, the

⁴⁰ *Id.*

⁴¹ *Id.* at 928-29.

⁴² *Id.* at 931.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 931-32.

⁴⁶ *Id.* at 932.

⁴⁷ *Id.*

⁴⁸ *Id.* at 927.

⁴⁹ *Id.* at 932. The Memorandum of Agreement is a document where BLM, SHPO, and ACHP agree that the project should be implemented in accordance to some standards aimed to resolve adverse effects of the undertaking on historic projects. Through this memorandum, ACHP is provided with a reasonable opportunity to comment pursuant to section 106 and Native Americans Tribes are invited to concur in the agreement.

⁵⁰ *Id.*

⁵¹ *Id.*

Advisory Council on Historic Preservation, BLM, the Army Corps of Engineers, and Ocotillo entered into an MOA to mitigate and minimize adverse impacts of the project on cultural resources.⁵² Finally, on May 11, 2012, BLM issued a record of decision (“ROD”) approving the project, and also approving a 10,151-acre right-of-way grant over public land to build 112 wind turbine generators.⁵³

C. Complaint and Decision

On May 14, 2012, the Quechan Tribe filed a complaint in the United States District Court for the Southern District of California against BLM and DOI.⁵⁴ The Tribe challenged BLM’s approval of the ROD allowing the construction of 112 wind turbines in an area that contains cultural and biological significance to the Tribe.⁵⁵ The complaint alleged that the Project area included hundreds of locations on Tribal lands that contain human remains and archeological sites.⁵⁶ The Tribe argued that the Project would destroy burial and religious sites, ancient trails, and probably buried artifacts.⁵⁷ Moreover, the Tribe alleged that the Project would endanger the habitat of the flat-tailed horned lizard, which is also culturally significant.⁵⁸ Thus, the Tribe argued that BLM and DOI had violated the Federal Land Policy and Management Act (FLPMA); National Environmental Policy Act (NEPA); National Historic Preservation Act (NHPA); Archaeological Resources Protection Act (ARPA); and Native American Graves Protection and Repatriation Act (NAGPRA).⁵⁹ For purposes of this article, the analysis will be limited to considering the Court’s response with regards to right to consultation pursuant to the NHPA.

The Tribe asserted that under section 106 of the NHPA, BLM failed to comply with the consultation requirement early in the process because the first government-to-government consultation occurred less than four months before the approval of the Project.⁶⁰ Additionally, it complained that BLM did not

⁵² *Id.* at 927.

⁵³ *Ocotillo Wind Energy Facility Project*, OCOTILLO ENVIRONMENTAL AND CONSTRUCTION COMPLIANCE PROGRAM, <http://www.ocotilloecomp.com> (last visited April 11, 2015). The Record of Decision (ROD) is “a written public record identifying and explaining the reasoning for the decision on the Proposed Action.” *Clark, Lincoln, and White Pine Counties Groundwater Development Project EIS Record of Decision*, BUREAU OF LAND MGMT., http://www.blm.gov/nv/st/en/prog/planning/groundwater_projects/snwa_groundwater_project/record_of_decision.html (last visited April 11, 2015).

⁵⁴ *Quechan Tribe of Fort Yuma Indian Reservation*, 927 F. Supp. 2d at 926.

⁵⁵ *Id.* at 925.

⁵⁶ See Complaint for Plaintiff, *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep’t of Int.*, 927 F. Supp. 2d 921 (S.D. Cal. 2012) (No. 12CV1167), 2012 WL 5206037.

⁵⁷ *DUVIVIER*, *supra* note 2, at 405.

⁵⁸ *Id.*

⁵⁹ *Quechan Tribe of Fort Yuma Indian Reservation*, 927 F. Supp. 2d at 926.

⁶⁰ *Id.* at 930-31.

provide timely information necessary for a meaningful consultation process.⁶¹ The District Court applied the Administrative Procedure Act's highly deferential arbitrary and capricious standard of review, which gives agency action a presumption of validity, to be affirmed so long as a reasonable basis for the agency's decision exists.⁶² The District Court noted that the administrative records showed that BLM made numerous good faith attempts early in the process to engage in government-to-government consultation.⁶³ The Court also ruled that BLM provided the Tribe with timely information about the progress of the project.⁶⁴ Thus, the Court held that the four meetings in 2012 were sufficient to comply with the section 106 consultation requirements.⁶⁵ On April 26, 2013, the Tribe appealed the decision; and on September 4, 2013 it submitted its opening brief seeking review under the Administrative Procedure Act (APA) and alleging mismanagement of Class L (Limited Use) lands in violation of the California Desert Conservation Area Plan.⁶⁶ Appellees responded to the opening brief and the case is currently pending.⁶⁷

In reaction to the judicial decision, the Tribe stated that the District Court overlooked the identity and origin ties that the Tribe has historically had with the lands where the Project is located.⁶⁸ The Quechan people assert that the developer is building the project while litigation is pending and that bulldozers are causing irreparable harm to burial, cremation sites and artifacts in greater areas than indicated in the final project approval documents.⁶⁹ Apart from the spiritual, religious, cultural, historical, and archeological significance of the lands, the Quechans fear that all the projects in Imperial County will be approved. They fear that this will result in the removal of their history in the area, which predates the European colonization.⁷⁰

The Quechan Tribe and other Native American tribes emphasize that they do

⁶¹ *Id.* at 933.

⁶² *Id.* at 927.

⁶³ *Id.* at 933.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Opening Brief for Appellant at 18, *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 927 F. Supp. 2d 921 (S.D. Cal. 2013), *appeal docketed*, No. 13-55704 (9th Cir. April 26, 2013), available at https://turtletalk.files.wordpress.com/2013/09/doc-11_1-appellants-opening-brief-090413-wo-addendum.pdf.

⁶⁷ Appellees answered the brief on November 25, 2013. Brief for the Federal Defendants-Appellees, *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 927 F. Supp. 2d 921 (S.D. Cal. 2013), *appeal docketed*, No. 13-55704 (9th Cir. April 26, 2013).

⁶⁸ Miriam Raftery, *Judge Denies Quechan Tribe's Request for Temporary Restraining Order to Stop Ocotillo Express Wind Project*, EAST COUNTY MAGAZINE (May 23, 2012), <http://www.eastcountymagazine.org/judge-denies-quechan-tribes-request-temporary-restraining-order-stop-ocotillo-express-wind-project>.

