

**FEDERAL APPROVAL OF OIL PIPELINES
AND INDIGENOUS CONSULTATION IN THE
UNITED STATES AFTER STANDING ROCK
AND KEYSTONE XL: LESSONS FROM
CANADA ON THE LIMITS OF INDUSTRY-
INDIGENOUS CONSULTATION**

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INTRODUCTION

Consultation is a process through which all parties work to address concerns to the maximum extent possible. In both Canada and the United States, government agencies are required by law to consult with Indigenous peoples to minimize the impacts of proposed linear infrastructure projects. However, in the United States, government consultation with American tribes frequently fails to protect Indigenous interests, and these failures are a clarion call for legal reform. Reform, however, is slow, and consequently linear infrastructure proponents in the United States (who are already active in consultation processes) are being asked to do more. However, there are limits to the benefits of industry-Indigenous consultation. Lessons from Canada suggest that the benefits of industry-Indigenous consultation are

best realized when the interests of proponents and Indigenous peoples are aligned, which generally occurs when Indigenous interests are fungible.

The scope of this paper is restricted in two ways. First, it only considers the American legal regime governing consultation for projects off-reservation that impact Indigenous rights or properties. Second, it only considers interstate oil pipelines, in part because the risk of an oil spill threatens Indigenous properties and rights. As provided by the Lakota people in the Dakota Access pipeline litigation:

The Lakota people believe that the mere existence of a crude oil pipeline under the waters of Lake Oahe will desecrate those waters and render them unsuitable for use in their religious sacraments. . . . The Lakota people believe that the pipeline correlates with a terrible Black Snake prophesied to come into the Lakota homeland and cause destruction. . . . The Lakota believe that the very existence of the Black Snake under their sacred waters in Lake Oahe will unbalance and desecrate the water and render it impossible for the Lakota to use that water in their Inipi ceremony.¹

History has done tribes a great disservice. Despite being sovereign, tribes in the United States lack the ability to protect cultural properties located off-reservation land, even though these properties are fundamental to Indigenous cultural survival.² However,

1. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 82 (2017).

2. For an overview of land use authorizations on Indian trust lands, over which Indian tribes have sovereignty and tribal law governs, see Colby L. Branch, *Linear Projects*, in *INDIAN LAW AND NATURAL RESOURCES: THE BASICS AND BEYOND* 5-1 (Rocky Mountain Min. L. Found. 2017). See e.g., *Standing Rock Sioux Tribe*, 239 F. Supp. 3d at 80, 82, 100 (explaining that the Indian tribes were unable to protect the cultural properties of Lake Oahe located off-reservation land in court as their motion for preliminary injunction was denied against the building of a pipeline under the lake which would render the lake water unsuitable for religious sacrament).

[d]ue to historical events, most tribes have been repeatedly moved from their aboriginal lands, and their current reservation lands often do not include ancestral areas of great cultural significance. Tribal religious or cultural practices often require tribal governments to protect sacred sites or burial sites now located off reservation, but they lack jurisdiction to exercise sovereignty over these lands.³

Consultation between Indigenous peoples and the federal government, called government-to-government consultation, holds promise for accommodating tribal protection of sacred sites and the exercise of cultural practices based on a connection with the land. However, tribes struggle to enforce Federal Indian Law. Treaties protecting aboriginal lands have not been respected, and lawsuits based on the National Historic Preservation Act, other treaty-based tribal rights claims, or government-to-government consultation are generally unsuccessful. Tribes have been more successful by arguing that the government has violated environmental law, including the National Environmental Policy Act. Success in these lawsuits only guarantees additional consultation between the federal government and tribes. Consultation does not guarantee that Indigenous interests will be accommodated. This challenge is exacerbated because there is no shared understanding of the consultation process. Federal Indian Law, and government-to-government consultation more specifically, needs reform, a task that will likely fall to congress rather than the judiciary.

The shortcomings with government-to-government consultation have generated interest in industry-Indigenous consultation. Proponents already undertake many government-to-government consultation obligations, and some laws obligate them to

3. James S. Anaya & Rebecca Tsosie, *International Indigenous Peoples Issues and Federal Indian Law*, in *INDIAN LAW AND NATURAL RESOURCES: THE BASICS AND BEYOND* 10-19 (Rocky Mountain Min. L. Found. 2017).

undertake their own consultation processes (although generally in the former tribes must sue the government to enforce consultation obligations, and in the latter, there is no real legal enforcement mechanism). Proponents also have a financial incentive to consult. In addition to goodwill and a strong relationship with local communities, consultation can lead to consent, and consent can defray costly legal challenges to the adequacy of any legally-required consultation. Proponents seek Indigenous consent to the project usually through benefit agreements. Not only can this process mitigate social and legal risk to pipeline projects arising out of a lack of government-to-government consultation, it can also facilitate protection of sacred sites often more efficiently than government-to-government consultation.

However, industry-Indigenous consultation is not a panacea. The Canadian Trans Mountain Expansion Project demonstrates that even extensive industry-Indigenous consultation will not guarantee that Indigenous peoples will consent to a pipeline project. Rather, the likelihood of success of industry-Indigenous consultation depends on the nature of the Indigenous interests affected by the development, and the level of government-to-government consultation necessary for a project to survive judicial review.

Because this insight is drawn from the Canadian experience with Indigenous consultation, it is important to account for the differences between Canadian and American laws on consultation. The Canadian government has a constitutional duty to consult with First Nations and may delegate this duty to proponents. Like American tribes, First Nations can delay projects by seeking judicial review of government-to-government consultation; however, because Canadian First Nations have constitutionally-protected rights, they are much more likely to be successful than their American counterparts. As a corollary, proponents in Canada have to engage in more robust consultation to stave off judicial review of government-to-government consultation.

To understand how the nature of interests involved limits the success of industry-Indigenous consultation, it is helpful to think of industry-Indigenous consultation as a business transaction.

Proponents can only accommodate Indigenous concerns to the extent compatible with the economics of the project. Indigenous groups are more likely to consent to a project, and therefore won't seek judicial review, if they are interested in infrastructure, employment opportunities, and revenue sharing. Indigenous groups are unlikely to consent to a project if it threatens cultural survival—a non-fungible interest. Industry can only accommodate Indigenous concerns and interests that are compatible with the existence of linear infrastructure. The more incompatible the interests, the less successful consultation will be at achieving consent. In the event that an Indigenous group articulates that their interest cannot be accommodated, then industry must at least have satisfied the legal standard required under government-to-government consultation in order for the project to survive any judicial review of government-to-government consultation. If government-to-government consultation does not satisfy the legal requirements, then more costly consultation will be undertaken, adding to the cost of time delay. When evaluating the risk of litigation and the nature of the interests, the proponent must also consider the political and social power of Indigenous groups. Both the Dakota Access and Keystone XL pipeline cases demonstrate that oil pipelines can quickly become a political flashpoint, and government actors will condemn a project even if the proponent satisfies the legal requirements necessary for the pipeline to proceed.

Thus, the proponent and Indigenous perspectives on the benefits and limits of industry-Indigenous consultation suggest that the nature of the interest being accommodated is critical to the success of industry-Indigenous consultation, and therefore project success. This insight is poignant given global trends towards more government-to-government and industry-Indigenous consultation.

Part I explains the reasons why industry-indigenous consultation should be pursued as well as best practices for engaging in this type of consultation. Part II explains consultation obligations of both government and proponents in the United States. Part III introduces how federal oil pipelines are routed and sited. Part IV applies the United States

consultation regime to two pipeline case studies, the Dakota Access and the Keystone XL, to highlight the benefits and drawbacks of the current legal regime. Part V compares the American consultation regime with the Canadian regime and uses a Canadian case study to demonstrate that extensive consultation will not guarantee project success, and suggests that consultation is most beneficial when Indigenous concerns and interests are compatible with the existence of linear infrastructure.

I. GOVERNMENT TO GOVERNMENT CONSULTATION AND INDUSTRY-INDIGENOUS CONSULTATION

Pipeline projects have cast a spotlight on government-to-government consultation and Industry-Indigenous consultation practices, and in particular the discrepancy between domestic legal obligations and the international law and norms that shape public expectations about consultation, and generally impose requirements above and beyond obligations in domestic law. Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) provides that Indigenous Peoples must provide “free, prior and informed consent” (FPIC) before any project proceeds which may impact them or their territories.⁴

4. See, e.g., *id.* at 10-21 to 10-24; see also Walter H. Mengden IV, Comment, *Indigenous People, Human Rights and Consultation: The Dakota Access Pipeline*, 41 AM. INDIAN L. REV. 441, 450–51 (2017) (suggesting that the UN concept of free, prior, and informed consent is the solution to the lack of involvement Indian tribes have in the government actions that affect their lands); Akilah Jenga Kinnison, Comment, *Indigenous Consent: Rethinking U.S. Consultation Policies in Light of the U.N. Declaration on the Right of Indigenous Peoples*, 53 ARIZ. L. REV. 1301, 1304, 1324–25 (2011) (arguing that the United States should endorse policy moving toward a consent-based approach to indigenous rights, as opposed to the current minimal interpretation of meaningful consultation with indigenous peoples); Cindy S. Woods, *The Great Sioux Nation v. The “Black Snake”: Native American Rights and the Keystone XL Pipeline*, 22 BUFF. HUM. RTS. L. REV. 67, 69 (2016) (arguing that the American Declaration on the Rights and Duties of Man required the United States government to obtain fully informed consent before construction began on the Keystone XL pipeline); Tarah Bailey, Comment, *Consultation with American Indian Tribes: Resolving Ambiguity and Inconsistency in Government-to-Government Relations*, 29 COLO. NAT. RES. ENERGY & ENVTL. L. REV. 195, 220 (2018) (arguing that legislation dictating the process for consultation with Indian tribes should encompass an adaptation of FPIC, best practices, and key principles identified by the

FPIC requires that the Indigenous peoples freely provide consent to a project before the project is started, and that consent must be based on full information about the scope, impact, and duration of the project (informed consent).⁵ Disagreement exists over whether consent means a veto power, or just meaningful consultation and accommodation.⁶ At the very least, FPIC requires that consultation occur through representative institutions, and be carried out in good faith.⁷ Many experts, including James Anaya and Rebecca Tsotsie, suggest government-to-government consultation should adopt and incorporate FPIC. The United States announced support for UNDRIP in 2010.⁸

While government-to-government consultation attracts the

tribes).

5. G.A. Res. 61/295, at art. 31–32, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

6. Article 32(2) of UNDRIP states: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.” *Id.* at art. 32. Article 32(2) does not require states to obtain consent but only to engage in a mandatory consultation and cooperation procedure “in order to” obtain consent, but the term is used by Indigenous groups to mean to actual consent. Robert J. Miller, *Consultation or Consent: The United States’ Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37, 64, 91–94 (2015). *But see* Jacqueline L. Weaver, *Sustainable Development: Indigenous Title, Human Rights and the Environment*, in INTERNATIONAL PETROLEUM TRANSACTIONS, 712 723–25, 735, 737 (forthcoming) (on file with author) (providing that the four nations to vote against ratification of UNDRIP did so because they feared indigenous peoples would have a right of veto power over the legislatures); James Anaya, *Indigenous Peoples’ Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT’L & COMP. L. 7, 11, 17 (2005) (arguing that when their property rights are affected, “the international norm is developing to . . . require actual consent by the indigenous people concerned”). For a Canadian perspective on FPIC, see Dwight Newman, *Political Rhetoric Meets Legal Reality: How to Move Forward on Free, Prior and Informed Consent in Canada*, ABORIGINAL CAN. & NAT. RESOURCE ECON. SERIES, Aug. 2017, at 1 (addressing the meaning of FPIC and the impact implementing this policy would have on Canadian law).

7. G.A. Res. 61/295, *supra* note 5, at art. 32.

8. *United States Endorses International Declaration on Indigenous Rights*, AM. CIVIL LIBERTIES UNION (Dec. 17, 2010), <https://www.aclu.org/print/node/16344>.

most legal and public attention, respected experts such as Jeanette Wolfley and Troy Eid point to the crucial role of industry consultation in facilitating government-to-government relations.⁹ Although Indigenous self-determination is best achieved through Indigenous-led development, such as Indigenous enterprises, industry-consultation can help support indigenous self-determination by supporting business ventures, implementing tribal-led cultural surveys, re-routing infrastructure, and signing community benefit agreements. Nonetheless, these are distinct processes. For example, Nigel Bankes writes that:

[W]hile an operator may be able to offer some forms of accommodation (especially economic measures such as an impact and benefit agreement or the rerouting of an access road), other forms of accommodation will require the intervention of government. For example, a community may seek the implementation of a regional plan that imposes limits on development or the creation of a buffer zone around a particularly ecologically sensitive or culturally important area. These measures can only be implemented effectively by governments.¹⁰

From the perspective of a corporation, while there are certainly moral reasons driving consultation, industry-Indigenous consultation mitigates litigation and political risk, thereby reducing commercial risk.

Litigation risk arises in two ways: first, when an Indigenous group seeks judicial review of government-to-government consultation, and second, an Indigenous group may sue a proponent directly. As discussed above, lawsuits based on

9. See Troy A. Eid, *Beyond Dakota Access Pipeline: Energy Development and the Imperative for Meaningful Tribal Consultation*, 95 DENV. L. REV. 593, 604 (2018); Jeanette Wolfley, "The Black Snake": *The Dakota Access Pipeline Project, Federal Consultation and the Energy Industry's Role*, 63 ROCKY MT. MIN. L. INST. § 1B-1, § 1B.04 (2017).

10. Nigel Bankes, *The Implications of the Tsilhqot'in (William) and Grassy Narrows (Keewatin) Decisions of the Supreme Court of Canada for the Natural Resources Industries*, 33 J. ENERGY & NAT. RES. L. 188, 197 (2015) (footnote omitted).

inadequate consultation are often unsuccessful. Ray-Hodge and Stevenson summarize as follows: “[t]he consultation process does not provide tribes with a veto over undertakings occurring off tribal lands, but federal agencies, and parties seeking federal permits or funds, proceed at risk if they do not engage in reasonable and good faith consultation with tribes.”¹¹ Eid anticipates an increase in litigation over inadequate consultation, which will scrutinize the substance of consultation—rather than the procedure—to ensure that Indigenous concerns are accommodated.¹² “[t]he adequacy of federal and state consultations with tribes on energy projects—not just whether the process occurs, but whether tribes’ views are meaningfully considered in decision making—increasingly matters not only to tribes, but to policy makers and the courts.”¹³ Given pervasive delegation of government-to-government consultation to industry, the courts will likely scrutinize industry consultation as part of government-to-government consultation.

Second, companies themselves may face increased legal risk given that companies are often responsible for conducting portions of consultation as part of the permitting process. At present, inadequate consultation only results in the denial or delay of a permit. That said, corporations are subject to increasing norms of international human rights instruments (such as the United Nations Guiding Principles) which set global conduct standards to respect human rights.¹⁴ Human rights include Indigenous rights and the right to consultation.¹⁵ Endorsed by the United Nations Human Rights Council in 2011, the United

11. Vanessa L. Ray-Hodge & Sarah M. Stevenson, *Examining the Legal Implications of Government-to-Government Tribal Consultation and Off-Reservation Development*, in INDIAN LAW AND NATURAL RESOURCES: THE BASICS AND BEYOND 11-15 (Rocky Mountain Mineral Law Found. ed., 2017).

12. Eid, *supra* note 9, at 601 (citing *Wyoming v. U.S. Dep’t of the Interior*, 136 F. Supp. 3d 1317, 1327 (D. Wyo. 2015)).

13. *Id.* at 593.

14. *The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments*, UNITED NATIONS (June 2014), https://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf [hereinafter *UN Guiding Principles*].

15. G.A. Res. 61/295, *supra* note 5, at art. 1, 15, 17, 30, 32.

Nations Guiding Principles on Business and Human Rights are a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.¹⁶ While states have the primary responsibility to protect human rights, corporations also have a responsibility under the United Nations Guiding Principles to comply with applicable domestic laws and independently to respect internationally recognized human rights.¹⁷ As Anaya states:

[B]usiness enterprises . . . should not assume that compliance with State law equals compliance with the international standards of indigenous rights. On the contrary, companies should perform due diligence to ensure that their actions will not violate or be complicit in violating [I]ndigenous peoples' rights, identifying and assessing any actual or potential adverse human rights impacts of a resource extraction project.¹⁸

According to some scholars, the United Nations Guiding Principles could provide a cause of action in tort against non-compliance corporations.¹⁹ Moreover, broad support for the UNGPs indicate that "obtaining informed consent can be viewed as a process whereby the prudent energy developer can avoid the appearance of being involved or complicit in practices or activities inconsistent with international human rights."²⁰ Intuitively, the best practice in situations where laws fall short of international

16. *UN Guiding Principles*, *supra* note 14.

17. *Id.*; James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Extractive Industries and Indigenous Peoples*, ¶ 15, U.N. Doc. A/HRC/24/41 (July 1, 2013).

18. Anaya, *supra* note 17, ¶ 53.

19. See generally Robert McCorquodale et al., *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, 2 BUS. & HUM. RTS. J. 195, 203 (2017); Madeleine Conway, *A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains*, 40 QUEEN'S L.J. 741, 746–747, 784 (2014).

20. William M. Laurin & JoAnn P. Jamieson, *Aligning Energy Development with the Interests of Aboriginal Peoples in Canada*, 53 ALTA. L. REV. 453, 462 (2015).

human rights norms is to insist on adhering to higher international standards in order to reduce or eliminate above-ground risk.²¹

The changing litigation risk profile also impacts political risks. For example, tribes and other advocates for reform have used FPIC to pressure for political change. Tribes use the language of FPIC in public discourse to draw attention to government and proponent actions, and legitimize opposition by withholding consent. In 2016, the United Nations Permanent Forum on Indigenous Issues declared that Standing Rock Sioux should have input into DAPL because it could impact sacred sites and environmental resources, including drinking water.²² In 2017, the United Nations Rapporteur on the Rights of Indigenous People asserted that the lack of good-faith consultation in DAPL violated UNDRIP.²³ This international pressure was effective under the Obama administration. The Obama administration withdrew support for both DAPL and Keystone XL, despite a strong legal position.²⁴ The joint statement and subsequent push by the executive to re-evaluate the environmental assessment of DAPL demonstrate the power of the alignment of Indigenous and environmental groups. These examples demonstrate that tribes empowered with greater political power can translate legal power into political power. Poignantly, a political decision on the matter makes legal argumentation about the adequacy of consultation

21. *Id.*

22. Press Release, Secretariat of the Permanent Forum on Indigenous Issues, Statement from Mr. Alvaro Pop Ac, Chair of the Permanent Forum on Indigenous Issues, and Ms. Dalee Dorough and Chief Edward John, Members of the Permanent Forum on Indigenous Issues on the Protests on the Dakota Access Pipeline (Aug. 31, 2016), https://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/Statement_by_UNP_FII_on_Protests_on_the_Dakota_Access_Pipeline.pdf.

23. *Tribe Should have Say on Dakota Access—U.N. Body*, E&E NEWS (Sept. 1, 2016), <https://www.eenews.net/greenwire/stories/1060042264/>.

24. Peter Barker & Coral Davenport, *Trump Revives Keystone Pipeline Rejected by Obama*, N.Y. TIMES (Jan. 24, 2017), <https://www.nytimes.com/2017/01/24/us/politics/keystone-dakota-pipeline-trump.html>; Coral Davenport, *Citing Climate Change, Obama Rejects Construction of Keystone XL Oil Pipeline*, N.Y. TIMES (Nov. 6, 2015); Jack Healy & Nicholas Fandos, *Protesters Gain Victory in Fight Over Dakota Access Oil Pipeline*, N.Y. TIMES (Dec. 4, 2016), <https://www.nytimes.com/2016/12/04/us/federal-officials-to-explore-different-route-for-dakota-pipeline.html>.

irrelevant. Therefore, it is more costly to mitigate political risk and raise public support for a project in these circumstances. One way political risk arises is when tribes are inadequately consulted in the first place. Proponents are better positioned to consult during the initial stages of the project than to fight widespread political opposition, or even challenge a political decision by the highest political authorities to cancel a project because of impacts to Indigenous groups.

Taken together, legal and political uncertainty translate into commercial risk. Litigation is expensive and time-consuming. Eid argues that industry should embrace consultation with Indigenous groups because it makes good business sense; consultation reduces transaction costs; for example, DAPL protests and lawsuits cost investors at least \$750 million dollars, and delayed the pipeline by months.²⁵ Regulatory delay and Indigenous challenges have already delayed the start of operations of the Keystone XL pipeline by 10 years (from 2013 to 2023).²⁶

The content of accommodation is an area where industry can provide significant value, including during initial pipeline permitting decisions, by internalizing and front ending litigation risk and social costs.²⁷ Working proactively with Indigenous groups can decrease litigation risk by encouraging collaboration and by accommodating key concerns, such as routing to avoid a sacred site, before these issues escalate or become mired in

25. Eid, *supra* note 9, at 593; see also Carla F. Fredericks et al., *Social Cost and Material Loss: The Dakota Access Pipeline*, 55–56 (Univ. Colo. L. Legal Studies Res. Paper No. 19-1, 2018), https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf.

26. *Annual Information Form*, TRANSCANADA 12 (February 22, 2010), <https://www.tcenergy.com/globalassets/pdfs/investors/reports-and-filings/regulatory-filings/2009/transcanada-2009-annual-information-form.pdf>; see also Geoffrey Morgan, *Fresh Legal Setback for Keystone Could Result in Delays of Up to a Year*, FIN. POST (Nov. 9, 2018, 4:11 PM), <https://business.financialpost.com/commodities/energy/fresh-legal-setback-for-keystone-xl-could-result-in-delays-of-up-to-a-year> (quoting an analyst who believes that the delay in the Keystone project could extend to the middle of 2022).

27. Eid, *supra* note 9, at 593 (noting that “[t]he private sector stands to gain by working proactively with tribes earlier in the project-planning process, including in pipeline routing decisions”).

bureaucracy.²⁸ Otherwise stated, industry can facilitate accommodation of low-hanging fruit, those interests which are inexpensive to accommodate at the onset of the project development phase but could otherwise escalate into significant conflict.

Industry-Indigenous consultation not only reduces transaction costs for proponents by empowering tribal leaders with the knowledge and tools to participate meaningfully in the process as sovereign nations, but also finances their ability to do so.²⁹ Addressing resource and knowledge gaps facilitates consultation and ensures that concerns are addressed in a timely way. Indigenous engagement is the most “efficient and desirable way of arriving at agreed-upon arrangements [. . .] that are fully respectful of Indigenous people’s rights, and may provide Indigenous peoples opportunities to pursue their own development priorities.”³⁰

Empowerment also facilitates tribal leaders to participate more effectively in government-to-government consultation; ongoing negotiation provides tribes with bargaining power, and elevates the sophistication of the negotiation strategy. Indigenous groups can also secure financial resources necessary to support community development. Industry-Indigenous consultation therefore benefits both proponents and Indigenous groups.

James Anaya in the Report of the Special Rapporteur on the Rights of Indigenous Peoples lists some best practices in Indigenous consultation and accommodation.³¹ Best practices include timing, method, goals, attitudes and content.³² First, companies must consult in good faith, especially where governments effectively delegate consultation obligations to companies. Good faith consultation means engaging in an open and trustworthy way, with a view to listening to and

28. Wolfley, *supra* note 9, § 1B.04.

29. Eid, *supra* note 9, at 604; Jeanette Wolfley, *Embracing Engagement: The Challenges and Opportunities for the Energy Industry and Tribal Nations on Projects Affecting Tribal Rights and Off-Reservation Lands*, 19 VT. J. ENV'T L. 115, 131 (2018).

30. Anaya, *supra* note 17, ¶ 61.

31. *Id.* ¶¶ 8–11.

32. *Id.* ¶ 8.

accommodating concerns. In this way, good faith industry-Indigenous consultation reflects the principles of FPIC. Companies should not approach consultation as an exercise in ticking boxes to get a permit; the benefits of consultation stem from listening to Indigenous concerns, engaging in dialogue, responding to and accommodating requests, and effectively developing a partnership from which both parties benefit.

Before engaging, companies should adopt formal Indigenous consultation policies with explicit procedures.³³ These procedures should recognize that Indigenous groups are unlike other stakeholders, and treat them accordingly.³⁴ Industry should identify groups as early as possible in the project process. Consultation should occur before any authorizations or formal commitments occur from the government, and then proceed through indigenous institutions in the manner requested by the particular group.³⁵ Information sharing is essential to trust: proponents must provide timely information, be responsive to Indigenous requests for information and participation in the information gathering process, as well as in any accompanying environmental impact assessments. Importantly, consultation must continue throughout the project life cycle.³⁶ Many of these procedural best practices reflect obligations under domestic law.

Effective consultation is also substantive. Proponents can modify routes, implement technological solutions, involve communities, and provide funding. Indigenous groups that negotiate with proponents to enable self-determination have entered into creative partnership models that balance Indigenous interests with industry interest. Emerging best practices include equity investment, community benefit agreements, or other partnership models that allow for the benefit sharing, and may

33. *Id.* ¶¶ 27–28.

34. *Eid, supra* note 9, at 604. The DAPL did consult with the Standing Rock Sioux, but their efforts were largely through existing stakeholder engagement processes, which are more likely to fail to recognize and accord sufficient respect to the unique interests of the tribe. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 15 (D.D.C. 2016).

35. *Anaya, supra* note 17, ¶¶ 67, 70.

