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## Exploring Alternatives to the "Consultation or Consent" Paradigm

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# EXPLORING ALTERNATIVES TO THE “CONSULTATION OR CONSENT” PARADIGM

*Jason Searle\**

## ABSTRACT

*The Dakota Access Pipeline brought the question of what adequate tribal consultation requires to the forefront. Some would argue that consultation is a weak standard and that only adopting a new standard of free, prior, and informed consent can guarantee tribes greater control and respect. However, the “consultation or consent” paradigm does not take into account important sources of law that do not fit under “consultation” or “consent” and yet could be valuable in strengthening tribes’ claims in the absence of a consent standard.*

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I. INTRODUCTION

In its fight against the Dakota Access Pipeline (DAPL), the Standing Rock Sioux Tribe’s (Standing Rock) earliest legal claims against the United States Army Corps of Engineers (USACE) included charges that the government failed to fulfill its consultation duties under Section 106 of the National Historic Preservation Act (NHPA) before approving construction permits for DAPL.<sup>1</sup> NHPA Section 106 establishes a basis for review that agencies must comply with before pursuing a federal undertaking that could have an impact on historical or cultural resources.<sup>2</sup> Most important to the tribe’s argument was the portion of Section 106 and its accompanying regulations that require tribal consultation. The U.S. District Court for the District of Columbia (D.D.C.) ruled for USACE.<sup>3</sup> The court’s conclusion rested in part on the finding that USACE had sufficiently consulted the tribe.<sup>4</sup>

It would be fair to say that inadequate consultation describes the United States’ posture toward tribes since their earliest relations. To many tribes and scholars, the character of this relationship has not changed greatly with

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1. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 205 F. Supp. 3d 4, 7–10 (D.D.C. 2016).

2. National Historic Preservation Act § 106, 54 U.S.C. § 306108 (2012); NATIONAL PARK SERVICE, NATIONAL HISTORIC PRESERVATION ACT SECTION 106: A QUICK GUIDE FOR PRESERVING NATIVE AMERICAN CULTURAL RESOURCES 1 (2012), [https://www.nps.gov/abpp/preservation/compliance/Quick%20Guide\\_Section106\\_Battlefields.pdf](https://www.nps.gov/abpp/preservation/compliance/Quick%20Guide_Section106_Battlefields.pdf).

3. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 7.

4. *Id.* at 32–33.

the administrative state, and they urge improvement.<sup>5</sup> Recently, some scholars have deemed the existing consultation process as an inadequate means to secure tribes' interests in many cases.<sup>6</sup> They note that agencies have often turned consultation into a *pro forma* box to check, rendering tribal consultation inconsequential.<sup>7</sup> Some of these scholars argue that, in order to ensure protection of tribes' interests, the United States would have to update its law to recognize the internationally held standard of "free, prior, and informed consent" (FPIC).<sup>8</sup> That standard of consent is thought to vindicate indigenous peoples' rights and give them meaningful leverage in instances where a dominant government's actions threaten their interests.<sup>9</sup>

But the United States has not adopted a consent-based standard. Instead, it has flouted the mandate of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the International Labor Organization (ILO), which require FPIC.<sup>10</sup> Further, U.S. domestic law does not meet consent-based standards.<sup>11</sup>

Though the United States is unlikely to adopt a consent-based standard in the near future, tribes are not consigned to the lackluster consultation standard. This Note argues that promising alternative provisions of law can be found by deconstructing the "consultation or consent" paradigm and looking to the primary sources of law on which these concepts rest. Some of these provisions could be characterized as moving away from consultation toward consent, but other provisions appear to compel a uniquely powerful standard that cannot be accurately categorized as either consultation or consent.

This Note identifies and explores options for applying provisions of law that can be read as going beyond the current "consultation or consent" para-

5. See, e.g., Diana Coronel David, *Green Energy in Indian Country as a Double-Edged Sword for Native Americans: Drawing on the Inter-American and Colombian Legal Systems to Redefine the Right to Consultation*, 38 ENVIRONS: ENVTL. L. & POL'Y J. 223 (2014-2015); Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 25 (2000).

6. See David, *supra* note 5; Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37 (2015).

7. See Haskew, *supra* note 5, at 25.

8. See Miller, *supra* note 6, at 37-38; 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, 87-93 (2015-2016); see also Dean B. Suagee & Christopher T. Stearns, *Indigenous Self-Government, Environmental Protection, and the Consent of the Governed: A Tribal Environmental Review Process*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 59, 61 (1994).

9. See Miller, *supra* note 6, at 37-38; Woods, *supra* note 8, at 87-93; see also Suagee & Stearns, *supra* note 8, at 61.