⁶⁹ *Id.*

⁷⁰ *Id.*

not oppose green energy, but rather oppose the development of projects at the expense of their cultural environments, without their insight, and through a meaningless consultation process.⁷¹ They argue that Native Americans should at least be consulted about the location of these projects, rather than merely being a part of a superficial “consultation” process that focuses solely on “how to miss particular concentrations of artifacts.”⁷²

II. EXISTING LEGAL FRAMEWORK GOVERNING THE RIGHT TO CONSULTATION IN THE UNITED STATES

A. *Section 106 of the National Historic Preservation Act*⁷³

Section 106 of the NHPA imposes consultation duties on state and non-state actors.⁷⁴ As a procedural right of indigenous peoples, consultation is derived from the protection of substantive rights, such as the right to preserve sacred sites.⁷⁵ As to state actors, under section 106 of the NHPA federal agencies have a duty to consult with Indian tribes prior to approval of a proposed federal or federally-assisted project that may affect historic properties or resources included or eligible in the National Register.⁷⁶ In addition, section 110 of the NHPA states that federal agencies assume the responsibility of compliance with section 106 regarding historic properties or resources that fall under their jurisdiction.⁷⁷

Issued by the Advisory Council on Historic Preservation (“ACHP”), the federal regulations on “Protection of Historic Properties” lists the state actors that are required to participate in the consultation process in section 800.2. Section 800.2 also lists the participants’ duties and includes agency officials, council, consulting parties, and the public.⁷⁸ In addition, section 800.3(c)(3)

⁷¹ Tom King, *Obama, “Green” Energy, and Indian Tribes*, HUFFINGTON POST (Jan. 22, 2014, 6:36 PM), http://www.huffingtonpost.com/tom-king/obama-green-energy-and-in_b_4645492.html.

⁷² *Id.*

⁷³ The legal framework of the consultation process is extensive, and it includes the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470-470x-6; the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h; the Archaeological Resources Protection Act (ARPA), 16 U.S.C. § 470aa-470mm; the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001-3013; the Archaeological and Historic Preservation Act (AHPA), 16 U.S.C. §§ 469-469c; the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 among others. The analysis in this paper will be limited to the right to consultation pursuant to the NHPA.

⁷⁴ 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. RESOURCES L. 297, 312 (2014).

⁷⁵ *Id.*

⁷⁶ National Historic Preservation Act § 106, 16 U.S.C. § 470f (2012).

⁷⁷ National Historic Preservation Act § 110, 16 U.S.C. § 470h-2 (a)(1) (2012).

⁷⁸ See 36 C.F.R. §§ 800.2-800.6 (2014). The agency official is required to provide the Indian

provides that the consultation process should be conducted “in a manner *appropriate to the agency planning process*.”⁷⁹ The applicable regulations require that the consultation should be initiated “*early* in the planning process,” and is to be conducted “in a manner *sensitive* to the concerns and needs of the Indian tribe.”⁸⁰ Accordingly, section 800.4 of the regulations lists some cases in which the tribe is entitled to be consulted before the project is approved.⁸¹ After identifying the project and consulting parties, NHPA section 106 requires identification of historic properties located within the project area, evaluation of potential adverse effects on those properties, and resolution of the same.⁸²

Based on these regulations, federal agencies are required to initiate the process, while the State Historic Preservation Officer (“SHPO”) coordinates the state’s historic preservation program and consults with federal agencies.⁸³ The latter also consult with officials of federally recognized Indian tribes when the undertaking has the potential to affect historic properties in Indian Country and the property is of significance to such tribes.⁸⁴ If the tribes have officially designated a Tribal Historic Preservation Officer (“THPO”), then that individual represents the tribe in the consultation process; otherwise, the tribe designates representatives to consult with agencies as needed.⁸⁵

Federal agencies must provide information to decide which area may be affected or which area is eligible as a “historic property” under the National Register of Historic Places.⁸⁶ Once the properties are established, federal agencies must seek alternatives to avoid or reduce adverse effects to historic properties.⁸⁷ Federal agencies must also seek to reach an agreement with the SHPO and THPO to resolve the negative impacts before moving forward. If an agreement is not possible, then they are to obtain comments from the ACHP,

tribe or Native Hawaiian organization a “*reasonable opportunity* to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.” *Id.* § 800.2(c)(2)(ii)(A) (emphasis added). The problem is that there is no definition as to what “reasonable opportunity” means, thus, leaving the good intentions of section 106 of the NHPA and its corresponding regulations powerless because the public officials’ conduct is reviewed under the rational basis standard, which provides significant deference to the agency’s actions.

⁷⁹ *Id.* § 800.3(c)(3) (emphasis added); See generally *A Citizen’s Guide to Section 106 Review*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, <http://www.achp.gov/docs/CitizenGuide.pdf> (last visited April 11, 2015).

⁸⁰ 36 C.F.R. § 800.2(c)(2)(ii)(A),(C) (2014) (emphasis added).

⁸¹ See *id.* § 800.4 (2014).

⁸² DUVIVIER, *supra* note 2, at 405.

⁸³ *A Citizen’s Guide to Section 106 Review*, *supra* note 79, at 4.

⁸⁴ 36 C.F.R. § 800.4 (2014).

⁸⁵ *A Citizen’s Guide to Section 106 Review*, *supra* note 79, at 4.

⁸⁶ *Id.*

⁸⁷ *Id.*

which sends them to the head of the federal agency.⁸⁸

Developers and Native Americans differ as to what constitutes meaningful consultation. In general, "consultation is the process in which the State individually, or in conjunction with the enterprise seeking to use the land, discusses a development project with affected indigenous peoples."⁸⁹ This meaning differs from the more progressive concept of FPIC given by the United Nations Expert Mechanism on the Rights of Indigenous Peoples, which refers to a "State duty that 'entitles indigenous peoples to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in the process.'"⁹⁰ Scholars have noted that good faith and mutual respect are essential for the consultation process, and have further advocated for a consultation process customized to indigenous peoples' traditions.⁹¹

B. Executive Order 13175

In 2000, President Clinton issued Executive Order No. 13175 ("Consultation and Coordination With Indian Tribal Governments"), which applies to the development of regulations, legislative comments, or proposed legislation in coordination with Indian tribes.⁹² Section 1(b) of the Executive Order 13175 establishes that "Indian Tribe," for purposes of the order, is a federally recognized tribe, and section 1(d) defines "Tribal Officials" as "elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations."⁹³ Section 2(a) of Executive Order 13175 recognizes the trust relationship between the federal government and the Indian Tribes.⁹⁴ Section 5 defines the parameters of consultation procedures and requires meaningful and timely input by tribal officials.⁹⁵ The focus is on regulations that have tribal implications and consensual mechanisms on issues relating to tribal self-government, tribal trust resources, Indian tribal treaty, and other rights.⁹⁶ Thus, based on this Executive Order, Native Americans are entitled to active participation in the drafting of federal regulations, legislative comments, and proposed legislation that may affect their rights.

⁸⁸ *Id.* The Tribal Historic Preservation Officer is involved when the undertaking affects historic properties of significance for the officer's tribe. *Id.*

⁸⁹ Butzier & Stevenson, *supra* note 74, at 312.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Consultation and Coordination With Indian Tribal Governments*, Exec. Order 13175, 65 Fed. Reg. 67249, 67249 (Nov. 6, 2000).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 67250-51.