36. *Id.* ¶ 67.

include income streams, guaranteed percentages of profits, and minority interests to participate in management decisions.³⁷ Equity participation for example, “provides affected Aboriginal communities with a voice in decision-making, aligns their interests with those of the energy developer, increases self-reliance by providing a line of sight to meaningful wealth creation and financial sovereignty, and ensures that both parties share in the costs, benefits and risks of energy development activities.”³⁸ Indeed, many forward-looking corporations have already voluntarily adopted FPIC as a best practice to “reduc[e] risk, identify[] appropriate and feasible mitigation measures, and honor[] the principle of equal respect and human dignity in relation to [I]ndigenous peoples.”³⁹

II. GOVERNMENT-TO-GOVERNMENT CONSULTATION IN THE UNITED STATES: FEDERAL INDIAN LAW AND THE TRUST DOCTRINE

Indian tribes are sovereign,⁴⁰ and pre-date the United States

37. *Id.* ¶¶ 76–77. Eid describes best practices similarly:

Fortunately, some companies are already demonstrating ways to work proactively with tribes to support the tribal consultation process. This approach recognizes that energy developers should not shift their project-related costs to tribes, but instead find ways to help tribal officials gain access to the specific expertise needed—from sources of tribes’ choosing—to make more accurate and complete project assessments. This includes providing appropriate financial and in-kind assistance to tribes to cover project-related costs to tribal staff and other governmental resources, such as the extra expense tribes incur in evaluating off-reservation projects and consulting with federal officials about them. Such arrangements must be carefully structured and monitored by companies and tribes to create no real or perceived obligations on the part of tribal officials to support projects, and to ensure funds are expended only for legitimate and approved purposes.

Eid, *supra* note 9, at 605.

38. Laurin & Jamieson, *supra* note 20, at 474.

39. Anaya & Tsosie, *supra* note 3, at 10-27.

40. See *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002) (“Indian tribes are neither states, nor part of the federal government, nor subdivisions of

from time immemorial. The tensions that characterize current legal and political relations between tribes and other levels of government in the United States have their origins in the treaty-making era and the laws that flowed forthwith.

All sources of law that govern the relationship between the federal government and Indian tribes are referred to in this paper as Federal Indian Law.⁴¹ Federal Indian Law includes the United States Constitution, international law, treaties with Indian tribes, executive orders, statutes, regulations, and the laws of each tribe, as well as judicial interpretation of these sources. This paper is concerned with the subset of Federal Indian Law that governs federal actions off-reservation that impact Indigenous properties and rights, including usufructuary rights and rights associated with cultural properties, primarily the trust doctrine and executive policies.

The history and evolution of Federal Indian Law and policy underpins modern government-to-government consultation. All 567 federally-recognized tribes are sovereign.⁴² Colonial settlers

either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate”).

41. See Monte T. Mills, *Why Indian Country? An Introduction to the Indian Law Landscape*, in INDIAN LAW AND NATURAL RESOURCES: THE BASICS AND BEYOND 1-1 (Rocky Mountain Min. L. Found. 2017) (citing COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.01, at 6 (Nell Jessup Newton ed., 2012)) (the leading treatise in the area, for a laundry list of legal sources that comprise Federal Indian Law). Mills distinguishes between federal law and tribal law, a distinction I adopt. See *id.* Tribal law refers to the diverse set of laws of the 567 federally-recognized Indian tribes within the United States. See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915 (Jan. 17, 2017). Importantly, tribes that are not federally-recognized do not benefit from the government-tribal relationship. For a discussion of the politics of tribal recognition, see generally Lorinda Riley, *When a Tribal Entity Becomes a Nation: The Role of Politics in the Shifting Federal Recognition Regulations*, 39 AM. INDIAN L. REV. 451 (2015). Further, this paper uses the terms “Indian” and “tribe” to refer to Indigenous peoples as recognized in the legal frameworks that apply to them, with no intention of invoking outdated tropes or stereotypes. See *id.*

42. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 82 Fed. Reg. at 4915; Anaya & Tsosie, *supra* note 3, at 10-11 (noting that tribal governments have “inherent sovereign power to govern their members”); see also Pueblo of San Juan, 276 F. 3d at 1192 (explaining that “[t]he Pueblo, like all Indian tribes, need not rely on a federal delegation of powers” due to “their original tribal sovereignty”).

who arrived on the shores of America encountered powerful, organized Indigenous peoples who asserted authority over what is now known as the American continent. Initially settlers depended upon Indigenous peoples for protection, guidance, and sustenance, but as the United States ascended and expanded across the Western plains, some tribes were forced into the Union through conquest. Other tribes, reading the writing on the wall, entered into treaties with the nascent administration.⁴³

Through treaties Indian tribes exchanged vast swaths of land in exchange for promises of protection of tribal lands, exclusion of outsiders, and provision of certain services.⁴⁴ Through treaties, tribes ceded their ancestral aboriginal lands but retained a right of use and occupancy, as well as all rights retained explicitly in the treaty.⁴⁵ However, treaties failed to establish the relationship

43. Mills, *supra* note 41, at 1-4.

44. Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1567 (1994) ("As expressed in treaties and elsewhere, the land cessions were conditioned upon an understanding that the federal government would safeguard the autonomy of the native nations by protecting their smaller, retained territories from the intrusions of the majority society and its ambitious entrepreneurs"). For example, the Great Sioux Nation surrendered their ancestral lands to the United States through the Treaties of Fort Laramie 1851 and 1868, in exchange for annual payments over an annuity period and protection from encroaching pioneers on their reservation lands. Carla F. Fredericks & Jesse D. Heibel, *Standing Rock, the Sioux Treaties, and the Limits of the Supremacy Clause*, 89 U. COLO. L. REV. 477, 501-02, 504-05 (2018) (explaining that the 1851 Fort Laramie Treaty established peace and "[i]n return, the United States agreed to protect Indians from the increasing number of homesteading pioneers and . . . compensate the Indians through \$50,000 payments each year for fifty years" and "the Treaty of 1868 . . . reserved the Great Sioux Reservation for" the Sioux).

45. Fredericks & Heibel, *supra* note 44, at 504. Tribes also reserved grants of land for the sole use and benefit of the tribe, called reservation lands, which in some instances overlap with treaty lands. *See id.* at 503-04. Many of the reservations did not overlap with ancestral aboriginal lands. *See id.* at 502. Reservation lands continue to refer to territories over which tribes exercise sovereignty, even if tribes do not legally own the land. *See Frequently Asked Questions*, U.S. DEP'T INTERIOR INDIAN AFFAIRS, <https://www.bia.gov/frequently-asked-questions> (last visited July 19, 2020). Understanding Federal Indian Law terminology is challenging. *See* STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 23, 23 (2012). The terms "Indian reservation" and "Indian Country" have distinct meanings. *See id.* at 23. As stated in the text, An Indian reservation is land set aside by treaty, statute, executive order, or by implication, for the benefit of one or more Indian Tribes. *Id.* at 23. Indian country includes reservation lands,

of tribes to the Union and the tribes' place in the Federation. The Supreme Court was asked to resolve these questions. First, Justice Marshall defined the federal-tribal relationship in the "Marshall Trilogy,"⁴⁶ which described tribes as sovereign entities who were entitled to protection from state government incursions.⁴⁷ Importantly, Justice Marshall established the primacy of federal authority over state authority,⁴⁸ which was consistent with both the practice and legal instruments of the day. Both the Articles of Confederation of 1781 and the Constitution of 1787 provided the federal government with authority over relations with Native Americans.⁴⁹ The treaty clause in the Constitution grants the President the power to sign

as well as trust lands and restricted allotment lands located off-reservation. *Id.* at 23. Trust and allotment lands are lands assigned to one Indian, who has beneficial title. *Id.* at 23. A trust land is legally owned by the government, but an allotment is owned by the individual. *Id.* at 23. In both cases, there is no right to alienate without consent of the federal government. *Id.* at 23. "Treaty lands," as used herein, include the original reservation lands guaranteed by treaty. Aboriginal title, also referred to as Indian title, are ancestral homelands. *Id.* at 24. Allotment lands were created by the General Allotment Act (GAA) and led to many Indians being dispossessed from these lands. Fredericks & Heibel, *supra* note 44, at 489. For a more thorough discussion of the GAA see *infra* note 58.

46. See *Johnson v. M'Intosh*, 21 (8 Wheat.) U.S. 543, 587–88 (1823) (holding that the United States maintains the right to extinguish Indian rights of occupancy, but grants the Indians a degree of sovereignty); *Cherokee Nation v. Georgia*, 30 (5 Pet.) U.S. 1, 17 (1831) (holding that sovereign Indian nations more akin to "domestic dependent nations" than foreign nations); *Worcester v. Georgia*, 31 (6 Pet.) U.S. 515, 561–62 (1832) (holding that the United States guarantees protection to tribes against state interference). The *Johnson*, *Cherokee Nation*, and *Worcester* cases together make up the "Marshall Trilogy." Matthew L. M. Fletcher, *States and their American Indian Citizens*, 41 AM. INDIAN L. R. 319, 324 n.20 (2017).

47. States have an important relationship with Indian tribes, and more so in modern times. Fully exploring the state-federal-Indian relationship is beyond the scope of this paper, but for more information see Fletcher, *supra* note 46, at 319–20, 324 n.20.

48. See, e.g., Mary Beth West, *Natural Resources Development on Indian Reservations: Overview of Tribal, State and Federal Jurisdiction*, 17 AM. IND. L. R. 71, 72–74 (1992) (arguing that Marshall's model provided that the federal government had authority over Indian tribes, but state law did not apply within Indian territory).

49. See ARTICLES OF CONFEDERATION, art. IX, para. 4 (Congress has the power to "regulat[e] the trade and manag[e] all affairs with the Indians"); U.S. CONST. art I., § 8, cl. 3 (Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

and negotiate treaties with foreign sovereigns, which historically included Indian tribes.⁵⁰ Although the Indian Commerce Clause provides Congress with seemingly limited power to regulate trades and affairs with the Indian tribes,⁵¹ the Court has found that Congress has plenary power over Indian affairs and lands, subject only to constitutional limitations.⁵²

Second, Justice Marshall found that although the United States acquired legal title to lands within its borders through the doctrine of discovery, tribes continued to have the right to use and occupy ancestral lands.⁵³ Through the treaty-making process, Indian tribes ceded sovereignty over aboriginal lands but reserved to themselves inherent rights,⁵⁴ including the rights to hunt, fish, and access water.⁵⁵ The land concessions through treaties led Justice Marshall to conclude that the federal government held ancestral lands for the benefit of the tribes in a “trust relationship,” also characterized as a “guardian-ward” relationship.⁵⁶ The legal obligations that flow from the Marshall Trilogy are explored further below.

The promises of the treaty-making era were short-lived. The

50. U.S. CONST. art II, § 2, cl. 2. Note that Congress halted the treaty-making process in 1871. *American Indian Treaties*, NAT'L ARCHIVES, <https://www.archives.gov/research/native-americans/treaties> (last updated Oct. 4, 2016).

51. U.S. CONST. art I, § 8, cl. 3.

52. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.02 (Nell Jessup Newton ed., 2017); see also *Del. Tribal. Bus. Council v. Weeks*, 430 U.S. 73, 84 (1977) (“[t]he statement in *Lone Wolf*, that the power of Congress ‘has always been deemed a political one, not subject to be controlled by the judicial department of the government,’ however pertinent to the question then before the Court of congressional power to abrogate treaties has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment. ‘The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.’” (citations omitted)).

53. *Johnson v. M'Intosh*, 21 (8 Wheat.) U.S. 543, 587–88 (1823).

54. See, e.g., *United States v. Winans*, 198 U.S. 371, 381 (1905) (“In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted”).

55. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 52, § 4.01(1)(a), (2)(d).

56. *Wood*, *supra* note 44, at 1496–98, 1502. Treaty lands upon which cultural properties continue to be located are held by the federal government, not the state government, which is one reason why this paper is concerned with federal, rather than state, authority. *Id.*

federal government forcibly renegotiated treaties, and in the process not only removed tribes from reservations guaranteed by treaty to different reservations, but also terminated and diminished reservations.⁵⁷ Further legislative acts aggravated, rather than remedied, the situation.⁵⁸ Starting with the Nixon administration in the 1960s, the federal executive acknowledged the profound failure of federal Indian policy to promote Indian interests.⁵⁹ Subsequently, the federal government has devolved much control over Indian affairs to tribes themselves, restored lands, and promoted tribal control over tribal resources.⁶⁰

After nearly 100 years of government policy, land ownership of tribal lands is fragmented, and the land tenure system is

57. PEVAR, *supra* note 45, at 75; *see also* Fredericks & Heibel, *supra* note 44, at 507 (explaining that the United States resorted to “sell-or-starve” tactics to forcibly coerce the Sioux into selling land given to them in the 1868 Treaty). In *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–66 (1903), the Supreme Court found that Congress has plenary authority to abrogate an Indian treaty. Anaya & Tsosie summarize the jurisprudence and conclude that Congress has power to dispose of lands without consent due to its guardianship powers. Anaya & Tsosie, *supra* note 3, at 10-24.

58. The guardian-ward analogy also empowered Congress to pass the General Allotment Act in 1887, a legislative solution to the so-called “Indian Problem.” Fredericks & Heibel, *supra* note 44, at 489–91; Wilcomb Washburn, *The Historical Context of American Indian Legal Problems*, LAW & CONTEMP. PROBS., Winter 1976, at 12, 18–19. The goal of the General Allotment Act (GAA) was to assimilate tribes into an American way of life and promote economic development. Fredericks & Heibel, *supra* note 44, at 489. The GAA empowered the federal government to break up reservation land and apportion beneficial title to Indian individuals in fee simple; the government held the legal title in trust for 25 years. *Id.* at 489. Many allotment lands ended up in non-Indian ownership through fraud or *sheriff's* sales. *See id.* The GAA dispossessed tribes of millions of acres of reservation land and disrupted cultural ways of life, resulting in widespread poverty. *See id.* at 489. Eventually, the government realized the cost of supporting tribes, and repealed the GAA by passing the Indian Reorganization Act in 1934. 25 U.S.C. § 5101 (2018). The government then tried unsuccessfully to distance itself from tribal affairs and promote tribal self-determination and governance. To achieve these goals, the government devolved some responsibility to the states. Mills, *supra* note 41, at 1-11 to 1-12.

59. *See* President Nixon, Special Message on Indian Affairs July 8, 1970, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON (1970), <https://www.epa.gov/sites/production/files/2013-08/documents/president-nixon70.pdf> (providing that Federal programs intended to serve American Indians were “ineffective and demeaning” and it was “long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people”).

60. Mills, *supra* note 41, at 1-6 to 1-14.

complex.⁶¹ Relevant to siting and operating oil pipelines, however, is the proposition that many important Indigenous cultural resources continue to be located off-reservation but on historical reservation lands guaranteed by treaty, or even ancestral lands, and therefore outside of tribal control. The trust doctrine, treaty rights, and government consultation through executive policy persist in a diminished state, although none of these bodies of law provide an effective means of protecting cultural properties located off-reservation.

A. *The Trust Doctrine*

As introduced above, the Marshall trilogy established the trust doctrine. At the core of the trust doctrine are three principles: sovereignty, protection, and a trust relationship. These arise because land was exchanged through treaties. In *Johnson v. McIntosh*,⁶² Justice Marshall imported the doctrine of discovery to support the conclusion that the United States owned title to tribal lands subject only to the Indian title right of occupancy.⁶³ However, the power of the U.S. government over lands came with responsibility: “the rights of the conquered to property should remain unimpaired.”⁶⁴ This limit inheres because, as Justice Marshall provided in *Cherokee Nation v. Georgia*, Indian governments are “domestic dependent nations.”⁶⁵

He analogized the relationship between sovereign tribes and

61. Land tenure on reservation and off reservation is of minimal import to the DAPL conversation in this paper, but for an in-depth discussion of the impacts of Federal Indian Law and policy on land ownership both on and off reservation, see Lynn H. Slade, *Puzzling Powers: Overlapping Jurisdiction of Indian Tribes and the Federal, State, and Local Governments in “Indian Country,”* ROCKY MOUNTAIN MIN. L. INST., 1996, at 11-6, 11-13. It suffices to say that, for this discussion, tribes have more control over the terms of which the Bureau of Indian Affairs may grant rights of way on tribal lands than on non-tribal lands. See Rights-of-Way on Indian Land, 80 Fed. Reg. 72492, 72512 (Nov. 19, 2015) (deferring to the tribes the responsibility to make certain decisions on tribal land, including whether to allow exemptions).

62. *Johnson v. McIntosh*, 21 (8 Wheat.) U.S. 543 (1823).

63. *Johnson*, 21 (8 Wheat.) U.S. at 592; Mills, *supra* note 41, at 1-6.

64. *Johnson*, 21 (8 Wheat.) U.S. at 589.

65. *Cherokee Nation v. Georgia*, 30 (5 Pet.) U.S. 1, 17 (1831).

the U.S. government as that of a ward-guardian.⁶⁶ Justice Marshall supported his analogy by reference to the act of treaty-making: “[t]he treaties made with this nation purport to secure to it certain rights. These are not gratuitous obligations assumed on the part of the United States. They are obligations founded upon a consideration paid by the Indians by cession of part of their territory.”⁶⁷ The act of treaty making also imposed on the U.S. government an obligation to protect tribes and their rights.⁶⁸

The language of the Marshall trilogy invokes the law of fiduciaries. As summarized by Matthew L. Fletcher, a Federal Indian Law expert, “[t]he structure of the Constitution and the treaties established a relationship between sovereigns akin to a trust relationship, with the federal government in the position of trustee and Indian nations and Indian people in the position of trust beneficiary.”⁶⁹ As beneficiaries, Indian tribes retained sovereignty in the form of self-government.⁷⁰ As a trustee, the federal government assumed protection obligations.

Despite using terminology from the law of fiduciaries, and although the Supreme Court has described it as such,⁷¹ the trust

66. *Id.* at 17; see *Worcester v. Georgia*, 31 (6 Pet.) U.S. 515, 551–52 (1832) (“What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving a surrender of their national character”); see also Mills, *supra* note 41, at 1–6 (the Cherokee Nation was “under the protection of the United States” and was a “ward” of the United States, which served as “guardian”); Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 663–64 (2006) (explaining that the Indians were dependent upon the United States, which Chief Justice Marshall identified from the number of treaties that included the word “protection”).

67. *Cherokee Nation*, 30 (5 Pet.) U.S. at 58–59.

68. *Worcester*, 31 (6 Pet.) U.S. at 551, 561–62.

69. MATTHEW L.M. FLETCHER, *FEDERAL INDIAN LAW* 3 (2016).

70. See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014).

71. *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

doctrine is not analogous to a modern fiduciary relationship.⁷² Fletcher opines that “[w]hat should have been a relationship that evolved into something like what the Vatican and Monaco have with their respective European hosts, devolved into weakness, dependence, and exploitation.”⁷³ In a fiduciary relationship, beneficiaries can enforce a trust relationship and pursue recourse against the trustee. By contrast, a century of Supreme Court case law has restricted the ability of federally recognized tribes to seek damages from the federal government even in clear instances of abuse of trust.⁷⁴ Supreme Court cases have legitimized and propagated horrendous treatment of tribes under the auspices of the “public good,” leading to a body of precedent unsupportive of a robust trust relationship. The Supreme Court has upheld abrogation of treaties,⁷⁵ and declined to intervene in allotment and assimilation.⁷⁶ The Supreme Court has also found that while Indian treaties are supreme under the

72. See, e.g., *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173 (2011) (“we have applied that analogy in limited contexts, but that does not mean the Government resembles a private trustee in every respect. On the contrary, this Court has previously noted that the relationship between the United States and the Indian tribes is distinctive, ‘different from that existing between individuals whether dealing at arm’s length, as trustees and beneficiaries, or otherwise.’ ‘The general relationship between the United States and the Indian tribes is not comparable to a private trust relationship’”) (citations omitted).

73. Fletcher, *supra* note 66, at 661.

74. See Mills, *supra* note 41, at 1-18 (arguing that the Supreme Court has narrowed “the potential for tribes to seek damages from the federal government where it fails to carry out its role in a manner consistent with how tribes view the trust relationship”); see also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 52, § 5.04 (explaining that Courts invoked the trust relationship, which created “nearly absolute and unreviewable congressional plenary power”); Wood, *supra* note 44, at 1541 (“Established principles of trust law provide a cause of action to the beneficiary against the trustee for breach of fiduciary duty”).

75. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

76. For a forceful argument that Supreme Court decisions such as *Lone Wolf* relied on racist stereotypes to justify congressional interference with Indian affairs, see Mary K. Nagle, *Nothing to Trust: The Unconstitutional Origins of the Post-Dawes Act Trust Doctrine*, 48 TULSA L. R. 63, 64–65 (2012). Moreover, the Supreme Court continued to justify the General Allotment Act in *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011).

Supremacy clause, Congress may abrogate treaties.⁷⁷ These judicial decisions have given Congress a license to exercise plenary authority over many aspects of the Federal-Indian relationship.

Modern courts are reluctant to apply the trust doctrine. According to Matthew L. Fletcher, the modern trust doctrine is considered a moral duty owed by the federal government to act in the best interests of the Indian tribes.⁷⁸ This understanding animates current lawsuits and public debate, but according to the courts, a moral duty is generally vague and unenforceable.⁷⁹ When tribes invoke the trust doctrine, the court reviews the congressional action using the rational basis test, which provides only a minimal check on congressional power.⁸⁰ The rational basis test provides that the judiciary will not interfere with congressional actions that interfere with the trust relationship so long as there is a rational connection between the legislative objective and the means Congress has chosen to accomplish that goal.⁸¹ This is not an exacting standard.

While courts refuse to enforce a freestanding common law trust doctrine against Congress, they will enforce a statutory duty that gives effect to the trust doctrine. Trust duties are only enforceable in court if Congress expressly provides for the duty in a statute, and makes clear that Congress consents to being sued for monetary damages in the event that Congress breaches the trust duty.⁸² In effect, Congress must waive sovereign immunity.

77. FLETCHER, *supra* note 69, at 4.

78. Fletcher, *supra* note 66, at 659.

79. *Id.*

80. Sharon M. Wheeler, *Is the Die Cast? Indian Casino Gambling in Maine*, 50 ME. L. REV. 143, 151–52 (1998).

81. Alex Tallchief Skibine, *Integrating the Indian Trust Doctrine into the Constitution*, 39 TULSA L. REV. 247, 253–54 (2003); Fletcher, *supra* note 66, at 660.

82. Fletcher, *supra* note 66, at 660. I rely heavily on Fletcher's and other authors' scholarship for the proposition that the structural relationship does not give rise to an action for breach of a trust relationship. Even if there is a trust relationship grounded in the Federal Indian Law, the government is protected from lawsuits under the doctrine of sovereign immunity. Therefore, Congress must waive sovereign immunity in a statute, and the claim must fall within the scope of the waiver. *See, e.g., Cobell v. Babbitt*, 30 F. Supp. 2d 24, 31–32 (1998). In this way, Congress plays a key role in shaping the

As Fletcher states, “[d]espite trust breaches that boggle the imagination, unless Congress says, ‘Go ahead and sue us for money,’ the Court will not allow it.”⁸³ Unsurprisingly, there are few instances where Congress creates such a cause of action.

Many experts have proposed reforming the trust doctrine to promote self-governance and self-determination. Fletcher provides:

The modern trust relationship—self-determination dichotomy retains the need for preservation of reservation boundaries (such as they are) and the need for self-determination, but it also includes a moral and legal obligation to restore tribes to the status they had when they entered into these treaties, or at least where they were headed before the betrayal of the United States.⁸⁴

Mary Christina Wood further argues that these values can be given legal force if the trust doctrine is rooted in property law because “[i]t is a principle that arises from the native relinquishment of land in reliance on federal assurances that

enforceable contours of the trust relationship, even if the trust relationship exists independently. Mary Christina Wood argues that this power imbalance is part of why Native American understandings of the trust doctrine—and crucially the duty of protection articulated by Justice Marshall—fail to give rise to litigation. See Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources through Claims of Injunctive Relief against Federal Agencies*, 39 TULSA L. REV. 355, 358–59 (2003). For cases applying the trust doctrine, compare *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474–76, 478 (2003) (holding that the U.S. breached its fiduciary duty to preserve trust property, allowing the White Mountain Apache Tribe to have a substantive claim for money damages), and *United States v. Mitchell*, 463 U.S. 206, 224–26 (1983) (holding that a fiduciary relationship is created when the U.S. government is given full responsibility to manage Indian resources and land, the breach of which allows for a claim for money damages), with *United States v. Navajo Nation*, 537 U.S. 488, 493 (2003) (holding that the Indian Mineral Leasing Act did not give the Tribe a claim for compensation), and *United States v. Mitchell*, 445 U.S. 535, 546 (1980) (holding that the mismanagement of forests on Indian tribal land did not warrant an award of money damages under the General Allotment Act).

83. Fletcher, *supra* note 66, at 660.

84. *Id.* at 661.

retained lands and resources would be protected for future generations.”⁸⁵

Although reforming the conceptual roots of the trust doctrine would benefit tribes opposing pipeline projects, the discernible conclusion relevant to this paper is that the absence of limits and cognizable standards within the trust doctrine at present undermine its ability to protect tribal resources off-reservation.⁸⁶ No act of Congress establishes or extends protection based on the trust doctrine to tribal properties located off-reservation.⁸⁷ Although ineffective as a legal doctrine, the executive branch of government is institutionalizing the promises and aspirations of the trust doctrine through government-to-government consultation.

B. Government-to-Government Consultation

In contemporary relations between the United States and tribal Indian governments, presidents and federal agencies are prophylactically institutionalizing Indian sovereignty and the trust doctrine through government-to-government consultation. Congress has also passed legislation requiring additional government-to-government consultation in specific instances where tribal rights are at risk, although it has refused to create a cause of action for damages for a breach of a consultation duty.⁸⁸ One of the goals of consultation is to ensure adequate protection for rights and properties at the initial stages of a government undertaking.

85. Wood, *supra* note 82, at 358.

86. Wood, *supra* note 44, at 1476 (arguing that “the trust doctrine is particularly important in the modern era of Self-Determination as a means of responding to threats to the native land base” and “attribute[ing] the doctrine’s past shortcomings largely to the absence of standards by which courts could protect tribal sovereignty concerns”). While the Trust Doctrine still provides an avenue for judicial reform, such a reform has yet to materialize. See Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 112 (1995).