10. See Woods, *supra* note 8, at 87-93; see also CONVENTION CONCERNING INDIGENOUS AND TRIBAL PEOPLES IN INDEPENDENT COUNTRIES art. 6, June 27, 1989, 1989 I.L.M. 1384.

11. See Woods, *supra* note 8, at 87-93.

digm. Part II identifies strong examples of “alternative paradigm” provisions, found in the NHPA and applicable regulations, such as the “government-to-government” relationship. This Note demonstrates how explicitly tying the government-to-government concept to specific legal provisions could significantly strengthen those provisions to promote tribal interests. Part II concludes by surveying the primary sources of international law’s standard of consent—FPIC. This Note argues that whether the United States has an obligation to enforce FPIC is uncertain, and whether the United States would enforce a consent standard is even less certain. In light of this, the better option is to seize the advantages of the alternative paradigm. The alternative paradigm can still achieve many of the aims of FPIC, and, furthermore, the alternative paradigm consists completely of U.S. federal law, which unquestionably binds the federal government. Additionally, the alternative paradigm would protect tribal interests more than consultation does, as it is presently understood.

Part III of this Note analyzes the D.D.C.’s decision denying Standing Rock’s motion for preliminary injunction. This Note analyzes the decision under the current framework, that is, under NHPA Section 106 as shaped by the present, diminished understanding of tribal consultation. The Part highlights how, even without the alternative paradigm, the D.D.C. could have favored Standing Rock. On the other hand, Standing Rock and USACE brought arguments of similar strength under the current understanding of consultation. Given these points, the need for the alternative paradigm is even greater. I consider how Standing Rock’s case would have been stronger under the alternative paradigm. The alternative paradigm, because of its ties to the Indian law canons of construction and tribal preference, would have demanded that the court consider factors other than agency deference. Finally, I will discuss how administrative bodies, tribes, and advocates should employ the alternative paradigm going forward.

## II. LAW SUPPORTING AN ALTERNATIVE TO THE “CONSULTATION OR CONSENT” PARADIGM

### A. *NHPA Section 106*

NHPA Section 106 establishes a regime for review that agencies must follow early on in any undertaking, such as permitting a pipeline, that could have an impact on any historic property included in or eligible for inclusion in the National Register.<sup>12</sup> NHPA Section 106 is drafted in a way that regards tribes as possessing expertise in this area, and as being the best fit to

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12. National Historic Preservation Act, 54 U.S.C. § 306108 (2012); 36 C.F.R. § 800.1 (stating that Section 106 review should start early); 36 C.F.R. § 800.2(c)(2)(ii)(A) (stating

identify their own properties of historical and cultural significance.<sup>13</sup> Against this backdrop, the regulations clearly establish a tribal consultation requirement.<sup>14</sup> But upon further inspection, consultation does not fully describe the extent of an agency's obligations to tribes. I will elaborate on two particularly powerful obligations: (1) the duty of agencies to "seek concurrence" with tribes, and (2) the right of tribes at the conclusion of Section 106 review to be signatories to Memorandums of Agreement (MOAs).

### 1. "Seek Concurrence"

36 C.F.R. § 800.5(c)(2)(iii) is found within a section concerning an agency's procedural duties to parties in the "adverse effects" determination process.<sup>15</sup> It provides that "[t]he agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding."<sup>16</sup> The concurrence provision provides a 30-day window for tribes to voice disagreement with an agency's finding and request that the Advisory Council on Historic Preservation (ACHP) review and object to the finding.<sup>17</sup> These "concurrence" provisions are not replicated for any other interest group, which reflects the government's unique obligation to tribes.<sup>18</sup>

Section 800.5(c)(2)(iii) requires more than consultation because it demands that agencies "seek concurrence" with tribes' views. Specifically, the agency, in making its adverse effects finding, must "seek concurrence" with an Indian tribe or Native Hawaiian organization that attaches cultural and religious significance to a property involved.<sup>19</sup> The Merriam-Webster Dictionary defines concurrence as "a state of agreeing with someone or some-

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that agencies should start consulting tribes early on in Section 106 review); *see also* Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

13. *See, e.g.*, 36 C.F.R. §§ 800.4(c)(1) (requiring agency officials to acknowledge tribal expertise in identifying historic properties), 800.2(c)(2)(i)(A) (allowing the tribe to assume the responsibilities of the State Historic Preservation Officer), 800.2(c)(2)(ii)(A) (2016) (including a list of tribal functions regarding historic property identification for which the agency official is to ensure that these attend throughout the review process).