⁹⁶ *Id.*

C. United Nations Declaration on the Rights of Indigenous Peoples

On September 13, 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples (“UNDRIP”).⁹⁷ In December 2010, the United States endorsed the Declaration, understanding FPIC as meaningful consultation with tribal leaders, “but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.”⁹⁸ UNDRIP does not define “indigenous peoples,” but in its preamble, it recognizes that they have been subject to a history of human rights violations, revealing its function essentially as a remedial instrument.⁹⁹ Hence, “[t]he purpose of the Declaration is to remedy the historical denial of the right of self-determination and related human rights so that indigenous peoples may overcome systemic disadvantage and achieve a position of equality vis-à-vis heretofore dominant sectors.”¹⁰⁰ As an aspirational instrument, UNDRIP does not have to be ratified and thus it is not legally binding.¹⁰¹ However, it is useful in determining states’ obligations under other sources of international law.¹⁰²

With regards to FPIC, UNDRIP provides substantive protection in articles 11 and 28, and procedural provisions in articles 13, 18, 19 and 32. Article 11 states that indigenous peoples have the right to “maintain, protect and develop the past, present and future manifestations of their cultures” and stipulates that “States shall provide redress . . . with respect to their cultural . . . property taken without their free, prior and informed consent.”¹⁰³ Article 28 provides just, fair and equitable compensation for the lands and territories used or damaged without FPIC.¹⁰⁴

As to the procedural provisions, article 13 protects indigenous languages and requires States to provide interpretation or other means “to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings.”¹⁰⁵ Likewise, article 18 provides that “[i]ndigenous

⁹⁷ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP], available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

⁹⁸ Chris Lang, *Manufacturing consent: The U.S. position on Free, Prior and Informed Consent*, REDD-MONITOR (June 2, 2011), <http://www.redd-monitor.org/2011/06/02/manufacturing-consent-the-u-s-position-on-free-prior-and-informed-consent/>.

⁹⁹ S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 59 (2009).

¹⁰⁰ *Id.* at 59. Article 3 of UNDRIP provides the right to self-determination, which entitles indigenous peoples to pursue their economic, social, and cultural development. UNDRIP, *supra* note 97, at art. 3.

¹⁰¹ *ILO Standards and the UN Declaration on the Rights of Indigenous Peoples*, INT’L LABOUR ORG., http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_100792.pdf (last visited April 11, 2015).

¹⁰² *Id.*

¹⁰³ UNDRIP, *supra* note 97, at art. 11.

¹⁰⁴ *Id.* art. 28.

¹⁰⁵ *Id.* art. 13.

peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures.”¹⁰⁶ Article 19 establishes that “States shall consult and cooperate in good faith with the indigenous peoples concerned . . . in order to obtain their free, prior and informed consent [FPIC] before adopting and implementing legislative or administrative measures that may affect them,”¹⁰⁷ and article 32 establishes the same requirements for any project affecting their lands, territories and other resources.¹⁰⁸

UNDRIP does not define whether FPIC includes veto power. Thus, there is some controversy as to what “consent” means.¹⁰⁹ Black’s Law Dictionary defines “consent” to mean an “[a]greement, approval, or permission as to some act or purpose.”¹¹⁰ Some argue that FPIC must include, at a minimum, the right to say “No;” otherwise, FPIC amounts to nothing more than the “right to say ‘Yes.’”¹¹¹ Conversely, others argue that if FPIC is interpreted in its most progressive way, “veto” is the “power of one person or body to prohibit a course of action chosen by another . . . [and] [i]t implies an extraordinary, unilateral measure taken to override the decision of a collective or cooperative process.”¹¹²

III. THE RIGHT TO CONSULTATION UNDER COLOMBIAN LAW

Colombia is a civil law country organized in the form of a Republic.¹¹³ The country was governed by the Constitution of 1886, but in 1991 the National Constituent Assembly gathered and decided to enact a new Constitution.¹¹⁴ The new Constitution, which is the supreme law of the land,¹¹⁵ created the Colombian Constitutional Court and the *acción de tutela*, which is a writ protecting constitutional rights.¹¹⁶ Both the Constitutional Court and the *acción*

¹⁰⁶ *Id.* art. 18.

¹⁰⁷ *Id.* art. 19.

¹⁰⁸ *Id.* art. 32.

¹⁰⁹ Frank Seier, ‘Free, Prior and Informed Consent’ under UNDRIP: What Does it Really Mean?, RIGHT2RESPECT (June 21, 2011), <http://www.right2respect.com/2011/06/free-prior-and-informed-consent-under-the-un-declaration-on-the-rights-of-indigenous-peoples-what-does-it-really-mean/>.

¹¹⁰ *Consent*, BLACK’S LAW DICTIONARY (9th ed. 2009).

¹¹¹ Seier, *supra* note 113.

¹¹² *Id.*

¹¹³ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 1.

¹¹⁴ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] preamble.

¹¹⁵ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 4.

¹¹⁶ Colombia’s highest courts are: the Constitutional Court, in charge of constitutional affairs, the Supreme Court of Justice, for civil and criminal matters, the Council of State, which decides administrative disputes, and the Superior Judicial Council, which rules the conduct of lawyers and the functions of the employees of the judiciary. Before 1991, the Supreme Court decided also constitutional matters. See generally Antonio Ramirez, *An Introduction to Colombian Governmental Institutions and Primary Legal Sources*, NEW YORK UNIVERSITY SCHOOL OF LAW (May 2007),

de tutela marked a huge difference in terms of recognition, protection and enforcement of rights.¹¹⁷ Today, the *acción de tutela* is perhaps the most popular mechanism for the protection of fundamental rights.¹¹⁸

The Constitution of 1991 has 380 articles, and it includes both substantive and procedural protection of constitutional rights. Article 93 of the Constitution establishes that treaties and international agreements ratified by Congress that recognize human rights and that cannot be limited in "states of exception" prevail over domestic law.¹¹⁹ Consequently, Part III will address both domestic protection in Colombia (substantive and procedural) and international protection with emphasis on case law from the Inter-American Court of Human Rights.

A. Domestic Protections

1. Substantive Constitutional Protections

The Colombian Constitutional Court has recognized the right to consultation as a fundamental right with a collective component.¹²⁰ The Court considers it an essential instrument to preserve the ethnic, social, economic and cultural integrity of the indigenous communities, and to help secure their survival as a distinct group.¹²¹ The Constitutional Court has emphasized that consultation must occur prior to approval of administrative or legislative decisions that may affect indigenous peoples' rights.¹²² In similar fashion, it has qualified the consultation process as public, special, and mandatory, and requires the consulting parties to conduct their activities in good faith.¹²³ The Constitutional Court has emphasized that the State's obligation to consult derives from indigenous peoples' participation rights and their importance in the process of

<http://www.nyulawglobal.org/globalex/Colombia.htm>. The *acción de tutela* is defined as an "easily-accessible and quickly-resolved writ for the satisfaction of fundamental rights." Patrick Delaney, *Legislating for Equality in Colombia: Constitutional Jurisprudence, Tutelas and Social Reform*, Vol. One The Equal Rights Review 50 (2008).

¹¹⁷ Alejandro Manrique G., *El Impacto Social de la Accion de Tutela*, EL TIEMPO (July 1, 1996), <http://www.eltiempo.com/archivo/documento/MAM-446957>.