87. Wood, *supra* note 86, at 205 (explaining that the Trust Doctrine does not protect tribal properties off reservation).

88. See Mills, *supra* note 41, at 1-17 to 1-19 (demonstrating the fluctuation in Congress’s legislation regarding consultation).

1. *Executive Policy.* Presidents are at the forefront of modern Indian policy. A disastrous century of Indian laws and policies led to the era of tribal self-determination in the late 1960s, as the Nixon administration ushered in a series of policies that forcefully articulated a renewed federal-tribal relationship premised on Indian sovereignty and the trust relationship.⁸⁹ In this new era, the federal trust relationship has become the basis of “efforts to ensure tribal interests are considered, if not protected, in any federal decision that may affect such interests, regardless of whether such decision is limited to Indian Country.”⁹⁰ Indigenous sovereignty is the cornerstone of modern policy, implemented by “government-to-government” consultation. “Government-to-government consultation” means that executive actors consult in a meaningful way with tribes, as sovereigns, when government actions affect tribal interests.⁹¹

Presidents Clinton and Obama also issued executive memoranda that built upon the themes of the Nixon administration, and proffer guidance that executive agencies must implement in their interactions with tribes.⁹² Consequently,

89. U.S. OFFICE OF THE INTERIOR, M-37045, REAFFIRMATION OF THE UNITED STATES' UNIQUE TRUST RELATIONSHIP WITH INDIAN TRIBES AND RELATED INDIAN LAW PRINCIPLES 1, 9–10 (2017) (describing the statutes and policies Nixon supported in favor of tribal self-government and self-determination).

90. Mills, *supra* note 41, at 1-18.

91. Exec. Order 13,175 of November 6, 2000, 65 Fed. Reg. 67,249, 67,249–50 (Nov. 9, 2000).

92. *Memorandum on Government-to-Government Relations with Native American Tribal Governments*, 30 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 936, 936–37 (1994) (stating that executive decision making that affects tribal interests must be candid, transparent, and conducted in the spirit of cooperation); Exec. Order No. 13,007 of May 24, 1996, 61 Fed. Reg. 26,771 (May 29, 1996) (concerning the protection of Indian Sacred Sites, which are narrowly defined to be “discrete” and “narrowly delineated”); Exec. Order 13,175 of November 6, 2000, 65 Fed. Reg. at 67,249–50 (directing an agency head to designate an official responsible for the implementation of the consultation process, who will then submit a description of the process the agency has taken to the Office of Management and Budget); Memorandum of November 5, 2009, 74 Fed. Reg. 57,881, 57,881 (Nov. 9, 2009) (directing federal agencies to develop and implement consultation plans); Exec. Order 13,647 of June 26, 2013, 78 Fed. Reg. 39,539, 39,540 (July 1, 2013) (establishing the White House Council on Native American Affairs to “improve coordination of Federal programs and the use of resources available to tribal communities”). For a thorough discussion of policies under the Obama administration, see

federal agencies, bureaus, and departments have promulgated guidance on how to engage with tribes, which set out specific procedures for contacting and consulting with tribes as opposed to engagement with other public stakeholders. Generally, meetings must address specific issues, include high-level delegates, and be on reservation where possible. Consultation must be ongoing and in many cases subsidized. Although procedures vary from agency to agency, many have signed inter-agency memorandums of understanding.⁹³

For example, the Department of Defense (DoD) policy on government-to-government consultation provides that the DoD, will provide “timely notice to . . . tribal governments prior to taking any actions that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands.”⁹⁴ Consultation must be in good faith.⁹⁵ The policy also provides that the structure of consultation varies with underlying legal obligations. In some cases, for example, consultation only requires notice, while in other instances consultation may require formal consent.⁹⁶ The policy anticipates that consultation will occur in two stages. Initial consultation will identify whether the project will impact rights, and if it will, then the DoD will consult further.⁹⁷ The policy further provides that when considering consultation obligations:

EXEC. OFFICE OF THE PRESIDENT, *A RENEWED ERA OF FEDERAL TRIBAL RELATIONS* 4–5, 8–10, 12 (2017) (detailing the policies under the Obama administration that improved consultation and supported self-determination).

93. See, e.g. U.S. DEP’T OF THE INTERIOR ET AL., *MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY RIGHTS* 1, 1–3 (2016), https://www.epa.gov/sites/production/files/2017-02/documents/mou_treat_rights_12-01-16_final.pdf.

94. DEP’T OF DEF., *AMERICAN INDIAN AND ALASKA NATIVE POLICY AND DEPARTMENT OF DEFENSE INSTRUCTION NUMBER 4710.02: DOD INTERACTIONS WITH FEDERALLY-RECOGNIZED TRIBES* 5 (2006), https://www.spk.usace.army.mil/Portals/12/documents/tribal_program/American-Indian-and-Alaska-Native-Policy-Booklet-Version-2-for-Web-Posting.pdf.

95. *Id.*

96. *Id.*

97. *Id.*

[T]wo principles should be kept in mind. One, tribes are not just another interested party; where tribal interests may be significantly affected, tribes must be regarded as separate from the general public for the purposes of consultation. Second, in most cases, consultation should include an invitation to potentially affected tribes to provide information to DoD concerning actions that may significantly affect tribal interests; that information should be given special consideration. In some instances, e.g., where Indian lands or treaty rights may be significantly and adversely affected, tribal rights may take precedence and dictate that DoD protect these rights to the fullest extent possible.⁹⁸

The United States Army Corps of Engineers (COE) is located under the jurisdiction of the DoD, and therefore it must implement the DoD policy on government-to-government consultation.⁹⁹ The COE participates in DoD consultation initiatives, and the COE has also promulgated its own guidance on government-to-government consultation, at the core of which are six principles:

- “Meet the Trust responsibility;
- Honor the government-to-government relationship;
- Acknowledge the inherent sovereignty of Tribes;
- Engage in pre-decisional consultation;
- Protect natural and cultural resources when possible;
- and

98. *Id.* The DoD has also developed an albeit dated consultation matrix that lists when it must seek consent, engage in consultation, or provide notification under various laws. OSD OFFICE OF GENERAL COUNSEL, TRUST RESPONSIBILITY AND CONSULTATION MATRIX (2004). Additionally, all DoD consultation-related guidance, including model protocols, is available at *Consultation Resources and Reference Materials*, DENIX, <https://www.denix.osd.mil/na/consultation/> (last visited June 15, 2020).

99. See U.S. ARMY CORPS OF ENG'RS, DRAFT PLAN OF ACTION TO IMPLEMENT THE POLICIES AND DIRECTIVES OF EXEC. ORDER 13175, CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS 1, 2 (2010), https://www.usace.army.mil/Portals/2/docs/civilworks/tribal/obamamemo_usaceplan_7jan.pdf.

- Find opportunities to use existing authorities to encourage economic capacity building and growth.”¹⁰⁰

The guidance does not elaborate further on the process of consultation. The memoranda themselves do not create or recognize enforceable legal rights to consultation, apart from those that exist under current law. The text of the 1994 memorandum explicitly states that it guides agency action and does not create a cause of action for tribes.¹⁰¹ Executive agency guidance on consultation is similarly only procedural in that it is unenforceable in a court of law.¹⁰² Otherwise stated, generally the court will review a failure to follow procedure by ordering more procedure; it will not award damages, even if such failure results in a substantive impairment of cultural properties, nor will it review the substantive results of consultation.¹⁰³ Absent judicial remedy, “there is no guarantee that agencies will engage in meaningful consultation by honestly considering tribal concerns.”¹⁰⁴ Moreover, as will be seen below in the Dakota Access Pipeline litigation, the court will not interfere with federal actions that impair tribal rights and properties so long as the procedures have been followed.¹⁰⁵

100. *Id.* at 2.

101. *Memorandum on Government-to-Government Relations with Native American Tribal Governments*, *supra* note 92, at 936–37 (“This memorandum is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right, . . . benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies . . . or any person”). There is also no cause of action under President Clinton’s year 2000 executive order or under President Obama’s executive order. Exec. Order No. 13,175 of November 6, 2000, 65 Fed. Reg. 67,249, 67,252 (Nov. 9, 2000); Exec. Order No. 13,647 of June 26, 2013, 3 C.F.R. § 13647 (2013); *see also* Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J. L. REV. 417, 450–51 (2013).

102. Routel & Holth, *supra* note 101, at 450–51.

103. *See id.* at 464–66; Michael Eitner, Comment, *Meaningful Consultation with Tribal Governments: A Uniform Standard to Guarantee that Federal Agencies Properly Consider their Concerns*, 85 U. COLO. L. REV. 867, 872 (2014) (citing *Ctr. for Biological Diversity v. Salazar*, No. 10–2130–PHX–DGC, 2011 WL 6000497 (D. Ariz. Nov. 30, 2011); *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010)).

104. Eitner, *supra* note 103, at 872–73.

105. *See The Standing Rock Sioux Tribe’s Litigation on the Dakota Access Pipeline*, EARTHJUSTICE, <https://earthjustice.org/features/faq-standing-rock-litigation> (last updated

2. *Congressional Consultations Laws and Interaction with Executive Policy.* Congress has enacted specific statutes that require government-to-government consultation with Native American tribes where government actions impact tribal interests.¹⁰⁶ These include, but are not limited to, the National Historical Preservation Act (NHPA), Native American Graves Protection and Repatriation Act (NAGPRA), and the National Environmental Policy Act (NEPA). The NHPA is discussed below, and the NEPA is discussed in Section C of Part III.¹⁰⁷

The NHPA provides procedural and occasionally substantive protection for tribal cultural resources, including those located off-reservation.¹⁰⁸ “Section 106 consultation” is the process through which historic properties, including tribal ones, are protected.¹⁰⁹ Section 106 provides that:

The head of any Federal agency having direct or

June 8, 2020) (providing examples of the court allowing the pipeline construction to proceed).

106. For an overview of statutes requiring consultation circa 2009, see WHITE HOUSE–INDIAN AFFAIRS EXEC. WORKING GRP. & CONSULTATION AND COORDINATION ADVISORY GRP., LIST OF FEDERAL TRIBAL CONSULTATION STATUTES, ORDERS, REGULATIONS, RULES, POLICIES, MANUALS, PROTOCOLS AND GUIDANCE (2009), http://www.ncai.org/attachments/Consultation_hJYORXOnCSfagkpaeFLgYFNCFnFTxSpQNdqyejdardbxFcdFUz_1%20fed%20consultation%20authorities%202-09%20AChp%20version_6-09.pdf.

107. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–13 (2018); 43 C.F.R. §§ 10.1–17. A full discussion of NAGPRA and the Archeological Resources Protection Act is beyond the scope of this paper. Taken together, these acts permit excavation activities and regulate ownership of unearthed cultural properties; tribes must be consulted if an excavation will impact or unearth tribal properties. See Walter E. Stern, “Black Snakes” or Essential Infrastructure: Dakota Access Pipeline, Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, *The Federal Government’s Tribal Consultation Obligations, and Why this Matters*, ROCKY MOUNTAIN MIN. L. INST., 2017, at 1A-3, 1A-20 to 1A-22, 1A-24 to 1A-28.

108. For a good summary of the issue, see COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 52, § 20.02(3) (describing the various protections the NHPA provides, including historic preservation, environmental review, and consultation requirements).

109. Section 106 was formerly 16 U.S.C. § 470(f), but it is now 54 U.S.C. § 306108 (2018). Despite the change in official title and reference to a new section, the process is still referred to as “Section 106 Consultation.” See AASHTO PRACTITIONER’S HANDBOOK: CONSULTING UNDER SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT 1 (2016).

indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.¹¹⁰

The NHPA enlists multiple different agencies to help protect historic properties. For example, the National Park Service maintains the National Register of Historic Places, a compendium of protected cultural and religious properties.¹¹¹ Further, the Advisory Council on Historic Preservation (ACHP) (an independent federal agency) administers and supervises the environmental review and consultation processes under section 106, which applies to all federal agencies.¹¹² State officials, called state historic preservation officers, also assist with carrying out section 106 consultation, although on tribal lands these responsibilities can be assumed by a tribal historic preservation officer.¹¹³ “Tribal land” is defined as “all land within the exterior boundaries of any Indian reservation” and “all dependent Indian communities.”¹¹⁴

Section 106 establishes the consultation process, elaborated on by regulation.¹¹⁵ First, a federal agency seeking to undertake a federal action evaluates whether the action meets the definition

110. 54 U.S.C. § 306108 (2018). The process is defined in the regulations at 36 C.F.R. §§ 800.1–.13 (2019).

111. See Cohen’s, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 52, § 20.02(3)(a).

112. *Id.*

113. *Id.*

114. 54 U.S.C. § 300319 (2018) (formerly 16 U.S.C. § 470w(14)).

115. 36 C.F.R. § 800.3–.7 (2019).

of an undertaking,¹¹⁶ which triggers section 106.¹¹⁷ As part of this process, the agency coordinates with other reviews, including environmental reviews under NEPA.¹¹⁸ The federal agency also consults with interested parties including state and tribal historic preservation officers, tribes, and the public.¹¹⁹ Once satisfied that the action is an undertaking, the federal agency makes a “reasonable and good faith”¹²⁰ effort to identify historic properties, such as those with religious and cultural significance, that may be affected.¹²¹ Historic properties may already be listed in the National Register. Previously unidentified properties must also be assessed for inclusion in the Register. Regardless, the effects to all historic properties, listed or not, must be considered. For historic properties that will be affected, the federal agency must

116. 54 U.S.C. § 300320 (2018) (“the term ‘undertaking’ means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including” those delegated to other levels of government, those requiring a permit, or license, and so on).

117. 36 C.F.R. § 800.3 (2019).

118. 36 C.F.R. § 800.8 (2019); *see* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370m-10 (2018) (creating a national policy to decrease environmental harm).

119. 36 C.F.R. § 800.3 (2019).

120. 36 C.F.R. § 800.4(b)(1) (2019). “[T]he agency official shall take the steps necessary to identify historic properties within the area of potential effects.” *Id.* § 800.4(b). The level of effort required is set out in subsection (b)(1), stating, “The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. The Secretary’s standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal, and local laws, standards, and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.” *Id.* § 800.4(b)(1). The ACHP has promulgated guidance on the meaning of “reasonable and good faith.” ADVISORY COUNCIL ON HISTORIC PRES., MEETING THE “REASONABLE AND GOOD FAITH” IDENTIFICATION STANDARD IN SECTION 106 REVIEW (2018), https://www.achp.gov/sites/default/files/guidance/2018-05/reasonable_good_faith_identification.pdf.

121. 36 C.F.R. § 800.4 (2019).

define the adverse effects.¹²² Once defined, adverse effects must be resolved. Resolution of effects requires considering alternatives, modifications, mitigation, and so on.¹²³ The resolution process is complicated. For example, if the agency and the historic preservation officer agree on how to resolve adverse effects, they must execute a memorandum of agreement.¹²⁴ If they do not agree, then the ACHP may comment on the agreement.¹²⁵ If the parties still cannot agree and the process is unproductive, consultation can be terminated, but the terminating party must provide reasons.¹²⁶ Tribes and the public are consulted at each step of this process. Once this process occurs, the undertaking can proceed and can affect historic properties.

Consistent with the cooperative federalism model of both resource governance and major environmental statutes, the NHPA also allows the Department of the Interior to “delegate authority to states so that they become the entities with which federal agencies consult about federal undertakings that may affect historical properties, and so that states may assist in developing plans to mitigate harm to the properties.”¹²⁷ Each state administers the NHPA through a State Historic Preservation Officer (SHPO), who coordinates with affected parties.¹²⁸ During initial planning, the agency determines which SHPOs must be involved, and works with them to identify all affected and interested parties.¹²⁹ State responsibilities, however, can be contracted to non-profit and educational institutions.¹³⁰

Tribes are explicitly recognized throughout the process, and the federal agency must engage with affected tribes through

122. *Id.* § 800.5.

123. *Id.* § 800.6.

124. *Id.* § 800.6(b)(1)(iv).

125. *Id.* § 800.6(b)(1)(v)–(2).

126. *Id.* § 800.7(a).

127. BRANDON J. MURRILL, CONG. RESEARCH SERV., R44432, PIPELINE TRANSPORTATION OF NATURAL GAS AND CRUDE OIL: FEDERAL AND STATE REGULATORY AUTHORITY 18 (2016) (citing 54 U.S.C. §302303).

128. 36 C.F.R. § 800.2(c)(1) (2019).

129. *Id.* § 800.3(c), (f).

130. 54 U.S.C. § 302304(a) (2018).

government-to-government consultation pursuant to both agency and ACHP guidance. The agency must also make reasonable and good faith efforts to identify tribes with an interest in a particular property and engage them early in the process.¹³¹ These tribes must then be provided a reasonable opportunity to identify additional properties and mitigate impacts, either through an elected Tribal Historic Preservation Officer (THPO) or a designated representative.¹³² If tribal properties are affected, regardless of location on or off reservation, the affected tribe must be given a reasonable opportunity to present its concerns and advise on identification.¹³³ The agency must conduct this process in a manner that is respectful of tribal sovereignty and that affirms the government-to-government relationship.¹³⁴

However, section 106 only requires good-faith consultation and does not prescribe specific accommodations. As stated in the *Standing Rock Sioux* case, once consultation is completed, section 106 is satisfied because “the provision does not mandate that the permitting agency take any particular preservation measures to protect these resources.”¹³⁵ Moreover, the NHPA does not create a cause of action, and all judicial review is conducted under the Administrative Procedures Act, subject to the arbitrary and capricious standard.¹³⁶ Under this standard, if there is evidence that the process was followed and comments were “considered” (even if not accommodated), then the process will satisfy judicial review.¹³⁷ If there was a breach of the NHPA, the Court may

131. 36 C.F.R. § 800.2(c)(2)(ii)(A) (2019).

132. *Id.* § 800.2(c)(1)(ii), (c)(2)(i)(A)–(B), (c)(2)(ii)(A).

133. *Id.* § 800.2(c)(2)(ii)(A), (c)(2)(ii)(D).

134. *Id.* § 800.2(c)(2)(ii)(B)–(C).

135. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 8 (D.D.C. 2016); *see* *CTIA–Wireless Ass'n v. FCC*, 466 F.3d 105, 106–07 (D.C. Cir. 2006) (noting that the NHPA does “not require [a federal agency] to engage in any particular preservation activities; rather, Section 106 only requires that the [agency] consult the [State Historic Preservation Officer] and the [Advisory Council on Historic Preservation] and consider the impacts of its undertaking.” (citing *Davis v. Latschar*, 202 F.3d 359, 370 (D.C. Cir. 2000))).

136. *Carson v. Alvord*, 487 F. Supp. 1049, 1052–53 (N.D. Ga. 1980).

137. *See id.* at 1053–54.

remand for additional consultation.¹³⁸ Because the focus is on procedure, rather than substance, section 106 is generally a weak means of protecting cultural resources off-reservation.

One theme emerging from the case law under the NHPA is that the court will respect the findings of an agency if the agency followed procedure.¹³⁹

3. *Treaty Rights.* Violation of treaty rights are another avenue for litigation under Federal Indian Law. Treaty rights are defined in treaties, and they generally include rights to hunt, fish, gather, trap, as well as access to water. Treaty interpretation is governed by specific canons of interpretation that have been developed based on the unique relationship of the United States and Indian tribes, as well as the trust doctrine.¹⁴⁰ The full treaty regime governing the interpretation and enforcement of treaty rights is beyond the scope of this paper, but infrastructure development may impact these rights (and sacred sites). Treaty rights are an imperfect legal tool to protect off-reservation sacred sites and practices. Generally, treaty rights describe activities and takings, like the right to fish, not a sacred cultural interest in a lake.¹⁴¹ That said, treaty rights are generally broadly interpreted to include activities essential to exercise the right; a

138. See *Pit River Tribe v. U.S. Forest Services*, 615 F.3d 1069, 1074, 1084–85 (9th Cir. 2010) (discussing the procedural history of the dispute, and how the district court entered summary judgment in favor of the tribe in *Pit River I* and then remanded the issue back to the relevant agencies for further proceedings, in which the Pit River tribe may participate); see also Eitner, *supra* note 103, at 894 (“the most common remedy to inadequate consultation is for a court to grant a preliminary injunction and remand the issue back to the agency”).

139. *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1436–1438 (C.D. Cal. 1985) (finding that the tribe was not adequately consulted because consultation was done on the basis of unofficial regulations); *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104, 1119–20 (S.D. Cal. 2010) (finding a likely NHPA violation where the Bureau of Land Management failed to satisfy the statutory requirements). But see *Te–Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, F.3d 592, 610 (9th Cir. 2010) (declining to find an NHPA violation where the record disclosed ongoing consultation over the course of many years, and the tribe failed to show that earlier consultation would have led to different results).

140. See, e.g., *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

141. For a discussion of treaty rights, see COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 52, § 18.04.

right to fish may include measures to protect the fish.

One avenue for enforcing treaty rights, however, is environmental law. For example, environmental assessments under the National Environmental Policy Act must consider impacts to treaty rights, and NEPA provides for government-to-government consultation when treaty rights are impacted.¹⁴² However, NEPA does not give rise to an independent cause of action, and agency determinations about the impact of an undertaking on a treaty right under NEPA are reviewed under the standards set in the administrative procedures act, pursuant to which treaty rights may be impaired so long as the decision maker adequately considered the impact on the treaty right and engaged in sufficient government-to-government consultation, and such consideration is adequate if the decision is not arbitrary or capricious.¹⁴³ Moreover, the legal remedies for inadequacy of the consultation procedure are distinct from the legal remedies for violation of a treaty right. The remedy for an inadequate consideration of a treaty right in a NEPA assessment is additional consideration and consultation. By contrast, the remedies for violation of a treaty right are more substantial, and can include substantive measures and accommodation.¹⁴⁴

The conclusion that follows is that Federal Indian Law is an imperfect avenue for litigating impacts to tribal rights and interests, particularly off-reservation. This conclusion is supported by the Dakota Access and the Keystone XL Pipeline examples, explored below. In both cases, tribes used environmental law to collaterally protect their rights and sacred properties when lawsuits based on consultation and Federal Indian Law failed.

142. Fredericks & Heibel, *supra* note 44, at 527.

143. 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”). For a discussion on the impact of this deference to the decision maker over treaty rights, see Fredericks & Heibel, *supra* note 44, at 527–32.

144. *United States v. Washington*, 853 F.3d 946, 970–71, 977 (9th Cir. 2017), *aff’d* 138 S. Ct. 1832 (2018).

III. SITING INTER-STATE OIL PIPELINE IN THE UNITED STATES

Both the Dakota Access Pipeline and the Keystone XL pipelines are interstate crude oil pipelines that affect Indigenous cultural resources located off-reservation. Government-to-government consultation obligations in both of these cases interact with the regulatory regime governing pipeline approval. Part III introduces how federal oil pipelines are routed and sited. The permitting process illustrates how tribes protect important Indigenous properties, interests, and rights that are located or exercised off-reservation.

A. Routing on Federal and State Lands

Pipeline routes are set by a complex combination of state and federal regulation, which can be administered by different agencies depending on the type of pipeline. Moreover, the interaction of federal permitting requirements, state permitting requirements, and potential tribal interests makes laying oil pipelines more challenging than natural gas pipelines.¹⁴⁵

The executive branch has authority over international pipeline crossings, such as the Keystone XL. Once the executive branch determines that an international pipeline is in the national interest, the President issues a permit authorizing the crossing.¹⁴⁶ Since 1968, the power to determine whether a pipeline is in the national interest has been delegated to the Secretary of State,¹⁴⁷ although the President retains final authority.¹⁴⁸ The

145. See Colin P. O'Rourke, *Oil Pipeline Regulation: The Current Patchwork Model and an Improved National Solution*, LSU J. ENERGY L. & RESOURCES (Feb. 2, 2016), <https://jclr.law.lsu.edu/2016/02/02/oil-pipeline-regulation-the-current-patchwork-model-and-an-improved-national-solution/> (advocating for the oil pipeline industry to be regulated in a similar way as the natural gas pipeline industry as the natural gas pipeline industry has much more straightforward regulations); MURRILL, *supra* note 127, at 7–9 (noting the lack of a unitary federal approval process for oil pipelines and discussing the various federal, state, and local requirements that work together to govern the siting, construction, and operation of oil pipelines within the U.S.).

146. Exec. Order 11,423 of August 16, 1968, 33 Fed. Reg. 11741 (Aug. 20, 1968).

147. *Id.*

148. Exec. Order 13,337 of April 30, 2004, 69 Fed. Reg. 25299, 25300 (May 5, 2004); see *Sisseton–Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1081–82 (D.S.D.

Secretary of State has delegated this authority to the Secretary of State for Economic, Energy, and Agricultural Affairs.¹⁴⁹ Under the regulations, the Department of State has broad authority to determine the national interest, but it must consult with various departments and provide a Record of Decision.¹⁵⁰ Additionally, some courts have found that a presidential permit is a federal action that can trigger an environmental assessment under NEPA, depending on the level of discretion the President retains over the permitting process.¹⁵¹

The Federal Energy Regulatory Commission (FERC) has jurisdiction over both interstate natural gas and oil pipelines (only oil pipelines are discussed herein). The Interstate Commerce Act of 1887 (ICA) regulates FERC's jurisdiction over oil pipelines.¹⁵² Unlike the NGA, the ICA does not operate through the issuance of a CPCN finding. The ICA restricts FERC's jurisdiction to tariffs and terms of service, and construction and operation of oil pipelines continue to be governed by state law.¹⁵³ Because there is no CPCN or analogous permit that governs the entire pipeline, federal environmental laws are applicable only to the extent a segment of the pipeline triggers

2009) (providing that actions under an Executive Order are not subject to the Administrative Procedures Act because the President is the final actor in determining whether a permit should be issued).