14. *See* 36 C.F.R. §§ 800.1–2 (establishing consultation as an integral part of the Section 106 process, and particularly with respect to tribes as consulting parties, from the beginning of the regulations).

15. 36 C.F.R. § 800.5(c)(2)(iii).

16. *Id.*

17. *Id.*

18. *See id.* Other consulting parties involved in the review process are mentioned in a parallel provision, Section 800.5(c)(2)(i), without a similar "seek concurrence" requirement, and no provision in Section 800.5 gives those stakeholders the opportunity to voice disagreement and request ACHP review as is afforded to tribes. 36 C.F.R. § 800.5.

19. *Id.*

thing.”<sup>20</sup> This definition, while not provided by the statute or regulations, indicates that the term “concurrence” means more than mere consultation.<sup>21</sup> Then again, the regulations define consultation expansively. Section 800.16 defines consultation as “the process of seeking, discussing, and considering the views of other participants, and, where feasible, *seeking agreement* with them regarding matters arising in the Section 106 process.”<sup>22</sup>

The part of the “consultation” definition containing the language “seeking agreement” may seem to resemble “seek concurrence” so closely that one may assume that the latter’s use in a provision mirrors the “seeking agreement” portion of the consultation definition. This is not to say, however, that just because “seek concurrence” is not used elsewhere that “seeking agreement” is not a component of consultation. But the use of “seek concurrence” in Section 800.5(c)(2)(iii) emphasizes the importance of “seeking agreement” for its purposes, whereas seeking agreement in other instances of consultation arguably depends more on an agency’s discretion concerning what is “feasible.”

Even though tribes are not guaranteed concurrence, Section 800.5(c)(2)(iii) gives them recourse if they disagree with an agency’s adverse effects finding.<sup>23</sup> This section gives tribes the right to challenge the process as unfair by bringing in the ACHP as a consulting party and requesting that it review and object to the agency’s finding.<sup>24</sup> This provision incentivizes agencies to take action in favor of tribes, seeking concurrence.

Section 800.5(c)(2)(i) highlights differences between concurrence and consultation under this section, as it already accounts for the agency’s duty to consult in making an adverse effects determination.<sup>25</sup> While it concerns the same issue as Section 800.5(c)(2)(iii)—disagreement over the finding of no adverse effect—Section 800.5(c)(2)(i) applies to *any consulting party* in disagreement.<sup>26</sup> The “seek concurrence” provision, on the other hand, is an additional measure specific to dealing with tribes, and it does not concern mere consultation.<sup>27</sup> Assigning Section 800.5(c)(2)(iii) a meaning that is equivalent to Section 800.5(c)(2)(i) would make both superfluous.

20. *Concurrence*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/concurrence> (last visited May 8, 2017).

21. Merriam-Webster defines consultation as simply “listening to the advice of.” *Consultation*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/consultation> (last visited May 8, 2017).

22. 36 C.F.R. § 800.16 (2016) (emphasis added).

23. *Id.* § 800.5(c)(2)(iii)

24. *Id.*

25. *Id.* § 800.5(c)(2)(i)

26. *Id.*

27. *Id.* § 800.5(c)(2)(iii)

Benefits notwithstanding, a supporter of the traditional paradigm might criticize Section 800.5 for leaving the ultimate adverse effects determination to the agency's discretion.<sup>28</sup> Behind this criticism is the lingering skepticism that only consent can make the difference between meaningful tribal participation and government treating Section 106 review as a hollow, *pro forma* requirement. But this position would fail to give Section 800.5 due credit. First, Section 800.5 reaffirms the theme of Section 106 review as it concerns tribes—that tribes are to be given an active role throughout the review process.<sup>29</sup> Second, the provision creates grounds for an “arbitrary and capricious” challenge under the Administrative Procedure Act (APA) if an agency disregards its duties to tribes, which would be an unlawful way to come to an adverse effects finding.<sup>30</sup> This possibility incentivizes the agency to fulfill its duties meaningfully, as was the case with the provision allowing a tribe to challenge the agency's adverse effects finding.<sup>31</sup> NHPA supports an “arbitrary and capricious” challenge because it provides that tribes are to be consulted in determining eligibility of historic properties for inclusion in the National Register.<sup>32</sup> If a property is deemed eligible for the National Register, a project altering it must be found to have an adverse effect.<sup>33</sup> But properties significant to a tribe, though not listed in the National Register, can still be hard to fight for, as the DAPL controversy has illustrated.<sup>34</sup> Rather than the “adverse effects” finding, the real concern may be ensuring that the agency makes a good faith effort to determine the historical and cultural importance of properties not listed in the National Register, and which non-Indians might not recognize as historically or culturally important. But as long as the agency follows the law and listens to tribes, it should be easier to identify previously unrecognized properties of historical or cultural significance.