¹¹⁸ Cesar Paredes, *Los Hijos de la Constitución del 91*, SEMANA (July 8, 2008), <http://www.semana.com/on-line/articulo/los-hijos-constitucion-del-91/93806-3>.

¹¹⁹ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93. The Colombian constitution refers to treaties on human rights that cannot be limited in "states of exception" as prevalent in the domestic order. The "states of exception" are explained in articles 212-215 of the Colombian Constitution and refer to political or juridical crisis such as war, serious disturbance of public order or catastrophes. See generally CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 212-215.

¹²⁰ Corte Constitucional [C.C.] [Constitutional Court], febrero 3, 1997, Sentencia SU-039/97, sec. II, subsec. 3.1-3.3 (Colom.) available at <http://www.corteconstitucional.gov.co/relatoria/1997/su039-97.htm>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

development and preservation of their culture.¹²⁴

Furthermore, the Constitutional Court has indicated that as a fundamental right of due process, consultation should include the principle of opportunity, inter-cultural communication, bilingualism, and access to the necessary information in a clear, accurate, and timely fashion.¹²⁵ The Constitutional Court has declared that the State must guarantee and encourage the real and effective implementation of the fundamental right to consultation.¹²⁶

2. Procedural Constitutional Protections

Article 86 of the Colombian Constitution establishes that all persons have *acción de tutela* to make claims if their fundamental rights are being violated or threatened.¹²⁷ The purpose of this recourse is to avoid irreparable injuries caused by the action or omission of any public authority.¹²⁸ For efficiency and accessibility purposes, the *acción de tutela* is a preferential, gratuitous and expedited procedure that does not require legal representation.¹²⁹ In addition, article 86 states that decisions on the *acción de tutela* require immediate compliance and should be issued in no more than ten days after the complaint is filed.¹³⁰

Since the Constitutional Court elevated the right to consultation to the level of a fundamental right, indigenous peoples in Colombia use *acción de tutela* to protect their right to consultation and other fundamental rights.¹³¹ As a result, the Constitutional Court has protected the fundamental right to consultation when the government has undertaken projects in indigenous territories involving mining activities,¹³² exploratory drilling projects,¹³³ road construction,¹³⁴ or

¹²⁴ Corte Constitucional [C.C.] [Constitutional Court], febrero 14, 2001, Sentencia C-169/01, sec. V, subsec. 2.3 (Colom.).

¹²⁵ Corte Constitucional [C.C.] [Constitutional Court], febrero 3, 1997, Sentencia SU-039/97, sec. II, subsec. 3.1-3.3 (Colom.).

¹²⁶ Corte Constitucional [C.C.] [Constitutional Court], febrero 14, 2001, Sentencia C-169/01, sec. V, subsec. 2.3 (Colom.); see also Corte Constitucional [C.C.] [Constitutional Court], abril 25, 2013, Sentencia C-253/13, sec. II, subsec. 6.2.4 (Colom.). In this opinion, the Constitutional Court stated that before adopting legislation affecting ethnic communities there should be timely, efficient, and sufficient participation and not a mere information-dissemination procedure. *Id.*

¹²⁷ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 86. For a deeper discussion of the *acción de tutela*, see Delaney, *supra* note 116.

¹²⁸ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 86.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See generally Corte Constitucional [C.C.] [Constitutional Court], mayo 8, 1992, Sentencia T-002/92, (Colom.); Corte Constitucional [C.C.] [Constitutional Court], junio 5, 1992, Sentencia T-406/92, (Colom.).

¹³² See generally Corte Constitucional [C.C.] [Constitutional Court], octubre 22, 2002, Sentencia C-891/02, (Colom.).

¹³³ See generally Corte Constitucional [C.C.] [Constitutional Court], octubre 26, 2006, Sentencia T-880/06, (Colom.).

fumigation of illegal crops¹³⁵ without meaningful consultation or involvement of indigenous peoples in the decision-making process. The Constitutional Court has even suspended projects until the government undertakes the consultation process in good faith and with the necessary guarantees required by the Constitution and the international standards applicable to domestic activities under article 93 of the Colombian Constitution.¹³⁶

In deciding cases under *acción de tutela*, the Constitutional Court has extended the meaning of irreparable injury to include preservation of the integrity of the indigenous community, its economic condition, and its existence.¹³⁷ The Constitutional Court has stated that in case of conflict between the collective rights¹³⁸ of the population in general and the collective rights of indigenous peoples, the latter should prevail.¹³⁹ This standard applies even if the non-indigenous population is greater in number.¹⁴⁰ The justification is that ethnic and cultural diversity has preferential protection under the Colombian Constitution and international law.¹⁴¹

B. International Protections: Inter-American Case Law

Colombia ratified the American Convention on Human Rights in 1973, which is the core legal instrument of the Inter-American system, and accepted the competence of the Inter-American Commission on Human Rights and the Inter-

¹³⁴ See generally Corte Constitucional [C.C.] [Constitutional Court], junio 24, 1992, Sentencia T-428/92, (Colom.).

¹³⁵ See generally Corte Constitucional [C.C.] [Constitutional Court], mayo 13, 2003, Sentencia SU-383/03, (Colom.).

¹³⁶ See generally Corte Constitucional [C.C.] [Constitutional Court], octubre 29, 2009, Sentencia T-769 of 2009; octubre 26, 2006, Sentencia T-880 of 2006; noviembre 10, 1998, Sentencia T-652 of 1998; febrero 3, 1997, Sentencia SU-039 of 1997, (Colom.). See also CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93. Article 93 of the Colombian Constitution states that treaties and international agreements ratified by Congress, which recognize human rights and prohibit their limitation in states of emergency, prevail in the domestic order. *Id.* Moreover, article 93 of the Colombian Constitution establishes that the rights and duties consecrated in the Constitution will be interpreted pursuant to the treaties on human rights ratified by Colombia. *Id.*

¹³⁷ Corte Constitucional [C.C.] [Constitutional Court], junio 24, 1992, Sentencia T-428/92, section II, subsec. D.2 (Colom.).

¹³⁸ Collective rights are those rights that the individual has in its inseparable connection to the community to which it belongs. *Individual vs. Collective Rights*, U.N. REG'L INFO. CTR. FOR W. EUROPE, <http://www.unric.org/en/indigenous-people/27309-individual-vs-collective-rights> (last visited April 11, 2015).

¹³⁹ Corte Constitucional [C.C.] [Constitutional Court], junio 24, 1992, Sentencia T-428/92, section II, subsec. D (Colom.). In the cited case, the conflict was between the collective right of the general population regarding the improvement of the infrastructure in the region and the collective right of property of the indigenous community over immovables fundamental for their survival. *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* For a practical reference about how the consultation process works in Colombia, see generally *10 Pasos para Realizar Consulta Previa en Colombia*, DINERO (Feb. 12, 2013, 11:00 AM), <http://www.dinero.com/actualidad/noticias/articulo/abc-consulta-previa-colombia/189017>.