149. U.S. DEP'T OF STATE, DEPARTMENT OF STATE RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION: TRANSCANADA KEYSTONE PIPELINE, LP APPLICATION FOR PRESIDENTIAL PERMIT 2 (2007), <https://puc.sd.gov/commission/dockets/hydrocarbonpipeline/2007/hp07-001/111908/signed.pdf>.

150. See Exec. Order 13,337 of April 30, 2004, 69 Fed. Reg. 25299, 25300 (May 5, 2004); U.S. DEP'T OF STATE, *supra* note 149.

151. *Indigenous Envtl. Network v. U.S. Dep't of State*, No. CV-17-29-GF-BMM, 2017 U.S. Dist. LEXIS 193546, at *11, *15 (D. Mont. Nov. 22, 2017).

152. Edwin I. Malet, *Outer Continental Shelf Oil Pipelines Under the Interstate Commerce Act*, 43 LA. L. REV. 1143, 1161, 1144 (1983). National oil pipeline regulation has its origins with the Hepburn Act of 1906, which brought the regulation of oil pipelines under the Interstate Commerce Act (ICA) of 1887, an act that formerly applied only to railroads. *Id.* at 1161.

153. Kirk Morgan & George Fatula, *Crude Oil and NGL Regulatory Primer Related to Commercial Issues*, BRACEWELL (2017), <https://www.bracewell.com/sites/default/files/knowledge-center/7-13-2017%20Crude%20Oil%20and%20NGL%20Regulatory%20Commercial%20Issues%20KMORGAN%20FATULA.pdf>.

them. For example, crude oil pipelines that cross federal lands require federal easements, and an easement can trigger an environmental assessment. The United States Army Corps of Engineers (COE) grants easements over COE-managed federal lands granted pursuant to section 185 of the Mineral and Leasing Act.¹⁵⁴ These permits also require notification to House and Senate Committees.¹⁵⁵

States play a crucial role in permitting the construction and operation of crude oil pipelines. As discussed above, because FERC does not have jurisdiction to permit crude oil pipelines, eminent domain is governed by state rather than federal law. Each state public utility commission or similar agency must issue a permit for the in-state portion of the route before the applicant can start construction.¹⁵⁶ The permit grants easements over state lands, allows the permit-holder to exercise eminent domain against recalcitrant landowners, and governs the operation of the pipeline.

State laws vary greatly. For example, some states offer a condemnation process to exercise eminent domain, and others do not.¹⁵⁷ Others grant certificates to public utilities but not to common carriers.¹⁵⁸

States also play a role in environmental permitting. State agencies administer much federal environmental law. For example, the states can assume responsibility for administering

154. Nicole T. Carter, *Army Corps Easement Process and Dakota Access Pipeline Easement Status*, CRS INSIGHT (Feb. 14, 2017), <https://fas.org/sgp/crs/misc/IN10644.pdf>.

155. *Id.*

156. MURRILL, *supra* note 127, at 7–9; Christopher J. Barr, *Growing Pains: FERC's Responses to Challenges to the Development of Oil Pipeline Infrastructure*, 28 ENERGY L. J. 43, 49–50 (2007).

157. See Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 IOWA L. REV. 947, 1027–1053 (2015) (listing eminent domain authorities and siting procedures for oil transmission pipelines in all 50 states).

158. See Barr, *supra* note 156, at 50. For example, in Montana a pipeline company must demonstrate to the Montana Public Service Commission that the pipeline satisfies the definition of a common carrier. MONT. CODE ANN. §§ 69-13-101, 69-13-104 (2013). Once satisfied, the commission grants a permit that allows the proponent to exercise eminent domain. *Id.* § 69-13-104 (2013).

portions of the Clean Water Act.¹⁵⁹ Second to administering federal environmental law, many states have their own environmental assessment processes analogous to NEPA.¹⁶⁰

The decentralized permitting, preemption, and condemnation processes render local opposition to crude oil pipelines particularly effective, not only because there are more junctures at which to protest a pipeline, but also because there is no specific procedure to judicially review state or federal actions or omissions that would prevent construction of an interstate crude oil pipeline.¹⁶¹

B. Permits to Cross Water Bodies under the CWA

Impacts to water caused by pipeline projects are particularly important because treaties often reserved water rights to tribes, and certain waterways have important cultural and spiritual significance to Indian tribes. Lake Oahe, for example, is at the heart of Standing Rock Sioux traditional territory, albeit located off-reservation.¹⁶²

First, pipelines that cross federally-regulated water bodies may require permits under the Clean Water Act (CWA) and the

159. 33 U.S.C. § 1251(b), (e) (2019).

160. Patrick Marchman, "Little NEPAs": State Equivalents to the National Environmental Policy in Indiana, Minnesota, and Wisconsin 3 (September 2012) (unpublished capstone paper submitted in partial fulfillment of the requirements for the Certificate in NEPA Duke Environmental Leadership Program, Duke University).

161. Before constructing or operating a pipeline, a project proponent must obtain a right-of-way from the Secretary of the Interior. 30 U.S.C. § 185(a) (2018); see *Hammond v. Norton*, 370 F.Supp.2d 226, 233 (D.D.C. 2005). These easements may be granted in accordance with 30 U.S.C. §185(a)-(y). The Mineral Leasing Act prohibits granting an easement through federal lands for a pipeline until, among other things, "a notice of intention to grant the right-of-way" along with "detailed findings as to the terms and conditions [the Secretary or agency] proposes to impose, has been submitted" to the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate. 30 U.S.C. § 185(w)(2).

162. See *Lake Oahe*, U.S. ARMY CORPS OF ENGINEERS, <https://corpslakes.erdc.dren.mil/visitors/projects.cfm?ID=G612960> (last visited June 16, 2020) ("Oahe Dam, SD takes its name from the Oahe Indian Mission established among the Lakota Sioux Indians in 1874").

Rivers and Harbors Act (RHA).¹⁶³ Unlike most environmental permits, which are administered by the Environmental Protection Agency or a state agency pursuant to delegated authority, projects that affect navigable waters are under the jurisdiction of the United States Department of Army, specifically the COE.¹⁶⁴

Three permits are relevant to the Dakota Access Pipeline. Section 404 permits, issued pursuant to the CWA, authorize the discharge of dredge or fill material into a navigable water of the United States.¹⁶⁵ Section 408 permits, issued under section 10 of the RHA, authorize impairment or alteration of a civil works project and are necessary when a proposed construction project will obstruct or impact interstate water bodies, or if dredging or digging activities will modify water flow.¹⁶⁶ Permits under section 14 of the HRA allow for temporary occupation of a civil work.¹⁶⁷ Nationwide Permit #12 is an expedited permitting process for section 404 and 408 permits, and is available for activities the COE has previously determined have only minimal individual and cumulative impacts on the aquatic environment.¹⁶⁸ These permits are all reviewable under administrative law.¹⁶⁹

C. Evaluating Environmental Impacts under NEPA

A federal act, such as granting a water crossing permit for an interstate crude or natural gas pipeline, can qualify as a major

163. See 33 U.S.C. §§ 408, 1341(a)(1) (2019); see Stern, *supra* note 107, at 1A-6.

164. *Obtain a Permit*, U.S. ARMY CORPS OF ENGINEERS, <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Obtain-a-Permit/> (last visited Oct. 14, 2019).

165. *Overview of Clean Water Act Section 404*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/cwa-404/overview-clean-water-act-section-404> (last visited Oct. 14, 2019).

166. 33 U.S.C. § 408 (2019).

167. 33 U.S.C. § 408a(a) (2018).

168. See *Nationwide Permit (12) Utility Line Activities*, U.S. ARMY CORPS OF ENGINEERS (Mar. 19, 2017), https://www.nao.usace.army.mil/Portals/31/docs/regulatory/NationwidePermits/Nationwide_Permit_12.pdf.

169. See *Regulatory Appeals*, U.S. ARMY CORPS OF ENGINEERS, <https://www.nwd.usace.army.mil/Missions/Civil-Works/Regulatory-Program/Appeals/> (last visited June 16, 2020).

federal act thereby triggering an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA).¹⁷⁰ For example, FERC's issuance of a certificate of public convenience and necessity is a federal action, and therefore FERC must follow NEPA.¹⁷¹

NEPA environmental processes are administered by the "lead agency."¹⁷² "Lead agencies" are designated for major federal projects that require permits from more than one federal agency, and other agencies are "cooperating agencies."¹⁷³ In the case of a natural gas pipeline, FERC is the lead agency and coordinates the preparation of an EIS under NEPA and other permits in cooperation with other agencies.¹⁷⁴ Tribes may be involved in a NEPA review through the general public participation process or, more formally, as a cooperating agency. For the Dakota Access Pipeline, for example, the NEPA process was administered by the COE.¹⁷⁵

NEPA evaluations ensure that environmental impacts are minimized and weighed against potential alternatives, and provide an important forum from other relevant federal, state, and local agencies.¹⁷⁶ For actions that do not clearly have significant impacts, the agency conducts an "environmental assessment" to determine the need for an EIS.¹⁷⁷ If the agency concludes in the environmental assessment that there will be no significant impacts or that impacts can be mitigated, it will issue a statement of Finding of No Significant Environmental Impact

170. 42 U.S.C. § 4332(2)(C) (2018).

171. 40 C.F.R. § 1508.18(a), (b)(4) (2019); see MURRILL, *supra* note 127, at 3–4.

172. *What is the National Environmental Policy Act?*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/nepa/what-national-environmental-policy-act> (last visited Oct. 14, 2019).

173. Exec. Order 13,807 of August 15, 2017, 82 Fed. Reg. 40,463, 40,464 (Aug. 24, 2017); *What is the National Environmental Policy Project?*, *supra* note 172.

174. MURRILL, *supra* note 127, at 5, 10.

175. Caitlin McCoy & Robin Just, *Dakota Access Pipeline*, HARVARD L. SCH. ENVTL. & ENERGY L. PROGRAM (October 24, 2017), <https://eelp.law.harvard.edu/2017/10/dakota-access-pipeline/>.

176. 42 U.S.C. § 4332 (2018).

177. See 40 C.F.R. § 1508.9 (2019).

(FONSI).¹⁷⁸ If the agency concludes there will be impacts, it will conduct an EIS, which includes an evaluation of impacts based on an assessment of alternatives, social, environmental and cultural impacts, as well as cumulative impacts of the project.¹⁷⁹ There are opportunities for community members to participate through reviewing draft assessments and statements.¹⁸⁰ As part of the NEPA analysis, the agency also considers effects under other environmental laws, such as the Endangered Species Act, as well as impacts to cultural resources.¹⁸¹

A proper NEPA analysis considers effects on cultural properties, although as discussed above, the NHPA is the primary statute governing cultural preservation and consultation.

Part IV demonstrates how government-to-government consultation interacts with the interstate oil pipeline permitting process, and illustrates how legal challenges to the pipeline permitting process based on Federal Indian Law have been largely unsuccessful, whereas lawsuits based on environmental law have enjoyed more success.

IV. GOVERNMENT-TO-GOVERNMENT CONSULTATION AND FEDERAL INDIAN LAW APPLIED INTERSTATE PIPELINES

A. *Dakota Access Pipeline*

The Dakota Access Pipeline (DAPL) is a \$3 billion, 30-inch diameter crude oil pipeline that stretches 1,172 miles from North Dakota to Illinois.¹⁸² DAPL is owned and operated by Energy

178. *Id.* § 1501.4(e); see *National Environmental Policy Act Review Process*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process#ea> (last updated Jan. 24, 2017).

179. 40 C.F.R. § 1501.4(c) (2019); *National Environmental Policy Act Review Process*, *supra* note 178.

180. *National Environmental Policy Act Review Process*, *supra* note 178.

181. See 40 C.F.R. § 1502.25 (2019).

182. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 7 (D.D.C. 2016); Sam Levin, *Dakota Access Pipeline: The Who, What and Why of the Standing Rock Protests*, GUARDIAN (Nov. 3, 2016, 12:00 PM). The DAPL route runs through North Dakota, South Dakota, Iowa and Illinois. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 7. DAPL consequently needed permits and easements from each relevant state, as well as the COE for federal land crossings. Crossing reservation lands would

Transfer Partners (ETP).¹⁸³

ETP intentionally routed DAPL across private lands and on existing easements and utility corridors to avoid tribal lands, resources, and all previously-identified historical and cultural sites.¹⁸⁴ However, DAPL crosses 200 federal waterways as well as Lake Oahe, an important cultural and spiritual site for the Standing Rock Sioux Tribe (SRST).¹⁸⁵ Lake Oahe is the fourth-largest reservoir in the United States by volume, created by damming the Missouri River and flooding traditional Tribal Lands reserved to the SRST by the Treaty of Fort Laramie.¹⁸⁶ The SRST rely on Lake Oahe for drinking water and for the exercise of hunting and fishing rights, and were concerned that an oil spill would contaminate potable water and sacred sites, and that construction activities would impact burial grounds.¹⁸⁷ The DAPL Lake Oahe crossing lies approximately half a mile north of the Standing Rock Reservation and 73 miles north of the Cheyenne

require additional permits. Stern, *supra* note 107, at 1A-5.

183. Olivia Pulsinelli, *Enbridge Energy Partners, Marathon Petroleum to Buy \$2B Stake in Pipeline System*, HOUS. BUS. J. (Aug. 3, 2016), <https://www.bizjournals.com/houston/news/2016/08/03/enbridge-energy-partners-marathon-petroleum-to-buy.html>; Alleen Brown, *Five Spills, Six Months in Operation: Dakota Access Track Record Highlights Unavoidable Reality—Pipelines Leak*, INTERCEPT (Jan. 9, 2018, 2:38 PM), <https://theintercept.com/2018/01/09/dakota-access-pipeline-leak-energy-transfer-partners/>.

184. See *The Facts*, DAKOTA ACCESS PIPELINE, <https://daplpipelinefacts.com/The-Facts.html> (last visited June 16, 2020).

185. *Dakota Access Pipeline FAQ's*, U.S. ARMY CORPS OF ENGINEERS, <https://www.usace.army.mil/Dakota-Access-Pipeline/FAQs/> (last visited June 16, 2020) (“The USACE approved approximately 200 jurisdictional water crossings that required permission under the Clean Water Act and the Rivers and Harbors Act, gave permission for the pipeline to cross seven USACE projects and managed federal lands under 33 U.S.C. 408. USACE has not granted the easement for the pipeline to cross Lake Oahe.”).

186. Troy A. Eid, *Beyond Dakota Access Pipeline: Energy Development and the Imperative for Meaningful Tribal Consultation*, 95 DENV. L. REV. 593, 596 (2018). The Standing Rock Sioux successfully petitioned to block eminent domain the lands six decades ago, only to have Congress take it via congressional action. *Id.* Compensation for the taking is still pending. *Id.*

187. STANDING ROCK SIOUX TRIBE, IMPACTS FROM AN OIL SPILL FROM THE DAKOTA ACCESS PIPELINE ON THE STANDING ROCK SIOUX TRIBE 1, 74, app. C, at 11–12 (2018), https://www.standingrock.org/sites/default/files/uploads/srst_impacts_of_an_oil_spill_2.2.1.2018.pdf.

River Reservation.¹⁸⁸ Both of these tribes articulated concerns throughout the consultation process, but in many cases their concerns were not accommodated. Despite fierce opposition and numerous legal challenges from the Cheyenne River Tribe and the SRST, DAPL is now operational.¹⁸⁹

The COE granted ETP a section 408 permit to tunnel under Lake Oahe, which constituted a major federal action requiring an environmental assessment (EA) under NEPA and triggered government-to-government consultation.¹⁹⁰ While the COE engaged in such consultation, the SRST and Cheyenne River Sioux took issue with both the limited scope of matters in which they were consulted, as well as the process of government-to-government consultation.

First, both tribes were concerned about the scope of the EA. Both tribes were concerned about on-reservation impacts of off-reservation activities.¹⁹¹ However, the COE only consulted tribes about on-reservation impacts of construction activities. The COE determined that the limited scope of consultation was appropriate because only 3% of the project came under federal authority.¹⁹² For example, the SRST argued that the EA needed to consider on-reservation impacts arising from off-reservation activities because of the proximity of the pipeline to tribal land.¹⁹³ An oil spill off-reservation would impact on-reservation.

The COE declined to extend the scope of the EA because DAPL did not cross any SRST reservation lands,¹⁹⁴ and Lake

188. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 114 (2017).

189. Brown, *supra* note 183.

190. DAKOTA ACCESS & U.S. ARMY CORPS OF ENG'RS, ENVIRONMENTAL ASSESSMENT: DAKOTA ACCESS PIPELINE PROJECT CROSSINGS OF FLOWAGE EASEMENTS AND FEDERAL LANDS 1 (2016) [hereinafter DAPL EA], <https://usace.contentdm.oclc.org/digital/collection/p16021coll7/id/2801>.

191. *Standing Rock Sioux Tribe v. U.S. Army Corp. of Eng'r's*, 205 F. Supp. 3d 4, 13 (D.D.C. 2016).

192. *Id.*

193. Taylor N. Johnson, *The Dakota Access Pipeline and the Breakdown of Participatory Processes in Environmental Decision-Making*, 13 ENVTL. COMM. 340, 341–42 (2019).

194. See DAPL EA, *supra* note 190, at 1, 3.

Oahe is located off-reservation. The COE also determined that the “[e]ffects from a potential release are speculative and beyond the scope of this EA for a private funded and operated project with nominal federal interests.”¹⁹⁵ Based on this assessment, the COE concluded that it had consulted in good faith, impacts were appropriately mitigated, and additional concerns were beyond the scope of the EA.¹⁹⁶ In summary, the COE considered that the harm from an oil spill is too remote and speculative, and no cultural properties would be meaningfully impacted.¹⁹⁷ The juxtaposition of COE and the SRST comments demonstrates a disconnect between what the tribes perceive as important and how the COE accounted for those interests. The EA was unconcerned with the possible extent of this impairment of rights based on proximity.

The SRST were also concerned about the process of government-to-government consultation. In their comments to the EA, the SRST were frustrated that they were consulted in the same manner as other stakeholders, which was improper because the SRST are sovereign.¹⁹⁸ As such, they alleged DAPL consultations failed to satisfy section 106 of the NHPA as well as sections of NEPA regarding historic properties.¹⁹⁹ The SRST were also frustrated that ETP and DAPL carried out many elements of consultation, rather than the COE,²⁰⁰ and as a consequence refused to participate in many meetings.²⁰¹ The COE replied to the SRST that government-to-government consultation satisfied the legal requirements, and if the SRST wanted more

195. *Id.* app. J, Draft EA Public Notice of Summary Comments Received, at 14.

196. *See id.* app. J, Draft EA Public Notice of Summary Comments Received, at 14; JOHN W. HENDERSON, MITIGATED FINDING OF NO SIGNIFICANT IMPACT: ENVIRONMENTAL ASSESSMENT DAKOTA ACCESS PIPELINE PROJECT 2-3 (2016), <https://usace.contentdm.oclc.org/digital/collection/p16021coll7/id/2801>.

197. HENDERSON, *supra* note 196, at 2-3.

198. DAPL EA, *supra* note 190, app. J, Draft EA Public Notice of Summary Comments Received, at 16.

199. *Id.* app. J, Draft EA Public Notice of Summary Comments Received, at 18.

200. *Id.*

201. *See* Standing Rock Sioux Tribe v. U.S. Army Corp. of Eng’rs, 205 F. Supp. 3d 4, 32 (D.C.C. 2016); DAPL EA, *supra* note 190, app. J, Draft EA Public Notice of Summary Comments Received, at 18.

consultation, the onus was on them to participate in the process in a more meaningful manner.²⁰²

In July 2016, the SRST filed lawsuits against the COE, alleging (1) that the COE did not ensure that the Nationwide #12 permit (which authorized DAPL to cross 200 federal waterways) complied with the NHPA; and (2) that the CWA/RHA permits did not comply with the NEPA, the CWA, and the NHPA.²⁰³ In August 2016, the SRST also sought a preliminary injunction and requested an expedited hearing, alleging inadequate consultation under the NHPA.²⁰⁴

On September 4, 2016, while the original complaint was pending, the SRST filed for an emergency temporary restraining order to prevent additional construction on the pipeline for 20 miles on either side of Lake Oahe until the Court ruled on the motion for a preliminary injunction.²⁰⁵ The impetus for the motion was the bulldozing of a culturally significant grave site recently uncovered by the SRST's cultural expert. The motion for an emergency temporary restraining order was granted on

202. DAPL EA, *supra* note 190, app. J, Draft EA Public Notice of Summary Comments Received, at 18 ("The Corps has demonstrated its willingness to meet and discuss all cultural, sacred and ceremonial sites to ensure they are identified and taken into consideration in the final effects determination, the NEPA process and its decision. The applicant avoided tribal trust lands in project design and has addressed concerns identified by the tribes in project implementation planning. There are many ways to conduct tribal consultation. It was most effective when interested tribes chose to participate in a meaningful way with the action agency in the governmental process and with the applicant and exchange information in a timely manner. Multiple opportunities were provided to tribes and the public for input during the project development process. All requests for surveys in action areas were accommodated and requests for information received in a timely manner were addressed").

203. Complaint for Declaratory Judgment & Injunctive Relief at 2, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4 (D.D.C. 2016) (No. 1:16-cv-01534).

204. Motion for Preliminary Injunction and Request for Expedited Hearing at 1, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4 (D.D.C. 2016) (No. 1:16-cv-01534); Memorandum in Support of Motion for Preliminary Injunction at 20–21, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4 (D.D.C. 2016) (No. 1:16-cv-01534).

205. *The Standing Rock Sioux Tribe's Litigation on the Dakota Access Pipeline*, *supra* note 105.

September 6, 2016.²⁰⁶

On September 9, 2016, Judge Boasberg declined to issue an injunction to prevent further violations of the NHPA.²⁰⁷ As an initial matter, Judge Boasberg expressed extraordinary sympathy for the SRST stating, “[t]he tragic history of the Great Sioux Nation’s repeated dispossessions at the hands of a hungry and expanding early America is well known. The threat that new injury will compound old necessarily compels great caution and respect from this Court in considering the Tribe’s plea for intervention.”²⁰⁸ Nonetheless the SRST had not demonstrated that an injunction would prevent the destruction of historic properties nor that consultation had been inadequate.

First, most of the pipeline had already been built, and the injunction would affect only federal permits.²⁰⁹ The NHPA process had not identified new historic sites near Lake Oahe, and the SRST failed to identify which specific sites would be harmed absent an injunction.²¹⁰ Finally, the overlap between ancestral lands and the DAPL route was ill-defined in the pleadings, so no harm could be extrapolated.²¹¹ Judge Boasberg also found that government-to-government consultation had been adequate,²¹² in part because the SRST did not reciprocate the myriad efforts of DAPL and the COE to consult.²¹³ He focused his analysis on the good-faith efforts and substance of consultation, rather than on the procedure itself.²¹⁴ He emphasized that ETP carried out appropriate cultural surveys, rerouted 140 times in North Dakota to avoid cultural resources, and established mitigation plans with

206. *Id.*

207. *Standing Rock Sioux Tribe v. U.S. Army Corp. of Eng’rs*, 205 F. Supp. 3d 4, 36–37 (D.D.C. 2016).

208. *Id.* at 33 (citations omitted).

209. *Id.* at 34.

210. *Id.* at 32, 34–36.

211. *Id.* at 35–36.

212. *Id.* at 28.

213. The SRST unsuccessfully argued that they did not participate because government-to-government consultation had not occurred; they wanted meetings with high-level government officials. *Id.* at 20, 28, 32. The SRST were also frustrated because the COE did not respond to their concerns about the scope of the EA. *Id.* at 22.

214. *See id.* at 28–29, 33.

the North Dakota SHPO where rerouting was not possible.²¹⁵ ETP also met with SRST as part of a broader community outreach effort, and met with the SRST HPO.²¹⁶ Moreover, the COE tried to set up meetings with the tribes and their THPO no fewer than five times.²¹⁷ By contrast, Judge Boasberg found that the THPO was slow to respond, if at all, to COE and ETP requests for comment.²¹⁸ He concluded: “Suffice it to say that the tribe largely refused to engage in consultations. It chose instead to hold out for more—namely, the chance to conduct its own cultural surveys over the entire length of the pipeline.”²¹⁹

Based on the foregoing, Judge Boasberg concluded that the COE appropriately tailored the scope consultation to the COE’s limited jurisdiction, and that the COE never unduly delegated the process to DAPL.²²⁰

The SRST also argued that the EA (prepared in 2015 and published in 2016) was deficient under the NEPA because it failed to consider the risks of a spill and the impact of a spill on treaty rights.²²¹ Both parties moved for summary judgment.²²²

In June 2017, just weeks after operations restarted, Judge Boasberg ruled that the COE had failed to comply with NEPA: the final environmental assessment did not adequately consider

215. *Id.* at 13–14.

216. *Id.* at 14.

217. *Id.*

218. *See id.* at 14–15.

219. *Id.* at 32. Stern succinctly summarized Judge Boasberg’s conclusions on the consultation process: “the Corps and Dakota Access addressed and resolved concerns and objections of Standing Rock. Despite the Corps’ repeated and good faith efforts to consult with Standing Rock, however, those efforts were hamstrung due to the Tribe’s actions (or inaction). Yet, when Standing Rock did engage in consultation on a limited basis, some of its concerns were addressed.” Stern, *supra* note 107, at 1A-7 (footnotes omitted). The Yankton and Oglala Sioux also launched legal challenges. *See* Complaint for Declaratory Judgment & Injunctive Relief at 2, *Yankton Sioux Tribe v. U.S. Army Corps of Eng’rs*, No. 16-1796 (D.D.C. Sept. 8, 2016); Complaint for Declaratory Judgment & Injunctive Relief at 1, *Oglala Sioux Tribe v. U.S. Army Corps of Eng’rs*, No. 17-267 (D.D.C. Feb. 11, 2017).

220. *See Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 31–33.