Given the agency's duty to work with tribes on a “government-to-government” basis,<sup>35</sup> it makes sense to require concurrence with tribes. These provisions increase agencies' accountability to tribes. Many interest groups are entitled to consultation in the form of having their advice heard by an

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28. See *id.* § 800.5(b).

29. See, e.g., *id.* § 800.2(c)(2)(ii)(B), (c)(2)(i)(A), (c)(2)(ii), (c)(2)(ii)(A).

30. See Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2015); 36 C.F.R. § 800.5(a)(1).

31. 36 C.F.R. § 800.5 (2016).

32. 16 U.S.C. § 470a(d)(1)(A) (2015).

33. 36 C.F.R. § 800.5(a)(1).

34. See generally *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4 (D.D.C. 2016).

35. See, e.g., Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); 36 C.F.R. § 800.2; see also *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of the Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010).



agency, but under the concurrence provision, only tribes are additionally entitled to the agency's good faith effort to integrate their advice into final agency decisions. "Seeking concurrence" is just one instance of agencies' additional duties toward tribes.<sup>36</sup> These provisions mean that an agency's discretion is not absolute, but rather is attended by concrete obligations to tribes.<sup>37</sup>

## 2. The Power of Tribes as MOA Signatories

36 C.F.R. § 800.6(c) is another example of how Section 106 regulations assign duties beyond consultation. This provision addresses the Memorandum of Agreement (MOA), a document drafted to verify an agency's compliance with a decision at the end of the Section 106 process.<sup>38</sup> Only a select group of parties are allowed to choose to be signatories to the MOA.<sup>39</sup> These parties typically are the State Historic Preservation Officer (SHPO), the Tribal Historic Preservation Officer (THPO), ACHP, and tribes.<sup>40</sup> Tribes must be invited by agency officials to be signatories to an MOA,<sup>41</sup> while other consulting groups are eligible to be invited only to concur with the MOA.<sup>42</sup> Further, a tribe can take on the role of the SHPO,<sup>43</sup> and acquire signatory rights in this way. The most significant power tribes likely have as MOA signatories is the superintending power under Section 800.6(c)(8).<sup>44</sup> Under this provision, any signatory perceiving that a project is not conforming to the MOA may demand consultation and even terminate the MOA if not satisfied that the problem is being remedied.<sup>45</sup>

### B. Government-to-Government Relationship

The government-to-government relationship of the United States with tribes is another important NHPA Section 106 source that goes beyond consultation and consent. This relationship is recognized in the U.S. Con-

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36. See, e.g., 36 C.F.R. §§ 800.6(a) (government-to-government relationship), (c)(3) (Memorandum of Agreement signatory rights), 800.2(c)(2)(ii)(E) (ability to expand agency duties to tribes through agreement).

37. *Id.* § 800.2(c)(2)(ii)(E).

38. *Id.* § 800.6(c)(2).

39. *Id.* § 800.2(c).

40. *Id.* § 800.6(c).

41. *Id.* § 800.6(c)(2)(ii).

42. *Id.* § 800.6(c)(3).

43. *Id.* § 800.2(c)(2)(i)(A). The SHPO represents the public's interests in cultural and historical preservation. *Id.* § 800.2(c)(1)(i).

44. *Id.* § 800.6(c)(8).

45. *Id.*

stitution and has been developed in executive orders, statutory regulations, and case law in order to reaffirm the importance of the United States' respect for individuated tribal sovereignty.<sup>46</sup> But the government-to-government concept also triggers substantive rights.<sup>47</sup> The reason the government-to-government concept has not been distinguished from consultation and highlighted for its independent power, may be that it often appears alongside the duty of consultation, and could even be wrongly conflated with it.<sup>48</sup> But consultation is just a piece of the government-to-government relationship picture. The difference between consultation and a government-to-government relationship is clear from executive statements and orders since the Clinton Administration, NHPA regulations, and case law.<sup>49</sup>

### 1. Executive Order 13,175 and Other Executive Materials

Executive Order 13,175 (E.O. 13,175 or Order), issued by President Clinton in 2000,<sup>50</sup> is one of the most significant sources of executive support for both consultation and government-to-government relations. Prior scholarship identifies that E.O. 13,175 imposes consultation requirements on NHPA and NEPA.<sup>51</sup> But the Order also emphasizes the government-to-government relationship between the United States and tribes to impose independent conditions on all laws affecting tribes.<sup>52</sup> The Order followed a 1994 memo President Clinton wrote concerning tribal relations.<sup>53</sup> Many of the memo's principles also appear in E.O. 13,175, such as acknowledging the United States' unique, government-to-government relationship with tribes,

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46. See, e.g., Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); 36 C.F.R. § 800.2(c)(4), (f)(1).