American Court of Human Rights in 1985.¹⁴² The Inter-American Court has applied the American Convention in light of the International Labour Convention Number 169 (ILO 169) and utilized article 29 of the American Convention on the grounds that the interpretation of international law should refer not only to agreements and documents directly related to it, but also to the system to which it pertains.¹⁴³

Article 93 of the Colombian Constitution states that the rights and obligations recognized in the Constitution are to be interpreted pursuant to ratified treaties and international covenants.¹⁴⁴ As a result, the Inter-American Court's interpretation of the right to consultation and the FPIC are binding on Colombia.¹⁴⁵

The Court has interpreted the right to property broadly to incorporate not only those material things that can be possessed such as land, but also "any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value."¹⁴⁶ In addition, the Court has determined that although the right to property is not absolute, State-made restrictions on it cannot endanger the survival of indigenous groups and their members.¹⁴⁷

With regards to the right to consultation, the Court has recognized the right as a *fundamental guarantee* to ensure participation of indigenous peoples and

¹⁴² Signatories and Ratifications, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm#Colombia (last visited April 11, 2015).

¹⁴³ *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 126 (2005); Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR. J. INT'L L. 585, 589 (2010). Articles 7 and 15 of ILO 169 have protected the right to consultation prior UNDRIP. Indigenous and Tribal Peoples Convention, 1989, ILO Convention No. 169, arts. 7 and 15. The Inter-American Court in application of the article 29 of the American Convention cites ILO 169 under the principle *pro homine*, which advances the interpretation most protective of human rights. *Ricardo Canese v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 181 (2004). Colombia ratified ILO 169 on August 7, 1991. *Latin America*, INT'L LABOUR ORG., <http://www.ilo.org/indigenous/Activitiesbyregion/LatinAmerica/lang--en/index.htm> (last visited April 11, 2015).

¹⁴⁴ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93.

¹⁴⁵ See generally Corte Constitucional [C.C.] [Constitutional Court], marzo 19, 2002, Sentencia C-200/02, (Colom.); Corte Constitucional [C.C.] [Constitutional Court], enero 19, 2000, Sentencia C-010/00, (Colom.); Corte Constitucional [C.C.] [Constitutional Court], agosto 10, 1999, Sentencia T-568/99, (Colom.); Diego García Sayán, *The Inter-American Court and Constitutionalism in Latin America*, 89 TEX. L. REV. 1835, 1840 (2011).

¹⁴⁶ *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) at ¶ 137; *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 144 (2001); *Ivcher Bronstein v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 122 (2001).

¹⁴⁷ *Saramaka People v. Suriname*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 128 (2007).

communities in decisions that may affect their rights.¹⁴⁸ The Court has also held that the obligation to consult is a general principle of international law.¹⁴⁹ The Court has also identified criteria for how consultation should be performed and requires the consulting parties to act in good faith and with the purpose of reaching an agreement.¹⁵⁰ For instance, the Court has indicated that indigenous peoples should be properly informed as to the possible risks of any project with an impact on their rights, including health and environmental risks.¹⁵¹ The Court has also specified that States must guarantee consultation at all stages of the planning and implementation of projects that may affect indigenous peoples.¹⁵² Similarly, it has emphasized that consultation should begin in the first stages so that indigenous peoples may actually influence the decision-making process;¹⁵³ otherwise, consultation is merely a procedural step.¹⁵⁴ Accordingly, the Court has stated:

[T]he State must ensure that the rights of indigenous peoples are not ignored in any other activity or agreement reached with private individuals, or in the context of decisions of the public authorities that would affect their rights and interests. Therefore, as applicable, the State must also carry out the tasks of inspection and supervision of their application and, when pertinent, deploy effective means to safeguard those rights through the corresponding judicial organs.¹⁵⁵

Based on the above, the Court has established a dual obligation for States: first to structure their laws and institutions so that indigenous peoples can be consulted effectively, in accordance with international standards¹⁵⁶ and second, to apply domestic law in light of the particular characteristics that distinguish indigenous peoples from the rest of the population and that constitute their cultural identity.¹⁵⁷ In addition, the Court has created the following distinct

¹⁴⁸ *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 160 (2012).

¹⁴⁹ *Id.* at ¶ 164.

¹⁵⁰ *Saramaka People*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) at ¶ 133.

¹⁵¹ *Id.* at ¶¶ 134, 158.

¹⁵² *Kichwa Indigenous People of Sarayaku*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) at ¶ 167.

¹⁵³ *Id.*

¹⁵⁴ *Saramaka People*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) at ¶ 133.

¹⁵⁵ *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 167 (2012).

¹⁵⁶ *Id.* at ¶ 166.

¹⁵⁷ *Sawhoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 59, 60 (2006); *Yakye Axa Indigenous Cmty.*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) at ¶ 138; *Kichwa Indigenous People of Sarayaku*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) at ¶ 162.

requisites that States have to comply with before the exploitation or exploration of natural resources: first, they are obligated to consult with the affected indigenous peoples and obtain their consent to proceed; second, they must assure that indigenous peoples *will reasonably benefit* from the exploitation of natural resources located in their territories; and third, states should prohibit any project in Indian Country until *independent* and technically qualified entities, under state supervision, make a previous study about the social and environmental impact.¹⁵⁸

Due to the profound impact of certain legislative and administrative measures on indigenous peoples, the Court has established a higher standard when deciding cases regarding large-scale development plans, investments, and the relocation of indigenous peoples.¹⁵⁹ Further, the Court has defined the right to consultation under the meaning of FPIC.¹⁶⁰ If the administrative or legislative measure involves relocation of indigenous peoples, States must obtain the FPIC of the people because it constitutes forced displacement and puts the people in a special situation of vulnerability.¹⁶¹ The Court has emphasized the destructive effect of relocation on the ethnic and cultural scheme of indigenous peoples, noting that it produces a clear risk of cultural or physical extinction of indigenous populations.¹⁶² Thus, the Court has determined that States must adopt specific protective measures that recognize indigenous peoples' intricacies, their customary laws, values, uses, and customs to prevent and revert the effects of such situations.¹⁶³

IV. RENEWABLE ENERGY PROJECTS IN INDIAN COUNTRY SHOULD PROVIDE THAT TRIBAL SELF DETERMINATION RIGHTS ARE SECURED

While the topic of Native Americans' rights is very complex, this article focuses solely on the issue of meaningful consultation and FPIC and offers three proposals. The first proposal refers to the federal trust responsibility doctrine as

¹⁵⁸ Saramaka People v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 129 (2007).

¹⁵⁹ Yakye Axa Indigenous Cmty., Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) at ¶ 137. The right to property is understood in its broadest meaning, and it includes more than title to land.

¹⁶⁰ Saramaka People v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) at ¶ 134; Saramaka People v. Suriname, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 17 (2008).

¹⁶¹ Chitay Nech v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 212, ¶ 147 (2010). Similarly, article 10 of UNDRIP also requires FPIC in case of relocation. UNDRIP, *supra* note 97, art. 10.

¹⁶² Chitay Nech, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) at ¶ 147.