221. Complaint for Declaratory Judgment & Injunctive Relief, *supra* note 203, at 29.

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

the impact of an oil spill on treaty hunting and fishing rights.²²³ To assess the impact on treaty rights, Judge Boasberg focused on the COE's assessment of the risks to the resources necessary to exercise the rights, namely fish and wildlife: "the Corps did not wholly ignore the consequences of a possible oil spill, despite its conclusion that the risk of such an event was low. On the contrary, it adequately discussed the impacts of such 'a low risk/high consequence event,' on water—but not on hunting or aquatic—resources."²²⁴

The EA considered in detail the risks of an oil spill to drinking water, including the effects of Benzene.²²⁵ No similar care was devoted to the impact on fish or game, which are the subject of fishing and hunting rights reserved to the tribe by the treaty of Fort Laramie.²²⁶ The SRST had raised these concerns through multiple comments on the draft environmental assessment.²²⁷ The final EA did not substantially consider any of these effects.²²⁸ The court ordered a new analysis of this critical issue, and ordered a separate briefing to determine whether construction should be placed on hold pending a new environmental review.²²⁹

DAPL became operational on June 1, 2017.²³⁰ Judge Boasberg ruled on October 11, 2017, that ETP did not need to shut down

223. *Id.* at 112.

224. *Id.* at 133 (citation omitted).

225. *Id.*

226. *Id.* at 112, 130, 133.

227. *Id.* at 115, 130.

228. *Id.* at 133–34 (explaining over 199 family fishing permits were issued in 2015, and oil pollution along the shoreline would impact animal health).

229. *Id.* at 112. In the same ruling, Judge Boasberg rejected Cheyenne River's argument that the COE had failed to comply with the consultation obligations required by both NEPA and the Department of Defense. *Id.* at 159. On March 19, 2018, Judge Boasberg rejected additional claims that the Corps violated NEPA by segmenting its review by preparing three environmental assessments and findings of no significant impact. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 301 F. Supp. 3d 50, 73 (D.D.C. 2018).

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

the pipeline pending the COE's review.²³¹ In December 2017, Judge Boasberg ordered the COE and DAPL to work with tribes to complete an oil spill response plan and an audit of DAPL's compliance with permit conditions, and he imposed a requirement on DAPL to report on incidents.²³² On August 31, 2018, the COE affirmed its decision to grant the easement under Lake Oahe.²³³

In summary, procedural rights under the NHPA do not guarantee protection for off-reservation properties even if the undertaking affects reservation properties and treaty rights, and court review of consultation requirements focused on the good faith participation on the part of both parties. The SRST were concerned about impacts of pipeline construction and operation on off-reservation cultural properties, including sacred burial sites, as well as on drinking water, hunting, and fishing — concerns that ultimately materialized. More fundamentally, the tribes wanted consultation processes to respect their sovereign status. Because the efforts to challenge consultation were ineffective, the SRST used environmental law under NEPA to recast accommodation and consideration of Indian rights as environmental issues, and ensure adequate consideration of treaty rights.

B. *Keystone and Keystone XL Pipeline*

These issues recur for the Keystone XL pipeline, which also reflects an alignment of environmental issues, and in particular climate change, and Indigenous interests. Legal challenges to the Keystone pipeline are ongoing — and have been ongoing for over a

231. See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 96, 109 (D.D.C. 2017).

232. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 280 F. Supp. 3d 187, 191–92 (D.D.C. 2017).

233. Status Report Regarding Remand at Ex. 1, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 1:16-cv-01534 (D.D.C. Aug. 31, 2018). Developments in DAPL case are still ongoing. See Vanessa Romo & Soctt Neuman, *Court Halts Dakota Access Pipeline Shutdown as Legal Fight Goes Forward*, NPR (July 15, 2020; 4:10 AM), <https://www.npr.org/2020/07/15/891276857/court-halts-dakota-access-pipeline-shutdown-as-legal-fight-goes-forward>.

decade— but a survey of some of the judicial challenges further illustrate the difficulties of protecting sacred sites.

The Keystone system, comprising the extant Keystone and the proposed Keystone XL pipelines, has faced significant opposition from tribes in the United States, including protests and lawsuits. The Keystone Pipeline is a 2,147 mile pipeline that starts in Hardisty, Alberta and crosses the Canada-U.S. border in the province of Manitoba on its way to Steele City, Nebraska, where it connects with a separate segment of the Keystone pipeline system that runs through Cushing, Oklahoma down to the Texas coast.²³⁴ The Keystone XL pipeline is a 1,179 mile, 36-inch diameter crude oil pipeline that also starts in Hardisty and ends in Steele City, but crosses the border in Saskatchewan.²³⁵ As originally proposed, it would have a total capacity of 1,291,000 barrels per day and an estimated price tag of \$8.9 billion USD.²³⁶ Both are owned by TransCanada, now TC Energy.²³⁷ As cross-border pipelines, both Keystone and Keystone XL required a presidential permit.²³⁸

234. TRANSCANADA CORP., ANNUAL INFORMATION FORM 3 (2010), <https://www.transcanada.com/globalassets/pdfs/investors/reports-and-filings/regulatory-filings/2009/transcanada-2009-annual-information-form.pdf>; *Pipeline Profiles: Keystone Pipeline*, CAN. ENERGY REGULATOR, <https://www.cer-rec.gc.ca/nrg/ntgrtd/pplnprtl/pplnprfls/crdl/kstn-eng.html> (last updated June 2019).

235. See Peter Forrester, Kent Howie, & Alan Ross, *Energy Superpower in Waiting: New Pipeline Development in Canada, Social Licence, and Recent Federal Energy Reforms*, 53 ALTA. L. REV. 419, 424 (2015); *Project Information*, CAN. ENERGY REGULATOR, <https://www.cer-rec.gc.ca/pplctnflng/mjrpp/kstnxl2/prjctnf-eng.html?&wbdisable=true#:~:text=Project%20Information,-TransCanada%20Keystone%20Pipeline&text=The%20Canadian%20portion%20of%20the,US%20border%20at%20Monchy%2C%20Saskatchewan.&text=The%20Keystone%20XL%20Pipeline%20is,%2C%20Alber%20to%20Haskett%2C%20Manitoba> (last updated Dec. 6, 2019).

236. Forrester, Howie, & Ross, *supra* note 235, at 424; Nia Williams, *Pipeline Company TransCanada Changes Name to TC Energy*, REUTERS (May 3, 2019, 7:08 AM), <https://www.reuters.com/article/us-transcanada-results/pipeline-company-transcanada-changes-name-to-tc-energy-idUSKCN1S911H>.

237. Williams, *supra* note 236.

238. See *New Keystone XL Pipeline Application*, U.S. DEPT OF STATE, <https://2012-keystonepipeline-xl.state.gov/index.htm> (last visited June 17, 2020); *A Chronological History of Controversial Keystone XL Pipeline Project*, CBC (Jan. 24, 2017, 3:01 PM), <https://www.cbc.ca/news/politics/keystone-xl-pipeline-timeline-1.3950156> (overviewing the twist and turns of Keystone XL Pipeline's nearly decade's long presidential approval

Multiple legal challenges have ensued over the permitting of the Keystone and Keystone XL Pipelines.²³⁹ These lawsuits focused on the deficiencies in the environmental review process, and although many plaintiffs and intervenors were tribes, the legal strategy did not include alleging deficiencies in consultation. For example, in November 2008, the Sisseton-Wahpeton Oyate, Rosebud Sioux Tribe, Santee Sioux Tribe of Nebraska, and Yankton Sioux Tribe sued the State Department in the U.S. District Court of South Dakota, alleging the State Department's initial approval of Keystone violated NEPA and the NHPA.²⁴⁰ Specifically, they alleged that the government breached a trust duty, failed to engage in good-faith efforts to identify cultural resources, and failed to engage in government-to-government consultations.²⁴¹

The claims arose from dissatisfaction with the EIS prepared by the Department of State. The Department of State solicited comments on the scope of the proposed EIS. The plaintiffs expressed concerns about possible damage to cultural sites and the nature and extent of section 106 consultation under the NHPA.²⁴² After engaging in NHPA consultation, the Department of State concluded there would be minor impact on cultural resources, even though impacts to cultural resources were not fully evaluated at the time the EIS was released.²⁴³

The plaintiffs first established that they have treaty and Aboriginal lands (their ancestral lands) conferred by the Indian

process along with other major events related to the pipeline).

239. See *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1076 (D.S.D. 2009); *Indigenous Envtl. Network v. U.S. Dep't. of State*, No. CV-17-29-GF-BMM, 2017 WL 5632435, at *1–2 (D. Mont. Nov. 22, 2017); *N. Plains Res. Council v. Shannon*, No. CV-17-31-GF-BMM, 2017 WL 5630319, at *1 (D. Mont. Nov. 22, 2017).

240. *Sisseton-Wahpeton Oyate*, 659 F. Supp. 2d at 1076, 1079, 1082–83 (stating that the plaintiffs also sued under the Administrative Procedure Act and that those claims failed).

241. First Amended Complaint for Declaratory and Injunctive Relief at 37–38, *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071 (D.S.D. 2009) (No. 08-3023).

242. *Id.*

243. See *id.*; U.S. DEP'T OF STATE, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEystone OIL PIPELINE PROJECT 33 (2008).

Claims Commission, and that the government owes a perpetual fiduciary duty to protect their sacred and historic sites, including burial grounds.²⁴⁴ An integral part of their treaty rights includes access to cultural objects. They characterized their right to access as an unextinguished usufructuary right, protected under the Fifth Amendment.²⁴⁵

The plaintiffs alleged that the survey of historic objects under the NHPA was completed before they were consulted, and none of their 12 requests raised during consultation were incorporated in the final agreement for the Keystone pipeline.²⁴⁶ The plaintiffs also argued that they were provided with inadequate funds and time to enable effective participation,²⁴⁷ and that consultation was insufficient because the process was incomplete and confusing with respect to the nature and extent of meetings and critical decision points and decision makers.²⁴⁸

Judge Kormann rejected these claims in 2009, finding that presidential permits are immune from judicial review.²⁴⁹ He

244. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 241, at 7–13.

245. *Id.* at 11–12.

246. First Amended Complaint for Declaratory and Injunctive Relief at 30–31, *Sisseton-Whapeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071 (D.S.D. 2009) (No. 08-3023). These requests included, *inter alia*: an integrated cultural resource management plan, a tribal advisory committee, a 100% on-the-ground pedestrian Traditional Cultural Property survey, State Department funding for evaluation, a revised inadvertent discovery plan, NEPA consultation and tribal involvement in with excavations, a tribal liaison, future consultations under section 106, and a meeting with Canadian First Nations (Canada's Indigenous peoples) to learn about their experiences with TransCanada. *Id.*

247. *Id.* at 31. The government offered each of the tribes \$10,000 USD in November 2007 to cover a traditional cultural property survey, to be completed by February 2008. *Id.* Not only was the amount insufficient, but the plaintiffs noted that it was impossible to survey for cultural properties in the winter, when the ground is frozen and covered in snow. *See id.*

248. *Id.* at 32–33, 36. For example, the plaintiffs alleged they were told that they were attending informational meetings, which then were referred to during the meeting as consultation. *Id.* at 32. One meeting was conducted by an employee, rather than a government official. *Id.* at 33. In a latter instance the plaintiffs were provided two weeks advance notice of a meeting in Washington DC, which was insufficient to enable effective participation. *Id.* at 36.

249. *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1081

concluded that the plaintiffs did not have standing because there was no evidence that their injuries would be redressable.²⁵⁰ The President has final decision making authority over presidential permits pursuant by virtue of having constitutional authority over foreign policy.²⁵¹ Consequently, any benefit or alternative outcome would be speculative at best.²⁵² Even if the plaintiffs had standing, the plaintiffs had no independent cause of action under NEPA or the NHPA. The plaintiffs needed to plead a proper cause of action under the Administrative Procedures Act (APA) to enforce either the NEPA or the NHPA.²⁵³ Judge Kormann also concluded that the APA provides no relief because it does not expressly subject the actions of the President to review.²⁵⁴ Moreover, in approving a presidential permit, the President is acting pursuant to constitutional, rather than statutory, authority, further insulating his actions from judicial review.²⁵⁵ In any event, the actions did not violate the APA because they were not arbitrary, capricious, or an abuse of discretion.²⁵⁶ The four meetings held by the Department of State constituted a good faith effort, which was all the statute required.²⁵⁷

With respect to the treaty/trust claim, Judge Kormann also ruled against the plaintiffs because the Keystone Pipeline does not cross any tribal reservations:

The proposed pipeline, although running, in part, through lands previously ceded to the United States will be located exclusively on land that was restored to the public domain. When the Tribe ceded the land in question back to the United States, it “lost the right of absolute use and

(D.S.D 2009).

250. *Id.* at 1078–79.

251. *Id.* at 1081.

252. *Id.* at 1078–79.

253. *Id.* at 1080.

254. *Id.* at 1082.

255. *Id.* at 1081.

256. *Id.* at 1082–83.

257. *Id.*

occupation of lands . . . conveyed, [and therefore,] the Tribe no longer ha[s] the incidental power to regulate the use of the lands by non-Indians.”²⁵⁸

Even if the plaintiffs did have treaty rights in the ceded lands, the plaintiffs failed to establish a trust duty by “identif[y]ing] a substantive source of law that establishes specific fiduciary or other duties, and alleg[ing] that the Government has failed faithfully to perform those duties.”²⁵⁹ In order to do so, the plaintiffs had to identify treaty language imposing on the government “a specific duty regarding preservation of historic resources,” and by failing to do so, the plaintiffs failed to state a claim under Federal Rules of Civil Procedure.²⁶⁰

Environmental organizations and Indigenous groups have filed additional lawsuits since, primarily alleging deficiencies in environmental law.²⁶¹ Most recently, in April 2020, the U.S. District Court in Montana found that the COE “had violated the federal Endangered Species Act in approving a Nationwide permit 12,” pulled the permit, and ruled that Nationwide permit 12 could not be used for future oil and gas developments.²⁶² This ruling was appealed by the Trump administration.²⁶³

258. *Id.* at 1083 (quoting *South Dakota v. Bourland*, 508 U.S. 679, 688 (1993)) (alterations in original) (citations omitted).

259. *Id.* (quoting *U.S. v. Navajo Nation*, 537 U.S. 488, 506 (2003)).

260. *Id.*

261. *Indigenous Envtl. Network v. U.S. Dep’t. of State*, No. CV-17-29-GF-BMM, 2017 WL 5632435, at *1–2 (D. Mont. Nov. 22, 2017) (stating that the plaintiffs sought an injunction on the basis that environmental review was deficient and therefore the Department of State’s approval of the permit violated environmental law, including the NEPA); *Complaint for Declaratory and Injunctive Relief* at 6–7, 26–27, 38, *N. Plains Res. Council v. Shannon*, No. CV-17-31-GF-BMM (D. Mont. May 24, 2017) (alleging that the 2014 environmental impact statement failed to adequately address the impacts of Keystone XL on greenhouse gas emissions and climate change, concerns which were also raised in comments to the draft); *see TransCanada Keystone Pipeline, LP v. Dunavan*, 932 N.W.2d 653, 660–74, 679–80 (2019) (denying an appeal partially based on the claim that the state agency did not properly consider environmental impacts).

262. *Trump Administration Appeals Ruling on Keystone XL Pipeline*, KALLANISH ENERGY (May 15, 2020), <https://www.kallanishenergy.com/2020/05/15/trump-administration-appeals-ruling-on-keystone-xl-pipeline/>.

263. *Id.*

In summary, Federal Indian Law is ill-equipped to protect sacred sites and non-treaty rights located off-reservation. The trust doctrine, although a powerful clarion call, carries little legal import. Claims based on specific treaty rights, or consideration of specific treaty rights, were more effective, and claims based on government-to-government consultation were not effective, because statutes like the NHPA guarantees procedure, not accommodation or a particular outcome. Further, the court only requires a “good faith effort” on the part of the government, and imposes upon the tribe a corresponding obligation to participate in the NHPA process, analogous to a duty to exhaust procedural remedies. The court will only step in when there is an absence of reciprocated government efforts to engage with a willing and engaged tribe.

The flaws in Federal Indian Law reinforce and are reinforced by poor procedural guidelines for government-to-government consultation. Stern notes that officials struggle to identify the content of reasonable, good faith consultation, as well as the time frame over which it must occur.²⁶⁴ Anaya and Tsotsie further note that officials struggle with timing, which tribes to invite, the type of notice effective to provide an opportunity to consult, and the amount of consultation required “for development on lands that are ancestral to tribes but in areas where there are virtually no remaining tribes.”²⁶⁵ Tribal leaders similarly struggle to participate because they are often not apprised until after a federal agency becomes involved, which can occur late in the planning and development process.²⁶⁶ Consequently, consultation may not start early enough, a repeat problem regardless of whether the project is led by a state or federal agency. Tribes also struggle to navigate the policies and procedures unique to each federal agency. These policies are often poorly implemented, and

264. Stern, *supra* note 107, at 1A-21.

265. Anaya & Tsosie, *supra* note 3, at 10-25.

266. U.S. DEPT OF THE INTERIOR ET AL., IMPROVING TRIBAL CONSULTATION AND TRIBAL INVOLVEMENT IN FEDERAL INFRASTRUCTURE DECISIONS 19 (2017) [hereinafter IMPROVING TRIBAL CONSULTATION], <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc2-060030.pdf>.

staff poorly trained.²⁶⁷ Finally, the process has been described “as inadequate and inefficient.”²⁶⁸ These flaws underscore the importance of an effective legal process that supports consultation and determines whether and how to address tribal concerns as a project proceeds.²⁶⁹

The weak legal regime enforcing and guaranteeing tribal rights on treaty lands off-reservation and the protection of cultural and sacred properties explains ardent political participation and lobbying for government action. Indeed, after DAPL, the Department of the Interior, Department of Justice, and the Department of the Army recognized these inherent problems and consulted with 59 tribes to identify areas of improvement in current government-to-government policy.²⁷⁰ These reforms will hopefully empower tribes with a legal right to safeguard and manage cultural resources located off-reservation.²⁷¹ Improving judicial review based on the principles of the trust doctrine and government-to-government consultation would provide a way of contesting procedural and substantive deficiencies, absent which “there is no guarantee that agencies will engage in meaningful consultation by honestly considering

267. See ADVISORY COUNCIL ON HISTORIC PRESERVATION, IMPROVING TRIBAL CONSULTATION IN INFRASTRUCTURE PROJECTS 5–6, 8, 12 (2017) [hereinafter ACHP], https://www.achp.gov/sites/default/files/reports/2018-11/ImprovingTribalConsultationinInfrastructureProjectsFinalApril272017_0.pdf.

268. See, e.g., Eitner, *supra* note 103, at 886.

269. Stern, *supra* note 107, at 1A-27; see Nadia B. Ahmad, *Trust or Bust: Complications with Tribal Trust Obligations and Environmental Sovereignty*, 41 VT. L. REV. 799, 829–831 (2017). Ray-Hodge and Stevenson come to a similar conclusion: “Government-to-government consultation requires more than simply informing tribes of a potential undertaking that may affect a historic property of religious and cultural significance to a tribe. It requires actually engaging with, listening to the concerns of the consulting parties, and changing or rejecting the undertaking where the concerns of the consulting parties cannot be resolved.” Ray-Hodge & Stevenson, *supra* note 11, at 11–15.

270. IMPROVING TRIBAL CONSULTATION, *supra* note 266, at 2. See generally ACHP, *supra* note 267, at 1.

271. Of the three challenges that the Standing Rock Sioux and Cheyenne River Sioux litigated (consultation under the NHPA, a violation of religious freedom, and a legally deficient environmental assessment) only one succeeded: the environmental law claim. See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 111–12 (D.D.C. 2017).

tribal concerns.”²⁷²

However, and as the Canadian examples below will demonstrate, stronger legal requirements and increased consultation efforts are not a guarantee of project success. Unlike in the United States, however, the Canadian legal regime empowers First Nations to effectively protect their Indigenous rights and demand recognition and accommodation of the same. The legal position of First Nations has led proponents to engage in prolific and detailed efforts to engage early and to meaningfully accommodate interests, in order to avoid challenges to government-to-government consultation efforts which may be found lacking. Nonetheless, more consultation has not led to more pipelines. As made explicit by Anaya, “[o]n the other hand, there are certainly cases in which resource extraction is simply incompatible with [I]ndigenous peoples’ own aspirations and priorities for development, or may impede their access to lands and natural resources critical to their physical well-being and the integrity of their cultures and livelihoods.”²⁷³ The comparison is relevant because many of the interests voiced by Canadian First Nations echo interests voiced by the SRST and Rosebud Sioux. Canadian Aboriginal groups similarly want to protect sacred lands and waters, as well as preserve their cultural way of life for future generations. This vision of the future includes an ability to practice cultural rituals that rely on a connection to the land, which is threatened by anthropogenic climate change.

V. GOVERNMENT-TO-GOVERNMENT AND INDUSTRY INDIGENOUS CONSULTATION IN CANADA

Canadian Aboriginal Law is as complex as American Federal Indian Law. Before discussing relevant doctrine in depth, some basic political concepts clarify the legal landscape. The Canadian constitution splits power between the federal government and the provinces.²⁷⁴ Like the United States, the Canadian government

272. Eitner, *supra* note 103, at 872–73.

273. Anaya, *supra* note 17, at 3.

274. *The Canadian Constitution*, GOV’T OF CANADA, <https://www.justice.gc.ca/eng/csj-sjc/just/05.html> (Oct. 16, 2017).

at both the federal and provincial levels is a government of limited powers, with executive and legislative authority further split between the Prime Minister and the Cabinet (or privy council) on the one hand, and the legislative assembly, called the House of Commons, on the other.²⁷⁵ However, unlike the United States, the executive sits in the legislative assembly, giving the executive an extraordinary amount of domestic power because a majority government can both create and execute laws.²⁷⁶

The relationship between the government and Aboriginal Peoples in Canada is strained by history and colonial policies that stripped First Nations of their land, culture, and identity. As settlers moved east to west across what is now Canada, the federal government signed treaties with First Nations. Each of the treaties, whether historic or modern, is different. The first treaties, signed in eastern Canada, were generally peace and friendship treaties.²⁷⁷ Many of the first treaties did not involve land concessions. The numbered treaties were signed throughout the prairies, northern Ontario, and the northern territories, and did involve land concessions.²⁷⁸ In British Columbia many First Nations have never signed treaties. Canada has now entered a period of modern treaty making. Land concession treaties and most modern treaties involve surrendering Aboriginal rights and title to Aboriginal lands in exchange for defined rights and protections in the treaty document.²⁷⁹ Rights guaranteed by treaties are referred to as “treaty rights,” which include procedural rights as well as substantive rights to, for example, hunt, fish, and trap.²⁸⁰ However, for First Nations without land-concession treaties, Aboriginal rights antecedent to the creation

275. *Id.*

276. *The Prime Minister of Canada*, CAN. GUIDE, <https://thecanadaguide.com/government/the-prime-minister/> (last visited June 18, 2020).

277. See David V. Wright, *Federal Linear Energy Infrastructure Projects and the Rights of Indigenous Peoples: Current Legal Landscape and Emerging Developments*, 23 REV. CONS. STUDIES. 175, 181 (2018).

278. See *id.* at 183–85 (stating that certain “historic treaties” did not include land cession provisions, while others, such as Treaty 3 and Treaty 8, did).

279. *Id.* at 187.

280. *Id.* at 182.

of Canada are extant unless extinguished.²⁸¹ These rights may include Aboriginal title to land.²⁸² As provided in *R. v. Van Der Peet*:

the doctrine of Aboriginal rights exists . . . because of one simple fact: when Europeans arrived in North America, [A]boriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates [A]boriginal peoples from all other minority groups in Canadian society and which mandates their special legal . . . status.²⁸³

When Canada amended its constitution in 1982, it recognized and affirmed Aboriginal rights and treaty rights in section 35, which provides in relevant part:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, ‘aboriginal peoples of Canada’ includes the Indian, Inuit and M. . . tis peoples of Canada.

(3) For greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired.²⁸⁴

281. *See id.* at 185–86.

282. *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44 at paras. 10–18, [2014] 2 S.C.R. 257 (Can.).

283. *R v. Van der Peet*, [1996] 2 S.C.R. 507, 538–39 (Can.). For an overview of recent developments in Canadian duty-to-consult law, see Maureen Killoran, Dan Kolenick & Thomas Gelbman, *Navigating Murky Waters: Emerging Trends in Aboriginal Consultation and Project Approval*, 52 *ALTA. L. REV.* 207 (2014).

284. Rights of the Aboriginal Peoples of Canada, s 35, Part II of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

Section 35 gives constitutional protection to treaty rights and Aboriginal rights. Although unassuming on its face, judicial interpretation has positioned Section 35 as the most important vehicle through which First Nations seek to vindicate their rights, and has helped give judicial force to a now foundational doctrine called the “honor of the Crown”, a core principle that cannot be extinguished. (“The Crown” refers to the government, either federal or provincial.) The Crown must “exercise its powers in conformity with the honour of the Crown and is subject to fiduciary duties that lie on the Crown in dealing with Aboriginal interests.”²⁸⁵ The relationship between treaties and the honour of the Crown is summarized by Wright: “[t]he honour of the Crown and the duty to consult exist independently of contract or treaty, and the duty is a continuing one in service of the broader objective of reconciliation”²⁸⁶ between First Nations and the Crown.

The nature of the relationship was explained by the Supreme Court of Canada in the landmark decision *R. v. Sparrow*, a key case interpreting Section 35 Aboriginal rights: “the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.”²⁸⁷ Unlike the Trust Doctrine in American Federal Indian Law, the Canadian courts have given substantive depth to the Crown’s fiduciary duty, creating a meaningful and rich doctrine that protects and empowers First Nations.

A. Government-to-Government Consultation

As part of the fiduciary duty, the government must consult with First Nations when their rights may be affected by a government action. This duty is called the duty to consult.²⁸⁸ The

285. *Grassy Narrows First Nation v. Ontario (Nat. Res.)*, 2014 SCC 48 at para. 50, [2014] S.C.R. 447 (Can).

286. Wright, *supra* note 277, at 188–89.

287. *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1108 (Can.).

288. Nigel Bankes, *Clarifying the Parameters of the Crown’s Duty to Consult and*

duty is triggered “when the Crown has knowledge, real or constructive,” that its action may adversely impact a potential or existing Aboriginal right or title.²⁸⁹ The content of the duty varies case by case, proportionate to the severity of the impact and the strength of the impacted right.²⁹⁰ The amount of consultation therefore lies on a spectrum. In cases where claim to title is weak, the right limited, or the infringement minor, the Crown may only have to provide notice.²⁹¹ If the right is strong or the infringement significant, “deep consultation” is required, and the government must go further and accommodate the Aboriginal interest in order to minimize impairment.²⁹² The duty to accommodate includes “taking steps to avoid irreparable harm or to minimize the effects of the infringement.”²⁹³ However, the Supreme Court of Canada has reiterated that under the duty to consult and accommodate, First Nations do not have a veto right over government action,²⁹⁴ and there is no duty to agree.²⁹⁵ Rather, the goal of the process is to balance interests and further reconciliation. Aboriginal rights are not absolute, and may be infringed based on a justification test.²⁹⁶

Accommodate in the Context of Decision-making by Energy Tribunals, 36 J. ENERGY & NAT. RES. L. 163, 163–65, 165 n.13 (2018).

289. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 35, [2004] 3 S.C.R. 511 (Can.); Bankes, *supra* note 288, at 165–66.

290. *Haida Nation*, 2004 SCC at para. 39.

291. *Id.* para. 43.

292. *Id.* para. 44.

293. *Id.* para. 47.

294. *Id.* para. 47–48.

295. *Id.* para. 49.

296. In Canada, treaty rights are guaranteed, but Aboriginal rights may have to be proven to exist in court before any suit for infringement of such interest can be made out. *See Haida Nation*, 2004 SCC at para. 35–37. Whether the right is proven or unproven can affect the amount of consultation and accommodation the government actor must undertake. *See id.* para. 37, 39. Nigel Bankes summarizes the case law as follows: “In cases dealing with treaties and modern land claim agreements rather than an asserted aboriginal title or rights claim, the Crown must recognise that it is dealing with *established* rights, although the scope and content of the duty may be affected by the specificity of the promise.” Bankes, *supra* note 288, at 167. *But see Wright*, *supra* note 277, at 188–89 (stating that in both cases the government may have to consult because “[t]he honour of the Crown and the duty to consult exist independently of contract or treaty, and the duty is a continuing one in service of the broader objective of reconciliation”).

While the duty to consult and accommodate is a fact-based inquiry, the Supreme Court of Canada has enunciated several guiding principles. The duty to consult is triggered once the Crown has real or constructive knowledge that a government action may adversely affect a potential Aboriginal right (or Aboriginal title, which is a bundle of Aboriginal rights that grant use and jurisdiction over ancestral lands).²⁹⁷ The Crown must discharge the duty to consult before it undertakes any action adverse to the Aboriginal interest.²⁹⁸ The Crown is only required to consult with respect to the particular interest, and the duty does not include consultation on broader interests or historical wrongs.²⁹⁹ The fiduciary duty also implicates a standard of conduct, which requires the Crown to act in good faith.³⁰⁰ However, both First Nations and the Crown must participate in the consultation process and work towards a mutual agreement; the First Nation must work to make its concerns known and respond to government requests and proposals, and the Crown must listen, provide culturally appropriate and digestible information, and work to address concerns raised.³⁰¹

Although the duty is ultimately the Crown's, the Crown may delegate its duty to third parties such as infrastructure project proponents,³⁰² albeit third parties do not owe any such duties.³⁰³

297. *Haida Nation*, 2004 SCC at para. 35; see *Bankes*, *supra* note 10, at 191–92.

298. *Tsilhqot'in Nation v. British Columbia*, 214 SCC 44 at para. 78, [2014] 2 S.C.R. 257 (Can.).

299. See *Haida Nation*, 2004 SCC at para. 18.

300. See *id.* para. 49.

301. See *Mikisew Cree First Nation v. Canada (Minister of Can. Heritage)*, 2005 SCC 69 at paras. 64–65, [2005] 3 S.C.R. 388 (Can.); see also *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 at para. 51–52, [2017] 1 S.C.R. 1099 (Can.); *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at paras. 47–49, [2017] 1 S.C.R. 1069 (Can.).

302. *Haida Nation*, 2004 SCC at para. 53; see *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 56, [2010] 2 S.C.R. 650 (Can.).

303. *Haida Nation*, 2004 SCC at para. 53; *Bankes*, *supra* note 288, at 168 (“Another issue concerns the role of the *proponent* in the discharge of the duty to consult and accommodate. The case law has consistently confirmed that it is the Crown and not the proponent that has the duty to consult and accommodate. At the same time, the case law also confirms that ‘(t)he Crown may delegate procedural aspects of consultation to industry proponents’”) (quoting *Haida Nation*, 2004 SCC at para. 53) (alteration in

Additionally, the Crown can rely on an administrative agency, such as the former National Energy Board (NEB), to carry out the duty to consult through its existing regulatory process so long as the agency has sufficient statutory authority.³⁰⁴ However, the Crown must inform First Nations if it intends to rely on such a process to discharge the duty.³⁰⁵ The Crown is entitled to rely on the NEB process to both fulfill the duty to consult and assess whether the duty has been met, subject to judicial review.³⁰⁶ If the duty to consult is not fully discharged by the administrative agency, the Crown is required to undertake additional consultation.³⁰⁷ Finally, where the agency only has authority to recommend a decision to a final decision maker, the Crown must consult with First Nations in the time between such recommendation and the final decision.³⁰⁸ Indeed, this last principle was key to overturning permit certificates issued to the Northern Gateway and Trans Mountain Expansion pipelines described below. In both cases, the NEB recommended that the Governor-in-Council approve the pipelines, but the Crown failed to sufficiently consult directly with First Nations about the recommendation report before the Governor-in-Council made a final decision.³⁰⁹

Finally, if a First Nation feels that government consultation is inadequate, it can challenge the government through judicial review, arguing insufficient consultation and accommodation.³¹⁰

If the First Nation argues that the Crown failed to obtain consent in an Aboriginal title claim or conduct deep consultation in a significant intrusion claim, the Crown must prove that its actions were nonetheless justified under a multi-step public

original).

304. Wright, *supra* note 277, at 198.

305. *Id.*

306. *See id.* at 198, 222.

307. *Id.* at 199.

308. *Gixtaala Nation v. Canada*, 2016 FCA 187 at paras. 213, 215–16, 237 (Can.).

309. *Id.* paras. 237, 325–32; *Tsleil-Waututh Nation v. Canada* (Att’y Gen.), 2018 FCA 153 at paras. 753–72 (Can.).

310. Killoran, Kolenick & Gelbman, *supra* note 283, at 209.

interest test.³¹¹

*B. Canadian and American Government-to-Government
Consultation Compared*

Several salient comparisons between the Canadian and American legal regimes are worth exploring before discussing industry-Indigenous consultation requirements in Canadian linear infrastructure projects. First, while the Canadian regime does not require consent, the Canadian duty to consult and accommodate clearly has more meaningful substance and stronger enforcement provisions than the Trust Doctrine in the United States. First Nations can seek judicial review of government actions that infringe an Aboriginal right absent adequate consultation. There is no analog under American laws. For example, in the DAPL litigation, the court found that the COE was reasonable in its decision not to consider the impact of pipeline construction and observation because it occurred off the reservation—the close proximity was irrelevant. A similar analysis under Canadian law would undoubtedly consider the proximity of development in assessing any potential impacts to and infringement of an Aboriginal right.

There is a general consensus in both Canada and the United States that neither government nor industry is doing enough. Laurin and Jamieson argue that the legal framework does “not readily align with the aspirations and expectations of the impacted Aboriginal communities, particularly in the context of international human rights as they are commonly understood by those communities,”³¹² which results in a gap in understanding that leads to litigation. The Canadian government, led by Prime Minister Justin Trudeau, is committed to renewing the “nation-to-nation” relationship and fully implementing UNDRIP by reviewing and modernizing resource development legislation.³¹³

In summary, Canada’s consultation regime closely codifies

311. Bankes, *supra* note 10, at 201–02; see *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 24, [2004] 3 S.C.R. 511 (Can.).

312. Laurin & Jamieson, *supra* note 20, at 459–60.

313. Wright, *supra* note 277, at 177–78.

the same government-to-government consultation principles that experts have promoted for the United States. One of the reasons Canada's Aboriginal law is more elegant and cogent than American Federal Indian Law is that it is newer; most of the doctrine has only been developed in the last 40 years, rather than over the last 200.³¹⁴ Although not a consent-based regime, the Canadian government must, as a constitutional matter, consult and, in some cases, accommodate First Nations interests even off-reservation, and First Nations can challenge a failure to do so in court. The Canadian judiciary has developed a robust body of common law guiding government-to-government consultation, striving through legal doctrine to achieve reconciliation between First Nations and the rest of Canada. Industry is often responsible for carrying out many of these obligations. This doctrine also informs legislation. Consequently, First Nations have a constitutionally-backed power to negotiate for better terms with industry and government, and to ensure that their voices are heard and interests accounted for in the development process.

C. Industry-Indigenous Consultation in Canada and Inter-Provincial Oil Pipeline Approvals

In Canada, industry is also required to consult with First Nations under certain statutes in order to obtain a permit for development. Two statutes formed the regulatory backbone of federal pipeline approvals when the three pipelines described below sought approval: the National Energy Board Act and the Canadian Environmental Assessment Act 2012 (CEAA). The National Energy Board (NEB), Canada's national regulator, was tasked with administering the regime.³¹⁵

However, Canada has recently passed the Canadian Energy Regulator Act, which replaces the NEB with the Canadian Energy Regulator (CER) and introduces an Impact Assessment

314. Rights of the Aboriginal Peoples of Canada, s 35, Part II of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

315. *Filing Manual*, CAN. ENERGY REGULATOR § 1.2, https://www.cer-rec.gc.ca/bts/ctr/gnnb/flngmnl/fmch1-eng.html#s1_1 (last updated Feb. 2020).

Agency.³¹⁶ All complete applications filed before August 27, 2019, continue under the NEB Act.³¹⁷ All incomplete applications or applications submitted after August 27, 2019, will proceed under the new CER Act.³¹⁸ The details of the new application process are forthcoming. This paper will not review the new regulatory regime, and will instead explain the NEB approval process as it applied between 2012 and 2019. However, one of the objectives of the new regulatory regime is to strengthen Indigenous participation and further respect the Government of Canada's commitment to protecting Indigenous rights, and, consequently, observers can expect that the Indigenous consultation process described below will remain important.

The NEB was created in 1959.³¹⁹ In addition to interprovincial pipelines, it also approved international pipelines and powerlines, exports, including exports of energy, and offshore development.³²⁰ The NEB was the final decisionmaker for pipelines shorter than 40km in length and for some modifications.³²¹ However, for major projects, the NEB merely recommended a course of action to the Governor-in-Council (the Governor-in-Council is the executive branch of government, and is ordinarily represented by a Minister, the cabinet, or the Prime Minister of Canada) who has final approval authority.³²² (Prior to 2012, the NEB was able to make a final decision not to approve a

316. *The New Canada Energy Regulator*, CAN. ENERGY REGULATOR, <https://www.cer-rec.gc.ca/bts/bllc69/index-eng.html> (last modified Nov. 13, 2019).

317. *Update on Coming into Force of the Canadian Energy Regulator Act*, CAN. ENERGY REGULATOR (Aug. 14, 2019), <https://www.cer-rec.gc.ca/bts/bllc69/2019-08-14nbltr-eng.pdf>.

318. *Id.*

319. *Our History*, CAN. ENERGY REGULATOR, <https://www.cer-rec.gc.ca/bts/whwr/nbfctsh-eng.html?&wbdisable=true> (last modified Sept. 30, 2019).

320. Brooke Neal, *The Economy, Environment, and Politics in the Canadian Pipeline Regulatory Process*, 22 LAW & BUS. REV. AM. 425, 426–27 (2016).

321. National Energy Board Act, R.S.C. 1985, c N-7, s 58(1)(a) (Can.).

322. *National Energy Board Hearing Process Handbook*, CAN. ENERGY REGULATOR, <https://www.cer-rec.gc.ca/prtcptn/hrng/hndbk/index-eng.html> (last modified June 11, 2020); *Compendium of Procedure—Parliamentary Framework*, PARLIAMENT CAN., https://www.ourcommons.ca/About/Compendium/ParliamentaryFramework/c_g_parliamentaryframework-e.htm (last visited Oct. 10, 2019).

major project; after 2012 that decision rested with the Governor-in-Council.)³²³ The CEAA process resulted in a recommendation report, not a certificate. The recommendation report enabled the NEB to determine whether to issue a certificate of public convenience and necessity.³²⁴ Once a certificate was issued, either by the NEB or the Governor-in-Council, the NEB conducted a further review process, that included routing and land acquisition, and facilitated other federal and provincial permits.³²⁵ For clarity, the rest of this paper is only concerned with major projects.

First Nations consultation is an integral part of the pipeline application process. Under the NEB process, the federal government delegated its duty to consult to the NEB, and in turn, the NEB imposed strict consultation requirements on proponents. The applicant was required to identify and consult with all potentially affected First Nations, and consultation had to be in good faith. All this information was submitted to the NEB in a project application.³²⁶

The NEB filing manual specifies the information a proponent must include in an application under the NEB Act.³²⁷ A project application must contain detailed information about the consultation process, including “the corporate policy or vision with respect to consultation; the principles and goals established for the applicant’s Consultation Program; and a copy of the Aboriginal consultation policy, if established, along with any documented policies and principles for collecting traditional knowledge or traditional use information, if applicable.”³²⁸ For all public consultation, including with First Nations, companies

323. *FAQs—2012 Changes to the National Energy Board Act*, GOV’T CAN. (2012), https://www.neb-modernization.ca/system/documents/attachments/a3c9ab47316f506352d3ed2a3dd09f5b4f7490cc/000/005/419/original/FAQ-2012_Changes_to_the_NEB_Act_v3_EN.pdf?1485811391.

324. Wright, *supra* note 277, at 194.

325. *Id.*

326. NAT’L ENERGY BD., FILING MANUAL §1.1–1.2 (2017), <https://www.cer-rec.gc.ca/bts/ctr/gnnb/flngmnl/nsrt/2017-01nsrt-eng.pdf>.

327. *Id.* § 3.4.

328. *Id.* § 3.4.1.

ordinarily hold open houses, send information packets, and post information online. They also engage in community discussions and one-on-one conversations. The applicant must include descriptions and outcomes of all consultation and a summary of all public comments.³²⁹ Specific to Aboriginal consultation, the applicant must also identify all groups contacted, how they were identified, when and how they were contacted, who was consulted, concerns raised and how they were addressed, any non-confidential information, and any government consultation activities.³³⁰ They must also explain any consultation they chose not to undertake and why.³³¹

The application must also assess how the project would impact current land uses and the traditional Aboriginal land uses. Environmental effects include effects on Aboriginal health and socio-economic well-being, physical and cultural heritage, and historical and sacred sites. Traditional and community knowledge is important to identifying impacts.³³²

Once an application was submitted, the NEB conducted a review, which could include public hearings and commentary from stakeholders who felt that their interests had not been adequately addressed.³³³ The NEB also worked closely with the Canadian Environmental Assessment Agency to perform an environmental impact assessment under CEAA, and in some cases convened a joint panel.³³⁴ The hearing stage was—and is—crucial to ensuring that Aboriginal interests are respected and accommodated; the NEB is empowered to make changes to the routing and can attach additional conditions to an application, including ongoing consultation and reporting requirements.³³⁵ These conditions are legally enforceable throughout the life of the

329. *Id.* § 3.4.2–3.4.3.

330. *Id.* § 3.4.3.

331. *Id.* § 3.4.4.

332. *Id.* § 3.4.2.

333. *National Energy Board Hearing Process Handbook*, *supra* note 322.

334. See *Basics of Environmental Assessment*, GOV'T CAN., <https://www.canada.ca/en/impact-assessment-agency/services/environmental-assessments/basics-environmental-assessment.html#panel02> (last updated Nov. 18, 2019).

335. Wright, *supra* note 277, at 206.

project.³³⁶

Once the NEB finished its review, it prepared a final report and made a recommendation to the Governor-in-Council as to whether the project was in the public interest, including any conditions.³³⁷ The NEB weighed whether a project is inclusive of all Canadians and balanced economic, environmental, and social interests. The NEB then prepared its recommendation based on all relevant factors that appeared directly related to the pipeline, including the state of oil and gas markets, “the economic feasibility of the pipeline,” the financial health of the applicant, the methods of financing, and “any public interest that in the Board’s opinion may be affected by the issuance of the certificate or the dismissal of the application.”³³⁸ The Governor-in-Council makes the ultimate decision on whether a pipeline is in the national interest, and therefore, whether a project will receive a Canadian certificate of public convenience and necessity.³³⁹

1. *Canadian and American Industry-Indigenous Consultation Compared.* Unlike the United States, Canada mandates extensive industry consultation with First Nations. Industry, as a practical and legal matter, consults extensively and creatively with all First Nations on a pipeline corridor. Nonetheless, many recent linear infrastructure projects in Canada have failed. Although some of these projects have failed for political and economic reasons, First Nations opposition despite extensive consultation and accommodation rendered projects uneconomic and politically unpalatable. The overriding conclusion of the Canadian experience is that Indigenous

336. See *id.* at 207.

337. National Energy Board Act, R.S.C. 1985, c N-7, s 58(1) (Can.).

338. National Energy Board Act, s 52(2). Although the government is replacing Canada’s the NEB with a new regulatory regime, constitutionally mandated Aboriginal consultation is separate from but closely intertwined with project approvals, and developments in consultation doctrine will continue to be case-law driven. See Wright, *supra* note 277, at 178, 218; Nigel Bankes, *Some Things Have Changed but Much Remains the Same: The New Canadian Energy Regulator*, UNIV. OF CALGARY FACULTY LAW BLOG 1 (Feb. 15, 2018), <https://ablawg.ca/2018/02/15/some-things-have-changed-but-much-remains-the-same-the-new-canadian-energy-regulator/>.

339. National Energy Board Act, s 54(1) (Can.).

interests must be compatible with linear infrastructure development. In order to minimize above-ground risk, Laurin and Jamieson suggest,

proponents must first create a willingness on the part of affected Aboriginal communities to constructively engage with industry.... by aligning the interests of affected Aboriginal communities with those of the developer through the creation of thoughtful and innovative commercial relationships that benefit both the energy developer and the affected Aboriginal community.³⁴⁰

The differences between the legal regimes affect the bargaining power and judicial protection of Indigenous rights. The heightened legal position of First Nations in Canada compared with the United States also informs the more robust consultation undertaken by industry. If the Canadian government fails to sufficiently consult and accommodate First Nations interests, no amount of industry consultation can move a project forward. The only exception is if industry obtains First Nations consent to the project, in which case the Aboriginal Group has no interest in filing a lawsuit to challenge the government's action or lack thereof. Moreover, clear access to the Canadian courts informs the offer and drives improvements in the process; lawsuits are almost an inevitable response to mediocre consultation.

The comparison is also poignant for social and political reasons. Many Canadian First Nations, such as the Sioux, share history with tribes south of the border. Although each tribe is unique, many share similar interests and concerns with respect to cultural longevity, destruction of sacred sites, and opportunities for meaningful economic development that supports their communal understanding of self-development.³⁴¹

340. Laurin & Jamieson, *supra* note 20, at 455–56.

341. See KEN COATES, FIRST NATIONS, INFRASTRUCTURE AND INDIGENOUS

Additionally, many of the interests voiced by Canadian First Nations echo interests voiced by the SRST and Rosebud Sioux. Canadian Aboriginal groups similarly want to protect sacred lands and waters, as well as preserve their cultural way of life for future generations. This vision of the future includes an ability to practice cultural rituals that rely on a connection to the land, which is threatened by anthropogenic climate change. Unlike in the United States, however, the Canadian legal regime empowers First Nations to effectively protect their Indigenous rights and demand recognition and accommodation of the same. The legal position of First Nations has led proponents to engage in prolific and detailed efforts to engage early and to meaningfully accommodate interests, in order to avoid challenges to government-to-government consultation efforts which may be found lacking.

2. *Summary of Canadian Inter-Provincial Pipeline Approvals and Industry-Indigenous Consultation.* The Canadian government has a duty to consult and accommodate, and many of these responsibilities have been delegated to linear infrastructure proponents through the NEB approval process. Compared with the U.S. industry-Indigenous consultation regime, these requirements are detailed, substantive, ongoing, and preconditional to any project approvals. As a result, proponents engage in a variety of the best practices articulated by American legal scholars, as described above, and as required by the regulatory process.

Nonetheless, because the duty to consult is fact-based, dissatisfied First Nations have an incentive to file for judicial review to delay and prolong approval processes. Therefore, although consent is not a legal requirement (in most cases), First Nations may nonetheless exercise a tremendous amount of power over the project as a practical matter. This reality is acute in light

PARTICIPATION WITH MAJOR RESOURCE PROJECTS 15–17 (2015), <https://apps.neb-one.gc.ca/REGDOCS/File/Download/2836793> (reporting to the Assembly of Manitoba Chiefs, situating current First Nations opposition to government action in its historical context, describing First Nations expertise, and detailing best practices and approaches to drafting impact benefit agreements).

of the length of most major pipelines, which can affect hundreds of First Nations. As a result, the likelihood of a proponent securing consent from and adequately consulting with each and every First Nation is low. Despite extensive consultation with industry, a First Nation may file for judicial review against the Crown, who bears the ultimate burden to discharge the duty to consult.

At this point, the proponent takes a step back and observes whether the government successfully discharged its consultation obligations despite having carried out most of the activities on behalf of the Crown. Therein lies the benefit of obtaining elusive consent—if the proponent obtains consent, then the Crown never has to defend its actions. Proponents in linear infrastructure approvals are thus forward looking, striving for consent to mitigate commercial risk. Proponents concurrently examine the process in hindsight to anticipate and mitigate legal challenges to Crown consultation.

Part of First Nation success in Canada flows from legal and judicial uncertainty about the contours of the duty to consult. Dwight Newman, an expert in Canadian constitutional and Aboriginal law, sees legal ambiguities as a flashpoint.³⁴² Aboriginal communities can use flashpoints to negotiate for better economic opportunities. Newman suggests that Aboriginal communities should leverage flashpoints to secure better benefits instead of litigating flashpoints to produce legal certainty; there is no guarantee that a judicial decision on an aspect of Aboriginal law will benefit First Nations.³⁴³ However, Newman also expresses concern about the unintended consequences flowing from ambiguous judicial pronouncements on the duty to consult and increased litigiousness of some Aboriginal communities: “some Aboriginal communities are pursuing litigation that is not strategic and that harms the long-term position of those and other

342. DWIGHT NEWMAN, *IS THE SKY THE LIMIT? FOLLOWING THE TRAJECTORY OF ABORIGINAL LEGAL RIGHTS IN RESOURCE DEVELOPMENT* 10 (2015), <https://www.macdonaldlaurier.ca/files/pdf/MLIAboriginalResourcesNo7-06-15-WebReady-V3.pdf>.

343. *Id.* at 26–27.

communities.”³⁴⁴ Rash lawsuits reduce commercial certainty for proponents. Bernard J. Roth argues that Canada will continue to see the same level of adversarial engagement until benefit agreements receive the same level of constitutional protection, which will incentivize industry to better negotiate.³⁴⁵

The next section explains how First Nations concerned with protection of legal rights and sacred places interacted with the legal system to delay, and in some cases halt, pipeline projects, which demonstrates that extensive consultation and accommodation by proponents cannot guarantee project success, particularly where multiple First Nations are affected.

D. Trans Mountain Expansion Project

The Trans Mountain pipeline is a pipeline built in the 1950s that runs from Edmonton, Alberta to tide water in Burnaby, British Columbia.³⁴⁶ Kinder Morgan, via its subsidiary Trans Mountain Pipeline, applied to the NEB for a certificate of public convenience and necessity to twin the existing pipeline in 2013 and increase capacity from 300,000 barrels per day to 890,000 barrels per day, at an estimated cost of \$6.8 billion USD.³⁴⁷ The expansion includes new pump stations, expanded dock facilities, new pipelines, and an increase in tanker traffic (from five tankers per month to 34).³⁴⁸

Starting in 2012, Trans Mountain worked closely with First Nations communities to accommodate their requests and concerns and sign benefit agreements. Trans Mountain consulted with all First Nations in the project corridor, those outside the corridor who requested consultation, and additional coastal

344. *Id.* at 10.

345. See Bernard J. Roth, *Reconciling the Irreconcilable: Major Project Development in an Era of Evolving Section 35 Jurisprudence*, 83 SUP. CT. L. REV. 169, 185–86 (2018).

346. NAT'L ENERGY BD., TRANS MOUNTAIN EXPANSION PROJECT 104 (2016), <https://www.ceaa-acee.gc.ca/050/documents/p80061/114562E.pdf>.

347. *Id.* at 1–2; Gordon Hoekstra, *First Nations in B.C. Contemplating Financing, Equity Model for Stake in Trans Mountain Oil Pipeline*, VANCOUVER SUN (July 17, 2018), <https://vancouversun.com/business/local-business/if-first-nations-want-to-buy-a-stake-in-trans-mountain-what-would-it-take>.