¹⁶³ *Id.*

the genesis of the federal government's duties with the tribes. In short, the federal government must honor the treaty obligations through the proper application of existing rules. The second proposal advocates for the adoption of guidelines to enhance the consultation process. In this Part, the type and extent of the impact on tribal rights will determine the content of the guidelines. Policy reasons will be offered to justify a greater involvement of Native Americans in decisions affecting their rights. The third and final proposal argues for the creation of a higher standard of review aimed to protect Native Americans' self-determination rights and provides the judiciary with reasons of public policy to do so.

A. Protection Under the Federal Trust Responsibility Doctrine

Between 1787 and 1871, the United States entered into peace treaties with Indian tribes.¹⁶⁴ In these treaties, the United States obtained millions of acres of tribal lands and guaranteed that the federal government would respect "the sovereignty of the tribes, . . . would 'protect' the tribes, . . . [and would] provide food, clothing, and services to [them]."¹⁶⁵ However, the treaties lack precise duties to protect Indians' rights, assets, and resources, making the trust unenforceable at times.¹⁶⁶ Therefore, the first proposal seeks to prove that interpreting the existing law *in toto*, the federal government has the duty to elevate the recognition and protection of the right to consultation.

In comparison to the Colombian and Inter-American legal system discussed *supra* in Part III, the United States' protection of the right to consultation is a mere procedural formality for the following reasons: (1) there are no clear guidelines for how consultation should be conducted, (2) the U.S. has not ratified important instruments of international law such as the ILO Convention Number 169 (ILO 169) and the American Convention on Human Rights, and (3) the United States endorsed UNDRIP but understands "consent" to mean mere consultation. As a consequence, the right to consultation is still governed under the old reasoning of NHPA section 106.

This proposal asserts that, pursuant to the trust responsibility doctrine and in light of UNDRIP, the federal government has the duty to interpret section 106 in the most beneficial and favorable way regarding Native Americans' rights. If section 106 of the NHPA suffered no change after UNDRIP, then the latter is a superfluous instrument and the endorsement was only a political act without any legal significance. If that is the case, the federal government is not protecting the

¹⁶⁴ PEVAR, *supra* note 15, at 32.

¹⁶⁵ *Id.* For a deeper explanation of the trust responsibility doctrine, see generally *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).

¹⁶⁶ See, e.g., *United States v. Mitchell*, 445 U.S. 535, 546 (1980) (finding the United States did not have a "fiduciary responsibility for management" of Indian timber resources held in trust).

tribes' best interests,¹⁶⁷ enhancing their lands, resources and self-government,¹⁶⁸ nor providing the tribes with an accounting of all transactions regarding their resources.¹⁶⁹

Congress ceased creating treaties with Indian tribes in 1871 and left legislation as the primary source of enforceable trust obligations.¹⁷⁰ In this context, Native Americans and their supporters should focus on a progressive interpretation of current federal regulations to claim a meaningful consultation process or FPIC, depending on the situation. At this point, even though the United States has not adopted its jurisdiction, case law from the Inter-American Court of Human Rights is useful to support that UNDRIP provides something more than meaningful consultation; namely, FPIC. In other words, Inter-American case law supports that UNDRIP means more than just consultation at a domestic level. Since the United States' government has the duty to protect the tribes' best interests and because it previously endorsed UNDRIP, it should act consistently with the values reflected in the Declaration.

In order to justify the interpretation above, it is important to emphasize that the trust responsibility doctrine requires the parties to perform their duties in good faith.¹⁷¹ Thus, the federal government cannot oppose a progressive interpretation because Native Americans have lesser land rights in comparison to the Colombian tribes involved in the Inter-American cases. If the federal government uses Native Americans' lack of title to the land to justify the status quo, it would not be acting in good faith. This could arguably void the trust contract by operation of fraud or undue influence because Native Americans are not receiving the benefit of the agreement.

In conclusion, a more beneficial interpretation of the right to consultation or FPIC is justified by the application of the legislation already in existence under the principles of the trust responsibility doctrine. However, the question remains whether the federal government is willing to advance such interpretation, but that is a political issue outside the scope of this article.

B. Adoption of Guidelines to Facilitate Meaningful Consultation or FPIC

In the United States, DOI frequently uses the archeological survey prepared by the developer as part of its environmental impact statement.¹⁷² The archeologists and other consultants, paid by the developer, may strategically remove the most important archeological sites from the project area.¹⁷³ At this

¹⁶⁷ PEVAR, *supra* note 15, at 35.

¹⁶⁸ *Id.* at 33.

¹⁶⁹ *Id.* at 35.

¹⁷⁰ *Id.*

¹⁷¹ PEVAR, *supra* note 15, at 32; *see also* sources cited *supra* note 165.

¹⁷² King, *supra* note 71.

¹⁷³ *Id.*

point, DOI typically invites the tribes to consultation, presents the archeological plan and requests the tribes to sign it. When the tribes raise concerns, DOI balances Native Americans' concerns with the project's impact on the rest of the population and grants approval.¹⁷⁴ This approach reveals that Native Americans often do not participate early in the planning process as required by section 106 of the NHPA since they are not included in the initial archeological survey. It also reveals that the consultation process simply serves as the notification of the studies prepared by DOI and the developer, but in reality ignores Native Americans' rights. In order to solve this problem, this proposal will divide the analysis into the following categories: projects within the tribe's jurisdiction, projects outside the tribe's jurisdiction, projects that involve the exploitation or exploration of natural resources, projects that involve relocation of Native Americans or large-scale development plans or investments, and the consequences of giving Native Americans' a major role in decision-making processes.

1. Projects Within the Tribe's Jurisdiction

Tribes' active role in defining the government's duty to consult is important not only because UNDRIP is not binding on the government or private actors,¹⁷⁵ but also because renewable energy projects are being approved by the federal government on their lands or surroundings. Just in Imperial County, California, where the Quechan Tribe is located, there are two solar energy projects (Imperial Valley Solar and Tenaska Imperial Solar) and one wind energy facility (Ocotillo Express Wind Energy Facility).¹⁷⁶

Tribal sovereignty gives the tribes certain independence within their territories. However, the tribes do not use their sovereignty to create clear guidelines for the consultation process when the project occurs on tribal lands. Native Americans could use their sovereignty to define what constitutes consultation, who gets service on tribal lands and in what manner, what kind of information Native Americans need, and in what form and language. In addition, Tribes could require the dissemination of information in an understandable and publicly accessible format.¹⁷⁷ Tribes could also elevate consultation as a non-waivable step; determine which representatives will represent the tribe's

¹⁷⁴ *Id.*

¹⁷⁵ Butzier & Stevenson, *supra* note 74, at 323-24.

¹⁷⁶ For more information on solar projects in California, see generally *Solar*, BUREAU OF LAND MGMT., <http://www.blm.gov/ca/st/en/prog/energy/solar.html> (last visited April 11, 2015). For more information on wind projects in California, see generally *Wind Energy*, BUREAU OF LAND MGMT., <http://www.blm.gov/ca/st/en/prog/energy/wind.html> (last visited April 11, 2015). For an example of the active role of Native American tribes in the definition of guidelines for the extractive industry, see Butzier & Stevenson, *supra* note 74, at 323.