348. NAT'L ENERGY BD., *supra* note 346, at 53–54, 82, 298, 327.

communities.³⁴⁹ Their “final list included 120 Aboriginal groups, two non-land based B.C. Métis groups, and 11 Aboriginal associations, councils and tribes.”³⁵⁰

Trans Mountain reported that it engaged in more than 24,000 consultation activities, including eliciting feedback and hosting open houses.³⁵¹ “Trans Mountain said it executed 94 agreements, including letters of understanding (which included components for [traditional ecological knowledge, traditional land use, and traditional marine resource use] studies), capacity funding, and integrated cultural assessments.”³⁵² These agreements were worth an aggregate value of \$36 million CAD.³⁵³

Trans Mountain also signed mutual benefits agreements with 33 different First Nations affected by the pipeline, worth over \$300 million CAD.³⁵⁴ The agreements provided for economic benefits and capacity building opportunities throughout the life cycle of the project, including:

- “Lump sum cash, up-front costs, training funds . . . ;
- Lump sums following in-service;
- Annual payments over 20 years after [the certificate of public convenience and necessity], some indexed to inflation;
- Renegotiation after 20 years . . . ;

349. *Id.* at 32.

350. *Id.*

351. *A Safer, Stronger Project—Consultation Counts*, TRANSMOUNTAIN (Sep. 3, 2015), <https://www.transmountain.com/news/2015/a-safer-stronger-project-consultation-counts>; see also NAT'L ENERGY BD., RECONSIDERATION OF ASPECTS OF ITS OH-001-2014 REPORT AS DIRECTED BY ORDER IN COUNCIL P.C. 2018-1177 47 (2019), <https://www.ceaa-acee.gc.ca/050/documents/p80061/126868E.pdf> (stating Trans Mountain designed its engagement activities to reflect the diverse and varied interests of the communities and provide various engagement opportunities).

352. NAT'L ENERGY BD., *supra* note 346, at 34.

353. *Id.*

354. *Trans Mountain Expansion Project*, LIBERAL, <https://mcbibeau.liberal.ca/en/page/trans-mountain-expansion-project/> (last visited June 19, 2020); JOINT FEDERAL/PROVINCIAL CONSULTATION AND ACCOMMODATION REPORT FOR THE TRANS MOUNTAIN EXPANSION PROJECT 34 (2016) [hereinafter CONSULTATION AND ACCOMMODATION REPORT], http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/pdf/TMX_Final_report_en.pdf.

- Fees or taxes levied in exchange for land use where reserves are crossed by [pipeline];
- Funding for community improvement projects;
- Economic development contributions;
- Funding of committee work;
- Scholarships;
- Funding identified for environmental enhancement; and
- Funding identified for emergency response centers (buildings, equipment).³⁵⁵

Nonetheless, First Nations expressed broad concerns about employment, cumulative development impacts, cultural practices, sacred sites, and traditional land and marine resources, and not all felt that Trans Mountain had adequately consulted with them.³⁵⁶ The NEB was made aware that many First Nations had concerns about Trans Mountain's consultation activities. Some of the concerns were very specific, and failure to individually consider specific requests became an issue on judicial review, discussed below.

Trans Mountain submitted all of its consultation and accommodation efforts to the NEB for consideration during the approval process.³⁵⁷ First Nations aired their frustration with Trans Mountain's consultation activities through the NEB approval process. As discussed above, the NEB was required to submit a report on the merits and conditions of the pipeline along with the environmental impact assessment to the Minister of Natural Resources, who transmits it to the Governor-in-Council, the final decision making authority. To carry out this process, the NEB first wrote to identified Indigenous groups to advise of them of the application.³⁵⁸ Concerned parties were directed to participate in NEB hearings, and the NEB consulted with

355. CONSULTATION AND ACCOMMODATION REPORT, *supra* note 354, at 60.

356. NAT'L ENERGY BD., *supra* note 346, at 40; *see* Tsleil-Waututh Nation v. Canada (Att'y Gen.), 2018 FCA 153 at paras. 4, 72–80 (Can.).

357. NAT'L ENERGY BD., *supra* note 346, at 31–40.

358. Tsleil-Waututh Nation, 2018 FCA at para. 73.

Indigenous groups through a four-phase consultation process.³⁵⁹ Phase I started in 2013 and included initial correspondence with 131 First Nations up until the start of the NEB hearing process.³⁶⁰ Phase II lasted almost two years and included primarily informational meetings and NEB hearings.³⁶¹ Phase III of consultation started once the NEB issued its report, and ended with the final decision by the Governor-in-Council, which included consultation on unaddressed issues and incremental accommodations.³⁶² After Phase III consultations, the Crown assessed the adequacy of consultation.³⁶³ Phase IV involved regulatory permitting.³⁶⁴ The NEB provided funding to First Nations for various cultural and environmental reports, as well as travel to attend NEB hearings.³⁶⁵ The Governor-in-Council approved the expansion in 2016 subject to 157 conditions.³⁶⁶

Political opposition to the approval of the pipeline was fierce, and divided primarily along First Nations, municipal, and provincial lines. The First Nations involved all expressed frustration with Trans Mountain's consultation and the NEB's regulatory process for discharging the duty to consult.³⁶⁷ These First Nations included Tsleil-Waututh Nation, the Squamish Nation, the Coldwater Indian Band, the Stó:lō collective (an association of 10 bands and villages), the Upper Nicola Band, and the Stk'emlupsemc te Secwepmec of the Secwepemc Nation.³⁶⁸ At the end of 2016, the city of Burnaby, the aforementioned First Nations, and the city of Vancouver petitioned the Federal Court of Appeal for judicial review of the approval of the pipeline,

359. *Id.* para. 74.

360. *Id.*; NAT'L ENERGY BD., *supra* note 346, at 37.

361. *See* Tsleil-Waututh Nation, 2018 FCA at paras. 74–75, 110.

362. *See id.* paras. 74, 115–17.

363. *See id.* para. 74.

364. *See id.*

365. *Id.* para. 76, 102–07.

366. *Prime Minister Justin Trudeau's Pipeline Announcement*, PRIME MINISTER CAN. (Nov. 29, 2016), <https://pm.gc.ca/en/news/speeches/2016/11/29/prime-minister-justin-trudeaus-pipeline-announcement>.

367. NAT'L ENERGY BD., *supra* note 346, at 34–36; Tsleil-Waututh Nation, 2018 FCA at paras. 15, 115.

368. *See* Tsleil-Waututh Nation, 2018 FCA at paras. 15–16, 25, 30, 35–36, 41.

alleging, among other deficiencies, inadequate consultation with First Nations.³⁶⁹ This case, *Tsleil-Waututh Nation v. Canada*, will be discussed further below.³⁷⁰ The Squamish First Nation filed an additional challenge in 2017 to British Columbia's environmental assessment certificate for the project, arguing there was inadequate consultation.³⁷¹ The British Columbia Supreme Court found that the Province had met its duty to consult, a narrow holding that does not prejudice actions against the Federal Government in the Federal Court of Appeal.³⁷²

Although the government of British Columbia voted to approve the Trans Mountain Expansion subject to conditions, a new provincial government assumed office in 2017 after forming a coalition with the environmental party.³⁷³ (Inter-provincial pipelines are subject to federal jurisdiction, but provinces may impose additional conditions).³⁷⁴ The government of British Columbia renounced support for the pipeline and intervened in the judicial challenges pending before the Federal Court of Appeal.³⁷⁵ The premiers of Alberta and British Columbia have also threatened an interprovincial trade war over the Trans Mountain Expansion. Alberta halted imports of British Columbia

369. *Id.* para. 15, 51–52.

370. *Tsleil-Waututh Nation v. Canada* (Att'y Gen.), 2018 FCA 153 (Can.).

371. See Jason Proctor, *Court Throws out Trans Mountain Pipeline Challenge from City of Vancouver and Squamish Nation*, CBC (May 24, 2018; 11:57 AM), <https://www.cbc.ca/news/canada/british-columbia/squamish-nation-taking-fight-against-kinder-morgan-to-court-1.4676619>.

372. See *id.*

373. *Id.*; *Kinder Morgan Canada Limited Suspends Non-Essential Spending on Trans Mountain Expansion Project*, KINDER MORGAN CAN. LTD. (April 8, 2018), <https://ir.kindermorgancanadalimited.com/2018-04-08-Kinder-Morgan-Canada-Limited-Suspends-Non-Essential-Spending-on-Trans-Mountain-Expansion-Project> [hereinafter *Kinder Morgan Suspends Non-Essential Spending*].

374. See Penny Becklumb, *Federal and Provincial Jurisdiction to Regulate Environmental Issues* 8–9 (Libr. Of Parliament, Publication No. 2013-86-E, 2013), <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2013-86-e.pdf>.

375. *Id.*; see Geoffrey Morgan, *Supreme Court Dismisses B.C. Case against Trans Mountain Pipeline*, FIN. POST (Jan. 17, 2020; 11:04 AM), <https://business.financialpost.com/commodities/energy/supreme-court-dismisses-b-c-s-appeal-in-trans-mountain-pipeline-case>.

wine and threatened to halt exports of oil and gas to British Columbia unless the pipeline was approved.³⁷⁶

In March 2018, Trans Mountain and Kinder Morgan were facing an onslaught of legal and political challenges. Kinder Morgan halted unnecessary construction on the project, and acknowledged that even a partial loss at the courts and any additional requirements would set the project back too far to continue: "While we are prepared to accept the many risks traditionally presented by large construction projects, extraordinary political risks that are completely outside of our control and that could prevent completion of the project are risks to which we simply cannot expose our shareholders."³⁷⁷ Kinder Morgan then suspended all non-essential spending pending a resolution by May 31, 2018, that would allow them to proceed.³⁷⁸ The Government of Canada was unable to provide sufficient assurances and indemnities to Kinder Morgan, and by May 31, the decision was all but finalized to proceed with a sale of the Trans Mountain pipeline system to the Government of Canada for \$4.5 billion CAD.³⁷⁹

On August 30, 2018, the Federal Court of Appeal quashed the certificate of public convenience and necessity for the expansion, finding that the scope of the review should have included impacts

376. Carrie Tait & Justine Hunter, *Alberta Moves to Block B.C.'S Wine Imports in Dispute Over Trans Mountain Pipeline Expansion*, GLOBE & MAIL (Feb. 6, 2018), <https://www.theglobeandmail.com/report-on-business/alberta-moves-to-block-bcs-wine-imports-in-dispute-over-trans-mountain-pipeline-expansion/article37879749/>; Kelly Cryderman, Ian Bailey, & Jeff Lewis, *Alberta's Notley Threatens to Restrict Oil Exports to B.C. Amid Pipeline Dispute*, GLOBE & MAIL (Apr. 16, 2018), <https://www.theglobeandmail.com/canada/alberta/article-alberta-introduces-legislation-that-would-give-province-power-to/>.

377. *Kinder Morgan Suspends Non-Essential Spending*, *supra* note 373; see also Gordon Hoekstra, *First Nations Court Challenges Continue to Hang Over \$7.4-Billion Trans Mountain Pipeline Expansion*, VANCOUVER SUN (Apr. 19, 2018), <https://vancouversun.com/business/energy/first-nation-court-challenges-continue-to-hang-over-7-4-billion-trans-mountain-pipeline-expansion>.

378. *Kinder Morgan Suspends Non-Essential Spending*, *supra* note 373.

379. Geoffrey Morgan, *Canada Buys Kinder Morgan's Trans Mountain Pipeline for \$4.5 Billion—But Can We Sell It?* FIN. POST (May 29, 2018; 8:07 PM), <https://business.financialpost.com/commodities/energy/ottawa-buys-trans-mountain-pipeline-for-4-5-billion-but-can-it-sell-it>.

from tanker traffic.³⁸⁰ It further found that consultation with First Nations was inadequate during Phase III because the government sent (what amounted to) notetakers to meetings instead of persons with decision-making authority.³⁸¹ “Canada failed in Phase III to engage, dialogue meaningfully, and grapple with the concerns expressed to it in good faith by the Indigenous applicants so as to explore possible accommodations of these concerns.”³⁸² The Court found that the consultation team worked in good faith to understand and document concerns arising out of the NEB report to the Governor-in-Council, but the representative for the government of Canada did not provide substantive comments to address concerns; instead, replies were brief and generic.³⁸³ There was no indication that the decision makers were evaluating whether the NEB’s findings in the report were reasonable or that conditions imposed on the project were sufficient. Further yet, there was no consideration of whether the NEB’s conditions needed to be amended or supplemented.³⁸⁴ Consequently, consultation failed for want of “meaningful, two-way dialogue.”³⁸⁵ As put by the Court, “Canada acknowledged that it owed a duty of deep consultation to each Indigenous applicant. More was required of Canada.”³⁸⁶

The Federal Court of Appeal provided a substantial evaluation of the shortcomings inherent in the Government of Canada’s consultation process, and by proxy a critique of Trans Mountain’s processes. In Phase II, the NEB did not discuss the strength of Indigenous claims and the effect of the project on those rights, which placed greater responsibility on the NEB to do so in Phase III.³⁸⁷ The NEB was required to assess the nature and scope of asserted and established Aboriginal rights and title,

380. *Tsileil-Waututh Nation v. Canada*, 2018 FCA 153 at paras. 7, 398–99 (Can.).

381. *Id.* paras. 574–75, 598–601.

382. *Id.* para. 754.

383. *Id.* paras. 755–57.

384. *Id.* para. 757.

385. *Id.* para. 756.

386. *Id.* para. 758.

387. *See id.* para. 566 (“Phase III was the first opportunity for the Indigenous applicants to dialogue directly with Canada about matters of substance, not process”).

whether the duty was fulfilled, and whether the project would have adverse effects on claims to title and traditional governance structures. Canada was also required to assess, with specificity, not only the effects on each asserted right, but also the effect on each First Nation.³⁸⁸ The petitioners had raised specific concerns with Trans Mountain, and Trans Mountain could have responded with specific information. Instead, much of the information provided was generic and punted responsibility to future evaluations.³⁸⁹ The NEB relied on these processes and responses in its recommendations to the Crown.³⁹⁰ The Crown consequently had a duty to engage in deep consultation about whether such recommendations adequately addressed First Nations concerns, given the strength of the right and the severity of the impact.³⁹¹ The Crown assessment was insufficient; the Crown did not come back to the proponent and indicate which existing accommodations were sufficient and where additional ones were required, hence the legal issue.³⁹² Much of this process could have been avoided if Trans Mountain had effectively consulted and accommodated these issues between 2012 and 2014. Nonetheless, the failings belong to the government.

For example, the Stó:lō Collective was concerned that the pipeline posed a significant risk to their way of life and threatened their cultural identity. Members of the Stó:lō Collective have a constitutional right to fish, as well as asserted rights to harvest, hunt, and gather plants.³⁹³ The pipeline would affect specific cultural sites. The Stó:lō provided significant traditional knowledge to Trans Mountain about these rights and impacts, identifying ecological areas of concern and providing ways that Trans Mountain could use their knowledge to accommodate their interests and rights. Specifically, they provided 89 conditions to Trans Mountain that they felt, if implemented, would adequately

388. *Id.* paras. 567–68.

389. *Id.* para. 653.

390. *See id.* paras. 598, 658, 753–63.

391. *Id.* para. 489, 564.

392. *See id.* paras. 753–63.

393. *See id.* paras. 571, 713.

address their concerns.³⁹⁴ Many of these conditions involved direct community participation in environmental protection and management, and emergency response management, effectively fleshing out generic conditions requiring further consultation and requiring timely notification of incidents.³⁹⁵

The Stó:lō Collective expressed concern about Trans Mountain's reluctance to formalize commitments to the Stó:lō Collective.³⁹⁶ Trans Mountain did not adopt any of the 89 recommendations,³⁹⁷ and stated it had "developed mitigation measures in accordance with Trans Mountain standards, industry and provincial regulatory guidelines, current industry-accepted best practices, engagement with Aboriginal communities, experience gained from other pipeline projects with similar environmental and socio-economic conditions, and professional judgment."³⁹⁸ Trans Mountain also said that future plans would be developed.³⁹⁹ However, none of these plans specifically addressed the impact on a specific right.

Moreover, the NEB did not adopt any of the 89 recommendations.⁴⁰⁰ The report to the Governor-in-Council did not incorporate any of their traditional knowledge, repeating the errors of Trans Mountain's assessment and leaving critical impacts on their rights unaddressed. The report contained erroneous statements about rights, habitation, traditional plant harvesting, and traditional land use, and it focused on the temporary nature of the disruptions, which were inaccurate given that rights and sites excluded from the report would necessarily suffer permanent impairment; there was a real risk that excluded sites would receive no protection.⁴⁰¹

The Stó:lō Collective raised these issues with Canada's representatives. Government meetings emphasized that the

394. *Id.* paras. 681–86.

395. *Id.* paras. 683–84.

396. *Id.* paras. 682–92.

397. *Id.* paras. 685.

398. NAT'L ENERGY BD., *supra* note 346, at 42.

399. *Id.* at 43.

400. Tsleil-Waututh Nation, 2018 FCA at para. 686.

401. *Id.* paras. 687–703.

nature of the disruptions would be temporary.⁴⁰² The Crown suggested Stó:lō Collective continue its discussions with the Trans Mountain.⁴⁰³ The Crown did not explain how that would address their concerns “in light of the information they had provided as to the proponent’s unwillingness to deal directly with them on a timely basis, or in some cases, at all.”⁴⁰⁴ Somewhat obviously therefore, proponent involvement even in latter consultation phases is critical to success, because if the government determines that a particular accommodation is insufficient, then the proponent is best positioned to respond with stronger measures.

At a shareholder meeting 30 minutes after the judgment of the Federal Court of Appeal was released, the Kinder Morgan shareholders voted to approve the sale of the original Trans Mountain Pipeline system and the Trans Mountain Expansion Project to the Government of Canada.⁴⁰⁵ The Government of Canada chose not to appeal the decision of the FCA, opting instead to re-do the consultation process. The Government of Canada has affirmed its commitment to consulting with over 117 First Nations, and has offered an additional \$5 million CAD in participant funding above the \$2.2 million CAD offered previously as part of the NEB process.⁴⁰⁶

The project is now expected to be operational in 2022 and will cost approximately \$12.6 billion CAD.⁴⁰⁷ The federal government determined that consultation was adequate and issued a new certificate of public convenience and necessity, and First Nations sought judicial review of the consultation process. Public protests

402. *Id.* para. 695.

403. *Id.* para. 707.

404. *Id.* para. 709.

405. John Gibson, *With Project in Doubt, Kinder Morgan Shareholders Vote to Sell Trans Mountain Pipeline to Ottawa*, CBC (Aug. 30, 2018; 9:22 AM), <https://www.cbc.ca/news/canada/calgary/kinder-morgan-canada-shareholders-vote-sale-trans-mountain-pipeline-1.4804503>.

406. TRANS MOUNTAIN EXPANSION PROJECT: CROWN CONSULTATION AND ACCOMMODATION REPORT 1, 58, 72–73 (2019), https://www.canada.ca/content/dam/nrcan-rncan/site/tmx/TMX-CCAR_June2019-e-accessible.pdf.

407. *Expansion Project*, TRANS MOUNTAIN, <https://www.transmountain.com/project-overview> (last visited June 20, 2020).

are ongoing at the time of writing. Many First Nations continue to indicate they have not been adequately consulted, and many more continue to oppose the expansion.⁴⁰⁸

Among the most vocal opponents are the Tsleil-Waututh First Nation whose territory is at the end of the pipeline, near the Westbridge marine terminal.⁴⁰⁹ They maintain that the risk of an oil spill, should a tanker or pipeline leak, is too great, and no amount of consultation will justify the potential loss of their way of life.⁴¹⁰ The Tsleil-Waututh raised these concerns in their judicial review application, but construed them narrowly as errors in the consultation process and improper exclusion of increased marine shipping risks from the project scope. They argue these errors resulted in generic future response plans that did not adequately address their specific concerns regarding impacts of residue oil from an oil spill on critical habitat; the Tsleil-Waututh's subsistence economy, cultural activities, and contemporary economy; and the cumulative oil build up in the environment from increased shipping.⁴¹¹ "Tsleil-Waututh could not accept the increased risks, effects and consequences of even another small incident like the 2007 spill at the Westridge Marine Terminal or the 2015 MV Marathassa oil spill, let alone a worst-case spill."⁴¹² Moving forward, the dynamics of consultation have changed because the government is also the proponent. Most recently, in February 2020, the Federal Court of Appeal dismissed four challenges brought by First Nations to allow the project to proceed.

408. See Jorge Barrera, *Stó:lō First Nation Eyes Claim over Lightning Rock Site in Path of Trans Mountain*, CBC (May 13, 2020; 2:22 PM), <https://www.cbc.ca/news/indigenous/sumas-first-nation-lightning-rock-tmx-1.5566941>; Carl Meyer, *Chiefs From 133 First Nations Join Fight Against Kinder Morgan Pipeline and Oilsands Expansion*, NATIONAL OBSERVER (May 2, 2018), <https://www.nationalobserver.com/2018/05/02/news/chiefs-133-first-nations-join-fight-against-kinder-morgan-pipeline-and-oilsands>.

409. Tsleil-Waututh Nation, 2018 FCA at para. 18.

410. See *id.* para. 649; *How Likely Is an Oil Spill if the Proposed Trans Mountain Pipeline Goes Ahead?*, TSLEIL-WAUTUTH NATION SACRED TRUST, <https://twnsacredtrust.ca/concerns/likelihood-oil-spills/> (last visited June 20, 2020).

411. Tsleil-Waututh Nation, 2018 FCA at 649–56, 660.

412. *Id.* para. 649.

Although the Trans Mountain Expansion has been allowed to proceed over the objections of concerned First Nation stakeholders thus far, two other pipeline projects that were cancelled drive home the point that First Nation opposition can derail pipeline projects.

First, Enbridge's Northern Gateway was a twin-pipeline that would have carried crude oil from Bruderheim, Alberta to a port in Kitimat, on British Columbia's northern coast.⁴¹³ Despite extensive consultation with upwards of 80 different Aboriginal groups across Alberta and British Columbia, including all those within 80 kilometers of the pipeline right of way and any additional interested First Nations, including over \$10.8 million CAD in capacity funding and \$5 million CAD in traditional knowledge studies,⁴¹⁴ First Nations concerned with the impact of increased tanker traffic on the exercise of their rights were successful in challenging the permitting process. In 2016, the Federal Court of Appeal determined that the government did not adequately consult with First Nations in the fourth phase, quashed the certificate, and sent the decision back to the government for reconsideration.⁴¹⁵ The government chose not to appeal the decision, and determined the pipeline was not in the national interest, the death knell for the project.⁴¹⁶ This decision juxtaposes the financial interests of First Nations who supported the project against those who saw it as a threat to their way of life. Specifically, Enbridge formed a partnership with 31 Indigenous communities, who collectively had a 33% equity stake in the Northern Gateway pipeline and stood to realize \$2 billion CAD in benefits to their communities over time.⁴¹⁷ These

413. *Gixtaala Nation v. Canada*, 2016 FCA 187 at para. 12 (Can.).

414. *Id.* paras. 57–58.

415. *Id.* paras. 17, 332–33.

416. See *Feds Won't Appeal Northern Gateway Court Ruling, but Still Open to Pipeline: Enbridge Exec*, VANCOUVER SUN (Sept. 21, 2016), <https://vancouversun.com/business/energy/federal-government-wont-appeal-court-ruling-against-northern-gateway-pipeline>; Ryan Lemiski, *Was the Rationale behind Northern Gateway's Rejection Justified? Where Do We Go from Here?*, JWN (Oct. 4, 2019, 7:14 AM), <https://www.jwnenergy.com/article/2019/10/was-rationale-behind-northern-gateways-rejection-justified-where-do-we-go-here/>.

417. *Line 3 Replacement Program and Northern Gateway Decision Statement*,

communities would act as stewards over the lifetime of the pipeline. These economic benefits contrast with sentiments of an elder from the Gitga'at Nation, who were successful in challenging consultation: "The Gitga'at people are absolutely against this project. . . . There is really no good that can come of the Northern Gateway project. . . . Just one spill from this project basically wipes out our rights to harvest, wipes out our access to our food, wipes out our economy, wipes out our culture."⁴¹⁸ Faced with these sentiments, additional consultation by Enbridge would have been unlikely to sway opponents in favor of the pipeline, and as to the fate of the pipeline, legal challenges and public pressure were determinative.

Similarly, the Energy East Pipeline was cancelled in part as a response to First Nations opposition. In 2014, TransCanada submitted an application to the NEB for the Energy East and Eastern Mainline pipelines, a massive \$15.7 billion CAD infrastructure project that would carry 1.1-million barrels of crude oil 4,500 kilometers from Alberta and Saskatchewan to refineries in Eastern Canada.⁴¹⁹ The NEB initiated the regulatory process in June 2016.⁴²⁰ TransCanada consulted with approximately 155 First Nations communities along the proposed path, and continued to negotiate throughout the regulatory

ENBRIDGE (Nov. 29, 2016), <https://www.enbridge.com/media-center/media-statements/government-of-canada-pipeline-decisions>.

418. Jonathan Hayward, *Court Overturns Ottawa's Approval of Northern Gateway Pipeline*, GLOBE & MAIL (June 30, 2016), <https://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/federal-court-overturns-ottawas-approval-of-northern-gateway-pipeline/article30703563/>.

419. *Energy East and Eastern Mainline Projects*, CAN. ENERGY REGULATOR, <https://www.neb-one.gc.ca/pp/ctnflng/mjrpp/nrgyst/index-eng.html?=&wbdisabl e=true> (last updated Oct. 2, 2019); Brandi Morin, *Chiefs Express Shock, Relief to Energy East Pipeline Halt*, CBC (Oct. 6, 2017, 4:27 PM), <https://www.cbc.ca/news/indigenous/transcanada-energy-east-shock-relief-1.4344183>; *\$12-Billion Energy East Pipeline Project Takes Important Step Forward with NEB Application Filing*, TC ENERGY (Oct. 30, 2014), [https://www.tcenergy.com/announcements/2014/2014-10-30\\$12-billion-energy-east-pipeline-project-takes-important-step-forward-with-neb-application-filing/](https://www.tcenergy.com/announcements/2014/2014-10-30$12-billion-energy-east-pipeline-project-takes-important-step-forward-with-neb-application-filing/).

420. *National Energy Board Starts the Clock on Energy East Pipeline Project*, CAN. ENERGY REGULATOR (June 16, 2016), <https://www.cer-rec.gc.ca/bts/nws/nr/archive/2016/nr40-eng.html#archived>.

process.⁴²¹ As part of their stakeholder consultation plan, TransCanada held over 2100 meetings and met with 180 First Nations communities from 2013 onwards.⁴²² TransCanada has signed Communications Engagement Funding Agreements with 48 Métis and First Nations communities.⁴²³ These agreements have allowed the communities to hold information sessions, note concerns, conduct studies, and meaningfully consult without any obligation to come to an agreement.⁴²⁴ The Assembly of First Nations for Quebec and Labrador were among the most vocal opponents of Energy East (and they notably were not listed in TransCanada's original list of consulted First Nations).⁴²⁵ They were primarily concerned with NEB consultation processes and industry capture of the regulatory process, and passed tribal resolutions announcing their opposition on these bases.⁴²⁶

The Mohawks of Kanesatake rebuked the pipeline as an affront to Canada's climate change commitments and the duty to consult and reconcile,⁴²⁷ and accused the NEB of being captured by the fossil fuel industry, and linking pipeline approvals to

421. 1 TRANSCANADA, ENERGY EAST PIPELINE PROJECT DESCRIPTION 5-3 to 5-11 (2014), https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/2432218/2540913/3338229/2428790/A59129-2_Volume_1_Energy_East_Project_Description_ENGLISH_4-Mar-14_-_A3V0S2.pdf?nodeid=2428599&vernum=-2; see Julien Gignac, *Kanesatake Seeks to Solidify Indigenous Treaty Against Energy East with Sacred Items*, APTN NEWS (Nov. 16, 2015), <http://aptnnews.ca/2015/11/16/kanesatake-seeks-to-solidify-indigenous-treaty-against-energy-east-with-sacred-items/>.

422. Gignac, *supra* note 421.

423. *Id.*; Métis are a protected class of First Nation in Canada. See *Indigenous Peoples and Human Rights*, GOV'T CAN., <https://www.canada.ca/en/canadian-heritage/services/rights-indigenous-peoples.html> (last updated Oct. 25, 2017).

424. Gignac, *supra* note 421.

425. *Assembly of First Nations in Quebec, Labrador, Formally Opposes Energy East*, GLOBAL NEWS (June 16, 2016, 11:02 AM), <https://globalnews.ca/news/2766272/assembly-of-first-nations-in-quebec-labrador-formally-opposes-energy-east/>; see TRANSCANADA, *supra* note 421, at 5-6 to 5-11.

426. *Assembly of First Nations in Quebec, Labrador, Formally Opposes Energy East*, *supra* note 425.

427. Letter from Grand Chief Serge 'Otsi' Simon, Mohawk Council of Kanesatake, to Sheri Young, Sec'y of the Nat'l Energy Bd. (May 31, 2017) (on file with author) (concerning the comments submitted by the Mohawk Council of Kanesatake in respect to the draft lists of issues and draft factors and scope of the factors for the Environmental Assessments pursuant to the Canadian Environmental Assessment Act).

climate change, which they see as devastating their way of life and culture.⁴²⁸ On September 7, 2017, TransCanada requested the NEB suspend the review of the Energy East project application, and announced on October 5, 2017, that they were cancelling the project because of changed circumstances.⁴²⁹ The province of Quebec, the City of Montreal, and various First Nations groups heralded the cancellation as a victory for the environment, and attributed it to relentless lobbying.⁴³⁰

The demise of the Northern Gateway and Energy East and Eastern Mainline pipelines demonstrate the political power of First Nations international activism, in terms of rallying support from other social and political actors. Proponents consider these

428. See *id.* The Mohawks of Kanesatake helped found the Treaty Alliance Against Tar Sands Expansion, a group of 150 Indian Tribes in the United States and First Nations in Canada that have worked together to oppose Northern Gateway, Energy East, Keystone XL, and the Trans Mountain Expansion. See *The Story of the Treaty*, TREATY ALLIANCE, <http://www.treatyalliance.org/treaty/> (last visited June 20, 2020); *Treaty Against Tar Sands Expansion*, TREATY ALLIANCE, <http://www.treatyalliance.org/wp-content/uploads/2016/12/TreatyandAdditionalInformation-20161216-OL.pdf> (last visited June 20, 2020); *Signatory Nations*, TREATY ALLIANCE, <http://www.treatyalliance.org/wp-content/uploads/2018/04/TAATSE-SignatoryNations-EN-R12-20180430-OL.pdf> (last visited June 20, 2020).

429. *TransCanada May Abandon Energy East Pipe Facing Tougher Review*, REUTERS (Sept. 7, 2017), <https://www.reuters.com/article/us-canada-energy-transcanada/transcanada-may-abandon-energy-east-pipe-facing-tougher-review-idUSKCN1BI2Z>; Shawn McCarthy, Kelly Cryderman, & Jeff Lewis, *TransCanada Halts Pipeline, Sparking New Regional Tensions*, GLOBE & MAIL (Oct. 6, 2017), <https://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/transcanada-kills-controversial-energy-east-pipeline-project/article36498370/>. Part of the changed circumstances included allegations of bias against the NEB that resulted in a new panel that voided previous decisions and announced an expanded role for First Nations consultation. See Mike De Souza, *New Allegation of Bias over Charest Meeting Shake TransCanada Pipeline Hearings*, NAT'L OBSERVER (Aug. 22, 2016), <https://www.nationalobserver.com/2016/08/22/news/new-allegations-bias-over-charest-meeting-shake-transcanada-pipeline-hearings>; *East Hearing to Restart from the Beginning*, GOV'T CAN. (Jan. 27, 2017), <https://www.canada.ca/en/national-energy-board/news/2017/01/energy-east-hearing-restart-beginning.html>; *Engagement on Energy East Hearing Design*, GOV'T CAN. (June 5, 2017), https://www.canada.ca/en/national-energy-board/news/2017/06/engagement_on_energyeasthearingdesign.html.

430. See Kalina LaFramboise & Kamila Hinkson, *Quebec Politicians, Environmentalists Hail Demise of Controversial Energy East Pipeline*, CBC (Oct. 5 2017; 9:49 AM), <https://www.cbc.ca/news/canada/montreal/energy-east-pipeline-quebec-politicians-victory-1.4338579>; Morin, *supra* note 419.

costs when assessing the economic viability of a project. Also relevant is the fact that the Indigenous opponents framed their arguments around the threats that climate change and fossil fuel development pose to their continued cultural existence, concerns that no amount of consultation can accommodate.

E. Limits to Consultation

Returning to calls for a greater role for consultation in the United States, procedural and substantive reform of government-to-government consultation are essential to enabling indigenous peoples to determine their own futures. Consultation processes – and meaningful judicial resolution – enable the resolution of complex disputes that affect communities. This paper presents an arguable case that Canadian First Nations are able to participate in more robust and well-defined government-to-government processes than their American counterparts. Canadian First Nations are able to litigate and protect cultural resources using Aboriginal law, unlike American tribes that frequently resort to environmental law. What is clear from the Canadian experience, however, is that industry-indigenous consultation should not be viewed as a stop-gap to the deficiencies in government-to-government consultation. Industry-Indigenous consultation should continue to the extent that it realizes value for all participants, and that value proposition is dependent on the nature of the Indigenous interest sought to be accommodated.

While industry-Indigenous consultation plays an important role in realizing benefits for indigenous communities, it is not equivalent to government-to-government consultation. Industry-Indigenous consultation is complementary of government-to-government consultation, because it addresses some of the core criticisms of the current government-to-government process, namely that tribes have historically been unable to realize the benefits of development. Responsive industry consultation with tribes allows for tribal concerns to be identified and incorporated meaningfully and early in the process. It also allows for tribes to profit, and it can improve services in their communities and provide opportunities for their people. Consequently, Industry-indigenous consultation can help proponents manage both

litigation and commercial risk.

However, Industry-Indigenous consultation is not the same as government-to-government consultation. The act of government-to-government consultation is interwoven with Indigenous identity, but the same is not true of industry-Indigenous consultation, which establishes a business relationship. The benefit of the latter is that the proponents have a financial incentive to accommodate, and are well placed to do so. Nonetheless, the transactional nature of the relationship can obfuscate greater issues of identity and self-determination, which can only be accommodated and recognized through a government-to-government relationship or through government action. In this view, industry-Indigenous consultation complements government-to-government consultation, but cannot supplant the broader political and legal goal potential of government-to-government consultation to bring about reform.

Consequently, even with robust industry-Indigenous consultation practices, as in the Canadian experience, such consultation is not a project guarantee. Proactive consultation that complies with best practices will not guarantee successful accommodation and consent when Indigenous interests conflict with development. In all three of the Canadian case studies discussed above, proponents expended significant resources to sign financial agreements and benefit sharing agreements, modified routes, developed management plans, committed to using local expertise, incorporated traditional knowledge, and so on. Nonetheless, First Nations did not consent. First Nations publically condemned the Trans Mountain Pipeline because it presented an immitigable risk of oil spills and would contribute to greenhouse gas emissions, both of which posed existential threats to First Nations cultural survival. In the case of Northern Gateway, the Gitxaala First Nation wanted to protect the exercise of their Indigenous rights, and a crude oil spill would irreparably impair those rights. In the case of the Energy East Pipeline, First Nations organized opposition to the pipeline by linking fossil fuel development to climate change, which poses an unacceptable threat to the exercise of their constitutional rights and their continued cultural existence. While external factors—such as low

oil prices and the availability of alternative transportation means—undoubtedly play a role in the decision to cancel these pipeline projects, First Nations posed significant litigation and commercial risk, not insignificant factors.

The Ministerial Panel identified a tension between agreeing to a community benefit agreement and what is essentially nation-to-nation recognition. First Nations sign community benefit agreements even if they do not feel that their rights are being respected for multiple reasons. The Ministerial Report provides that some “are tired of seeing their communities struggle with grinding poverty and alienation from their land and their way of life”, and want to reap the same economic benefits as other communities.⁴³¹ The Scia’new First Nation on Vancouver Island felt that an increase in tanker traffic was inevitable, and the only way to protect their interests was to negotiate a mutual benefit agreement.⁴³² For First Nations, signing an agreement is a way to hedge against a project being approved over their opposition and getting nothing.⁴³³ The Ministerial Panel found that many First Nations viewed impact benefit agreements as a bribe, “often aimed at the communities that needed them most desperately,” and one person considered them part of a “divide and conquer” strategy.⁴³⁴

These misgivings and concerns emphasize that impact benefit agreements can only mitigate, not remove, the risk of litigation. First Nations who agree to a community benefit agreement may still have unresolved issues with government consultation, but they choose to forgo legal challenges and vindication of rights in favor of accrued benefits. This is the reason why proponents find these agreements a valuable guarantee of project success, even though an impact benefit agreement cannot override the overarching honor of the Crown. Moreover, the greater the number of parties that must be consulted on a linear

431. REPORT FROM THE MINISTERIAL PANEL FOR THE TRANS MOUNTAIN EXPANSION PROJECT 35 (2016), https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/files/pdf/16-011_TMX%20Full%20Report-en_nov2-11-30am.pdf.

432. *Id.* at 37.

433. *Id.* at 37–38.

434. *Id.* at 38.

infrastructure project, the greater the risk of judicial challenge that a First Nation was inadequately consulted at some phase on some issue. The number and sophistication of parties increase the risk of project failure and delay exponentially. It is important to note that signing an agreement to support a project does not mean that the First Nation feels they have been adequately consulted. A 2016 ministerial panel for the Trans Mountain Expansion Project sought input from First Nations on their experiences in order to help the newly-elected Trudeau government decide whether or not to approve the Trans Mountain Expansion Project.⁴³⁵ The panel reported that First Nations across British Columbia and Alberta ranged in views from “absolute rejection to formal support.”⁴³⁶

Thus, the legal uncertainty, the sophistication of First Nations opposition, the scrutiny of government consultation, and the consultation burden on government all contribute to proponents undertaking detailed and extensive consultation with First Nations, apart from and beyond their own obligations under law. As a consequence, this risk of project failure bears upon proponents and other First Nations communities with whom the proponent has signed an impact benefit agreement. What becomes readily apparent in this discussion is the amount of social conflict over consultation in inter-provincial linear infrastructure: between First Nations communities, between First Nations and multiple levels of government, between First Nations and the proponent, and between the proponent and the government. The cost of consultation as a determinant of securing First Nations consent is proportional to the number of First Nations along the pipeline corridor, each of whom may have an incentive to hold out.

Moreover, in Canada, proponents are not expected to carry out the same constitutional level of consultation as the government, but in many instances they do so by default because they have a vested interest in the government successfully discharging its duty to consult. In some instances the proponent

435. *Id.* at 2–3, 6–7.

436. *Id.* at 35.

fell short, as with the example of the Stó:lō Collective and Trans Mountain pipeline. In other instances, the First Nations realized significant value and were able to adequately protect their interests. The current reality is that government consultation is the benchmark against which industry-Indigenous consultation is judged, because only the government action can be judicially reviewed. The gap between accommodations that can be provided by industry and those that can be provided by government is increasingly important as infrastructure development projects, like pipelines, become more contentious. While certain accommodations can only be provided by government in practice, many, if not most, benefits flow from agreements with the proponent.

When negotiating with an individual First Nation, consultation will be most effective if impacts to Aboriginal rights can be mitigated through accommodation.⁴³⁷ In these circumstances, impact benefit agreements and industry-Indigenous consultation mitigate litigation risk. However, even if an interest can be accommodated, the proponent must nonetheless ensure that the interest is actually accommodated. The Stó:lō Collective provided an example of an interest that could be accommodated, but was not. They provided recommendations of how the Trans Mountain project could be modified to ensure that their sacred sites and lands were not damaged. When they felt their concerns went unaddressed, the Stó:lō Collective filed suit. This litigation likely could have been avoided.

Unlike the Stó:lō Collective, many First Nation interests are incompatible with crude oil pipelines, finding those projects pose an existential threat. Both the Squamish and Tsleil-Waututh First Nations opposed the Trans Mountain pipeline for this

437. "Harold Aljam, Economic Development Coordinator for the Coldwater Band, added that he is not opposed to the notion of industrial development on First Nations land, 'I understand we need pipelines. Do I like it? Not particularly so. But it's a necessary evil.' But, Aljam says that if the pipeline is to be built, 'I'd like to tax the crap out of it. Canada is at the table. The province is at the table. Well, they have to move over so the Shuswap can sit at that table. I don't want Canada's money. I want to tax our own resources.'" *Id.* at 40.

reason. According to the Tsleil-Waututh, “the project represents an unacceptable risk to [our] rights and title in Burrard Inlet.”⁴³⁸ Concerns about cultural existence cannot be accommodated. First Nation interests that are fundamentally incompatible with infrastructure development cannot be accommodated, and additional consultation in these cases is both expensive and frustrating for both proponents and First Nation.

Focusing on the nature of the interest suggests a rudimentary framework for both Indigenous groups and Tribes to assess the benefits of industry-Indigenous consultation.

For a proponent angling to maximize the chances of project success over First Nation protest, the nature of the Aboriginal interest determines how much consultation is necessary to project success. The nature of the impacted right is a proxy for the likelihood that a First Nation will seek judicial review rather than agree, after consultation and accommodation, to a tailored community benefit agreement. This process mirrors the judicial test for impairment of Aboriginal rights in Canada.

Similarly, the nature of the right for an Indigenous group dictates the level of legal and political pressure it may have to place on the government to accommodate its interests, either through litigation or through political pressure.

Based on the Canadian experience, a proponent should first consult to identify Aboriginal interests and rights at stake in the project area and understand how the project will impair the Aboriginal rights and interests. The more incompatible proposed development and the right in question are, the less effective consultation will be in reaching an impact benefit agreement, and consequently the less likely it will be that a proponent will be able to get First Nation consent. The goal of consultation in cases of incompatible interests is to anticipate judicial review and consult in good faith to the level required of government by law, and to ensure that the government similarly discharges its obligations.

If initial consultation identifies interests that are otherwise compatible with the development project, then these interests should be accommodated. Further consultation for accommodable

438. *Id.* at 41.

rights and interests can result in partnerships, community benefit agreements, and concessions such as re-routing, mitigation, economic benefits, and monitoring. The more particularized the interest, and the less the interest is tied to a generalized conception of the land and an existential approach to the tribe's place, the more likely a proponent will be able to accommodate the interest, resulting in a mutually beneficial arrangement.

For example, a proponent can accommodate protection of a sacred site, a discrete interest, but it will have a more difficult time accommodating protection of a vast sacred territory, a generalized interest. A pipeline can be re-routed around a grave site; it is more difficult for a proponent to accommodate an inter-generational interest in a clean environment. Otherwise stated, a proponent cannot accommodate an interest antithetical to linear infrastructure development.

The nature of the interest analysis also establishes a minimum level of consultation in which all proponents should engage. The legal minimum is to facilitate government-to-government consultation to the extent that it will withstand judicial challenge, and in order to so, the proponent must ascertain the nature of the Aboriginal interest through good faith consultation. In other words, initial consultation is necessary to ascertain the rights at stake and the nature of the impairment, and to determine whether or not the rights can be accommodated. It will generally be cheaper in the long run, in terms of reputation cost, social cost, and litigation cost, to accommodate interests and avoid litigation.

However, if an interest cannot be accommodated, then from an industry perspective any additional consultation is unnecessary except to hedge against legal liability, and ensure that the project will survive judicial review.

That said, a prescient proponent can continue to consult, if the Indigenous group is willing, with the goal of building a foundation for a future partnership. Circumstances and Indigenous leadership may change, and positive experiences and partnerships can lead to success in future endeavors. The benefits of consultation are measured against the likelihood of developing

a partnership for long-term success, and therefore, proponents benefit from treating Indigenous stakeholders as business partners with a vested interest in project success, particularly as the benchmark for judicial review of government-to-government consultation continues to shift based on executive action and changing norms.

From an Indigenous perspective, this same process also suggests avenues for changes to government-to-government consultation processes. Indigenous groups can similarly benefit from identifying and voicing their interests early in the project development by collaborating with Industry groups to accommodate concerns where possible. By also identifying, where possible, interests that the groups believe are incompatible with the proposed project, the Indigenous group may be able to suggest alternatives compatible with the economics of the project.

This analysis is broad enough that it suggests not only an approach to consultation in Canada, but also the United States. The relevant questions remain: what is the minimum level of consultation required of the government to survive judicial review? In the United States, so long as the government consulted in good faith, this standard is met; all but the most egregious of consultation procedures will survive judicial review, as demonstrated by the DAPL pipeline litigation. Industry may be required in practice to discharge many of the procedural obligations. Throughout this process, the proponent should strive to identify key tribal interests and determine whether these interests can be accommodated. If the interests can be accommodated, then the proponent should accommodate.

Failure to accommodate can result in significant political risks. The three Canadian pipelines demonstrate that First Nations are formidable legal and political opponents. The level of First Nation opposition depends on the nature of the impacted Aboriginal right or interest, and the degree to which these interests benefit from legal protection. For example, United States tribal interests located and exercised off-reservation receive minimal legal protection. As a consequence, in both DAPL and Keystone XL, tribes linked their interests to broader social causes, including climate change, and formed alliances to amplify

political opposition. Canadian Aboriginal rights and interests enjoy comparatively greater legal protection, and therefore, First Nations have been successful using litigation as a primary tactic to delay or cancel a project. Where judicial challenges are unlikely to succeed, or would be premature, First Nations pressure politicians to intervene. The scale of political risk, once it materializes, is difficult to mitigate and leads to cost escalation.

Contextualizing the benefits and drawbacks of industry-Indigenous consultation, from the perspective of industry, also clarifies that industry-Indigenous consultation is not a substitute for government-to-government consultation, nor should it be. Often Indigenous concerns about industry-Indigenous consultation are subsidiary to concerns about government-to-government relations. As demonstrated by the Standing Rock and Keystone XL pipeline projects, one key Indigenous interest is that of being recognized as sovereign, and having the benefit of the treaties and promises that were abrogated so long ago. Industry-Indigenous consultation leads to a business relationship, not a relationship between sovereign equals. For this reason, industry-led consultation cannot usurp or supplant government-to-government consultation; it can only facilitate that process.

In summary, the Canadian experience suggests that the nature of the Aboriginal interests impacted by crude oil pipelines are a proxy for the likelihood of successful industry-Indigenous consultation and project success. If an Aboriginal interest can be accommodated, then the consultation will likely be successful, and vice versa. However, identifying the interest requires good-faith consultation, and in the event that the aboriginal interest is incompatible with the project, then the proponent must ensure that the government-to-government consultation satisfied the legal standards.

VI. CONCLUSION

This paper recounts two interdependent stories. The first story is about the relationship between tribal governments and the federal government in the United States, told through tribal opposition to the Dakota Access and Keystone XL pipelines. Tribes in the United States with off-reservation interests struggle

to have these interests accommodated through consultation and other legal processes. The trust relationship between Indian tribes and the federal government needs reform.

The second story is about the relationship between tribes and industry, particularly in the aftermath of the Standing Rock and Keystone XL events. While this paper focuses on industry-Indigenous consultation, the reasons for undertaking this process, as well as the costs and benefits associated with it, are best understood against the backdrop of government-to-government consultation; in this respect, industry-Indigenous consultation can be seen as both a response and solution to the flaws in government-to-government consultation and Federal Indian Law. Indigenous lawsuits against oil pipeline approvals that impact off-reservation Indigenous resources, interests, and rights expose these flaws, and evoke the two centuries of broken promises to Indigenous peoples. Consequently, experts point to a greater role for industry in facilitating pipeline approvals. Industry-Indigenous consultation has become a solution to accommodate Indigenous interests and minimize frictions between tribes and the federal government.

However, the laudatory statements about the benefits of industry-Indigenous consultation offer no guidance to pipeline proponents, who must in practice pay the bill for consultation, as to when the costs of consultation will outweigh the benefits. The Canadian experience with industry-Indigenous consultation during pipeline approvals suggests that the costs of consultation must be evaluated against the likelihood of reaching an agreement with an Indigenous group that will mitigate litigation risk, as well as the associated political and financial risk. Industry-Indigenous consultation most effectively mitigates the risk of Indigenous opposition when Indigenous interests and the project are compatible. Therefore, proponents undertaking industry-Indigenous consultation must evaluate Indigenous interests impacted by the undertaking.

From an industry perspective, the goal of consultation and accommodation is consent from Indigenous groups. Consent can take the form of an impact and benefit agreement. Proponents benefit from decreased transaction costs, regulatory approval

timelines, commercial risk, and litigation risk when Indigenous groups consent to the pipeline. Proponents also benefit from ongoing Indigenous expertise and stewardship. Consenting Indigenous groups are empowered to protect and support their communities and participate in the project approval process. This best-case scenario is only possible, however, if the Indigenous interests at stake are compatible with the pipeline development project. In these circumstances, industry-Indigenous consultation is best practice and can lead to accommodation and facilitate government consultation, as well as effective long-term relationships between industry, government, and Indigenous groups.

However, if Indigenous interests cannot be accommodated, then industry consultation beyond identifying the incompatible interest will be ineffective at securing consent. An incompatible interest can include any interest that goes to the core of Indigenous identity, however a group seeks to define their identity. They can include sacred lands and resources, cultural burial grounds that create a link between the past and the present, and inter-generational interests in the environment. For an Indigenous group, these interests can be existential, and even a slight risk that the interests could become irreparably damaged is too great a risk. In these instances, the construction of the pipeline is a threat to cultural survival. If the pipeline would impact an existential interest that is incompatible with development, then the goal of industry-Indigenous consultation is not to identify a mutually beneficial arrangement, but rather to mitigate litigation risk by ensuring that both the proponent and the government follow all procedures and consult to the extent required by law. Ensuring that any government actor satisfies government-consultation requirements is critical, because the government, not the proponent, will be the respondent in any litigation. Consequently, only the actions of the government and government-to-government consultation matter to the outcome of resulting litigation.

Pipeline proponents must consider the likelihood of successful consultation not only with one Indigenous group, but with all Indigenous groups along the pipeline corridor. The greater the

number of Indigenous groups affected by the pipeline, the greater the risk to the proponent that an Indigenous group will have an interest that cannot be accommodated. For example, Energy East would have required approval by almost 180 groups with distinct needs and interests.⁴³⁹

Indigenous interests that cannot be accommodated present additional risks to pipeline development. Although additional industry-Indigenous consultation may allow a pipeline to survive a legal challenge, litigation and delays become so expensive that industry may choose to pursue other options rather than proceed, as in Energy East and Trans Mountain. Second, the pipeline may fail because of political pressure. The case of Northern Gateway demonstrates that holdouts can escalate legal and political tensions until a political actor ultimately determines the project is not in the nation's interest. The cancellation of Keystone XL in 2012 by President Barack Obama further illustrates this point. Once political pressure comes to bear on a pipeline, the alliance between environmental concerns and Indigenous concerns amplifies the bargaining power of Indigenous groups, leading to additional political pressure.

Based on the Canadian experience with industry-Indigenous consultation, greater adoption of industry-Indigenous consultation in the United States should heed several propositions to ensure that proponents do not undertake costly but ineffective consultation. First, the focus of industry-Indigenous consultation should be to identify Indigenous interests that will be impacted by the proposed project. As described in this paper, these interests can be rights, goals, aspirations, places, and so on. Industry-Indigenous consultation should first occur to the extent necessary to identify and define these interests, using best practices. This stage of consultation acts as an early warning system for potential issues and sets a blueprint for future accommodation. Once the interests are identified, then they must be classified as either accommodable or not. For accommodable interests, the proponent should consult with the goal of achieving consent. For un-accommodable

439. See Gignac, *supra* note 421.

interests, the proponent should consult and mitigate to the legally-required standard of government-to-government consultation in anticipation of litigation.

This framework for industry-Indigenous consultation qualifies the benefits of industry-Indigenous consultation, and offers practical guidance to proponents developing pipeline projects. This framework can easily be adapted for other infrastructure projects.