¹⁷⁷ *Saramaka People v. Suriname*, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 17 (2008).

interests; define obligations of the consulting parties, benefits and obligations for the tribe, participation of the tribe in the phases of performance, and monitoring of the project; and establish compensation for the tribe in case of foreseeable or unforeseeable harm. As a result, tribes would not be dependent on more complicated political decisions such as the ratification of international treaties that protect their rights.

In other words, Native American tribes could use their sovereignty to customize the consultation process in such a way that they are the actual decision-makers and not mere observers as it is today. For instance, Native Americans may find useful the reasoning of the Colombian constitutional case law, especially the opinion SU-039/1997 discussed *supra* in Part III, to define consultation as a right with a collective component that is essential to preserve its survival as a distinct group.¹⁷⁸ Furthermore, the Inter-American case law may prove useful for Native Americans to justify that the consultation process is an essential element of their right of self-determination and therefore be regarded as such by all intervening parties.

2. Projects Outside the Tribe's Jurisdiction

As to projects taking place outside of tribal jurisdiction, the same guidelines described above could be incorporated into section 106 of the NHPA via federal regulation. Pursuant to Executive Order 13175, the development of regulations, legislative comments, or proposed legislation requires the active participation of Native Americans in the legislative process.¹⁷⁹ But there is no practical difference between rights without proper enforcement and absence of rights. Section 106 of the NHPA should be amended to create a simple and expedited judicial recourse similar to the *acción de tutela* discussed *supra* in Part III that protects the right to consultation and prevents irreparable injuries caused by its misapplication.¹⁸⁰ Thus, the non-enforcement of the consultation provisions due to the lack of Native Americans' specialized knowledge or economic resources to pay attorneys' fees would be avoided.

The Colombian procedural protections derived from article 86 of the Constitution could serve as a starting point in framing this recourse. Native Americans could use a similar concept to protect their rights whenever they are

¹⁷⁸ Corte Constitucional [C.C.] [Constitutional Court], febrero 3, 1997, Sentencia SU-039/97, sec. II, subsec. 3.1-3.3 (Colom.).

¹⁷⁹ *Consultation and Coordination With Indian Tribal Governments*, Exec. Order 13175, 65 Fed. Reg. 67249, 67249-51 (Nov. 6, 2000).

¹⁸⁰ Although there is a trust relationship, ironically Native Americans pay their legal representation to get protection from the conduct of their trustee. Declaration of John Bathke in Support of Plaintiff's Motion for Summary Judgment at 5, *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 927 F. Supp. 2d 921 (S.D. Cal. 2013) (No. 3:12CV01167-GPC-PCL), available at <http://turtletalk.files.wordpress.com/2013/03/quechan-declaration.pdf>.

violated or threatened by any act or omission of any public authority. Still, it is important to establish a time limit for the decision of the recourse (ten days as in Colombia or other prudential time) to avoid irreparable injuries for tribes and for those investing in Indian country. For a progressive definition of "irreparable injury," it should include threats against the integrity of the indigenous community, its economic condition, or existence.¹⁸¹ The legislature should create a balancing test in case of conflict between Native Americans' rights and the general interest of the American population. This balancing test should be framed carefully to avoid abuses; otherwise, the protections proposed will have no effect on Native Americans' rights because "conflict" could be used as an excuse for non-compliance with the new guarantees.

In determining when consultation is required, the federal government should include any infringement on tribal rights with an impact on tribal property, interpreting the latter as a person's patrimony that includes all movables and immovable, corporeal and incorporeal elements, and any other intangible object capable of having value for indigenous peoples.¹⁸² For instance, if there is a project affecting the Coyote Mountains, the Quechan Tribe should be properly consulted regardless of whether the project occurs inside or outside the Tribe's lands because that area has spiritual significance. This extended interpretation of property rights will prevent irreparable injuries against Native Americans' land, identities, and traditions.¹⁸³

3. Projects that Involve the Exploitation or Exploration of Natural Resources in Indian Country

As to the exploitation or exploration of natural resources in Indian Country, the legislature should provide special requisites for the consultation process, such as requiring a showing that Native Americans will be reasonably benefited. The federal legislative branch should attempt in good faith to fund the hiring and supervision of independent and qualified consultants that create necessary studies regarding the potential social and environmental impacts of energy projects. In this manner, the federal government, the state government, Native

¹⁸¹ See, e.g., Corte Constitucional [C.C.] [Constitutional Court], junio 24, 1992, Sentencia T-428/92, sec. II, subsec. D.2 (Colom.).

¹⁸² See, e.g., *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 137 (2005) (citing *Mayagna (Sumo) Awá Tingni Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 144 (2001); *Ivcher Bronstein v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 122 (2001)) (defining property as "those material things which can be possessed, as well as any right which may be part of a person's patrimony," including "all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value").

¹⁸³ Corte Constitucional [C.C.] [Constitutional Court], febrero 3, 1997, Sentencia SU-039/97, sec. II, subsec. 3.1-3.3 (Colom.).

Americans and developers can rely on accurate and unbiased information, especially in cases where Native Americans have to provide informed consent.

4. Projects that Involve Relocation of Native Americans or Large-Scale Development Plans or Investments

For projects involving relocation of Native Americans or large-scale development plans or investments, the federal government should be sympathetic to the profound impact that such projects have on Native Americans. As to FPIC, the federal government should understand “consent” at least as the right to say “no,”¹⁸⁴ or ideally as the right to effectively determine the outcome of the process. In any case, FPIC should not be interpreted as a powerless procedural right to participate.¹⁸⁵ If the federal government insists on maintaining its current interpretation of section 106 of the NHPA (notwithstanding UNDRIP), then consultation will continue to focus only on the United States’ wants and ignore tribal needs.

5. Consequences of Ensuring that Native Americans Play a Major Role in the Decision-Making Process for Undertakings that Affect Them

Tribal lands are especially suitable for renewable energy projects because of their location, topographical conditions, absence of land use and tax-base regulations, and the ecological focus of the tribes.¹⁸⁶ Therefore, in developing any kind of energy project in Indian Country, Native Americans should be considered valuable participants in strategic partnerships between developers, public authorities, and tribes. The developer, government, and the tribe need clear duties to enforce their strategic partnership and be accountable to one another. Further, they should agree on reasonable benefits directly proportional to each party’s contribution.

Tribes have demonstrated that they can participate responsibly in energy projects without losing their identity. The Navajo Nation is a good example.¹⁸⁷ If Native Americans are included at the early stages of a project, as well as during its performance and monitoring phases, all parties will benefit. As locals,

¹⁸⁴ Seier, *supra* note 109 (“From a purely definitional point of view, and at a minimum, FPIC must include a right to say ‘No’ if the FPIC right is to have any meaningful content. If not, then it is simply the ‘right to say ‘Yes’”, as opposed to a ‘right of consent’.”)

¹⁸⁵ Butzier & Stevenson, *supra* note 74, at 312.

¹⁸⁶ Sara C. Bronin, *The Promise and Perils of Renewable Energy on Tribal Lands*, 26 TUL. ENVTL. L.J. 221, 224-27 (2013).

¹⁸⁷ The Navajo Tribal Utility Authority (NTUA) is part of the Big Boquillas Wind Project, mostly owned by the tribe, which provides energy to about more than 19,000 residential homes in the Phoenix area. See generally Alastair Lee Bitsoi, *Wind Projects Holds Promise for Tribe*, NAVAJO TIMES (Aug. 4, 2011), <http://navajotimes.com/news/2011/0811/080411wind.php#.VP4vP4m9LCQ>.

Native Americans will be the first witnesses of unwanted effects of the project, such as the killing of endangered birds by a turbine. This type of quick monitoring could ensure timely response and could save money for the developers, in addition to helping the government in effectively enforcing federal provisions.

Tribal manpower could be more competitive not only because these people reside in the area, but also because they have two-fold accountability: towards the developers and their tribal community. This will assure more effective and efficient compliance, to the benefit of both the project and the community. Finally, active involvement of Native Americans throughout all phases of an energy project lessens the likelihood of litigation. This saves both time and money, because as a major player in the project, the tribe will have lesser grounds to complain.¹⁸⁸

C. Increased Scrutiny for Federal or State Action with a Direct or Indirect Impact on Native Americans

To guarantee the proper implementation of guidelines for meaningful consultation or FPIC, the role of the judiciary is vital. In *Quechan Tribe v. Department of Interior*, the federal government's duties regarding the consultation process were reviewed under the Administrative Procedure Act's arbitrary and capricious standard (APA's standard), which gives great deference to the federal conduct.¹⁸⁹ As a consequence, the District Court decided that the government attempted in good faith to engage in government-to-government consultation and held in favor of the government.¹⁹⁰

Based on the existence of a trust relationship between the federal government and Native Americans, the standard of review for cases affecting Native Americans' rights should demand more from public officials than the generous and permissive APA's standard, in order to best honor the peace treaties.¹⁹¹ Judicial decisions could support an elevated standard of review by recognizing the right of self-determination as an essential component of tribal sovereignty, which predates the enactment of the United States Constitution. Finally, a

¹⁸⁸ For an example of partnerships renewable energy projects with meaningful consultation, see generally Jepirachi: An experience with the Wayuu indigenous community from the Upper Guajira in Colombia, EPM (2010), <http://www.epm.com.co/site/documentos/mediosdecomunicacion/publicacionesimpresas/jepirachi/LibroJepirachieningles.pdf> (summarizing EPM Group's experience developing the Jepirachi wind farm in consultation with the Wayuu indigenous community).

¹⁸⁹ *Quechan Tribe of Ft. Yuma Indian Reservation v. U.S. Dept of Interior*, 927 F. Supp. 2d 921, 927 (S.D. Cal. 2013) ("The standard is highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." (internal quotation marks omitted)), *appeal docketed*, No. 13-55704 (9th Cir. April 26, 2013).

¹⁹⁰ *Id.* at 933.

¹⁹¹ For a more detailed explanation of the trust responsibility doctrine, see generally sources cited *supra* note 165.

federal judge could justify such higher standard by stating that self-determination is connected with the concept of liberty, a right that Native Americans have not renounced in the trust with the federal government.¹⁹²

CONCLUSION

Renewable energy projects are important alternatives that combat climate change and tribal lands have proven attractive for these environmental endeavors. Native Americans are not opposed to renewable energy projects in Indian Country and this paper does not advocate against such projects. However, there is real concern that the federal government's green goals could come at the expense of Native Americans' right of self-determination.

In the Quechan Tribe case, the lack of proper guidelines on the consultation process left the implementation of section 106 of the NHPA and the Advisory Council on Historic Preservation's regulations inadequate to protect the Tribe's interests in cultural resources and preservation of its land and ecosystem. The sections examined in that case only required the federal government to act in "good faith" and provide tribes with "reasonable opportunities" to participate in the decision-making process. These broad and vague terms have left Native Americans at a disadvantage on their own territory.

The Inter-American and Colombian legal frameworks exemplify that the consultation process in the United States is a mere administrative procedure developed solely under the terms of the federal government, although it is labeled as otherwise. The guidelines given by the Colombian Constitutional Court demonstrate that important substantive and procedural changes can be made at a domestic level to effectively guarantee Native Americans' rights as decision-makers. Similarly, case law from the Inter-American Court of Human Rights provides different standards for the consultation process, depending on the kind, extent and impact of a project on Native Americans' rights.

Applying the federal trust responsibility doctrine, the federal government

¹⁹² Another argument could be that in compliance with the international obligations derived from article 1 of the International Covenant on Civil and Political Rights (ICCPR) ratified by the United States on June 8, 1992, the conduct of public officials should be examined under a strict scrutiny standard when it comes to consultation or free, prior and informed consent because it directly affects the right of self-determination guaranteed by under article 1. In fact, the Inter-American Court in *Saramaka v. Suriname* interpreted that a meaningless consultation process threatens indigenous peoples' self-determination of their economic, social and cultural development, as well as their disposal of their natural wealth and resources. *Saramaka People v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 93 (2007)*. However, the United States Senate in ratifying the ICCPR declared that the substantive provisions were not self-executing, and thus the ICCPR is unenforceable domestically since Congress has not to date enacted any implementing statutes. 138 CONG. REC. 8070-71 (April 2, 1992); see also S. EXEC. REP. NO. 102-23 (March 24, 1992) ("For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts.").

should give section 106 of the NHPA a more progressive interpretation in light of the United States' endorsement of UNDRIP. While the implementation of section 106 of the NHPA is currently failing its purpose, Native Americans can use their sovereignty to help establish clear guidelines about what constitutes meaningful consultation for energy projects within their jurisdiction. As to projects taking place outside the tribes' jurisdiction, a federal regulation could suffice to incorporate the same changes into domestic law. To create a simple, expedited and gratuitous writ aimed to effectively enforce the above protections, the legislative branch should amend section 106 of the NHPA. Congress should also amend section 106 to include additional requirements in case of exploitation or exploration of natural resources in Indian Country. In light of UNDRIP, Congress should confirm that FPIC is required in cases involving large-scale developments or investments, or relocation of Native Americans. This confirmation should include the understanding that "consent" is the right to unilaterally determine the propriety of the project in order to guarantee Native Americans' survival and dignity as a distinct and sovereign people. Finally, the judiciary should raise the level of scrutiny applicable to government action regarding consultation in order to protect Native Americans' self-determination as an essential component of historical rights.

Native Americans are strategic partners in the development of renewable energy projects in Indian Country. Therefore, tribes, investors, and the federal government should seek mutually beneficial agreements to be more efficient and sympathetic of each other's interests. This positive combination of expertise and resources will save time and money, and most importantly, will honor treaties' promises without sacrificing the national policy of advancing green energy goals.