47. Kirk Johnson, *Old Treaties and New Alliances Empower Native Americans*, N.Y. TIMES (Nov. 15, 2016), [https://www.nytimes.com/2016/11/16/us/old-treaties-and-new-alliances-empower-native-americans.html?\\_r=0](https://www.nytimes.com/2016/11/16/us/old-treaties-and-new-alliances-empower-native-americans.html?_r=0). Though it does not use the terminology, the note discusses how the "government-to-government" concept is being used to invoke treaty rights. *Id.*

48. See, e.g., Motion for Preliminary Injunction Request for Expedited Hearing, *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-1534-JEB), 2016 WL 4445382.

49. See, e.g., Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); 36 C.F.R. § 800.6; *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of the Interior*, 755 F. Supp. 2d 1104, 1104 (S.D. Cal. 2010).

50. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

51. Woods, *supra* note 8, at 79–82.

52. See Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

53. Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (Apr. 29, 1994) (setting out "principles that executive departments and agencies . . . are to follow in their interactions with American tribal governments").

and the requirement to conduct “consultation [with tribes] to the greatest extent.”<sup>54</sup> The Order’s distinction between “government-to-government” and “consultation” frames the alternative paradigm.

Executive Order 13,175 supports the alternative paradigm because it establishes consultation as a subordinate requirement of the government-to-government relationship. While the Order was primarily issued to establish greater consultation and coordination with tribes (as indicated by its title), the phrases “government-to-government” and “consultation” are used in ways that clarify the distinction between them.<sup>55</sup> The preamble to the Order states its purpose in part to be, “to strengthen the United States government-to-government relationship with Indian tribes.”<sup>56</sup> In the same sentence, establishing “regular and meaningful consultation” is mentioned, but is separated by a comma in a list of purposes.<sup>57</sup> Further, Section 2(a) of the Order recognizes the unique trust relationship is a fundamental principle that flows from the government-to-government relationship established by the U.S. Constitution, treaties, statutes, executive orders, and case law.<sup>58</sup> It is from this government-to-government relationship that the duty to consult tribes arises.<sup>59</sup>

In Section 3, where the criteria for policymaking are set out, E.O. 13,175 also defines the implications of the government-to-government relationship that stretch beyond consultation.<sup>60</sup> The criteria include delegating to tribes “the maximum administrative discretion possible.”<sup>61</sup> Most relevant to DAPL is Section 3(c), establishing the federal government’s obligations when it implements policies that have “tribal implications.”<sup>62</sup> The government must solicit tribes for their own policies, and “where possible, defer to Indian tribes to establish standards.”<sup>63</sup> This duty seems to go above and beyond consultation, even nearing consent. Section 3(c) also mentions consultation and because it is mentioned separately from the other duties, it must be a distinct concept.<sup>64</sup> Further, because consultation is a sub-provision in relation to the government-to-government provision giving rise to

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54. *Id.*; see Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

55. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

56. *Id.*

57. *Id.*

58. *Id.* § 2(a).

59. *Id.* § 3. This section says that certain “responsibilities” arise from the special relationship between the U.S. and tribes, and then goes on to mention tribal consultation as one of those responsibilities. *Id.*

60. *Id.*

61. *Id.* § 3(b).

62. *Id.* § 3(c).

63. *Id.* § 3(c)(2).

64. *Id.* § 3(c)(3).

certain responsibilities, consultation must be a component of government-to-government relations.<sup>65</sup>

The Obama Administration reaffirmed tribal sovereignty and the government-to-government relationship championed by the Clinton Administration.<sup>66</sup> It even implied greater agency obligations and protections for tribes, and maintained the distinction between consultation and government-to-government relations.<sup>67</sup> Just before the D.D.C. denied Standing Rock's motion for preliminary injunction in September of 2016, the Departments of Justice, the Interior, and the Army wrote a letter to tribes inquiring (1) how the federal government could better consult tribes within the current statutory scheme, and (2) what legislation might better promote the government-to-government relationship and consultation requirements.<sup>68</sup> Additionally, after the D.D.C. denied Standing Rock's motion for preliminary injunction, the Obama Administration halted DAPL construction pending the D.C. Circuit's evaluation of the case.<sup>69</sup> The Obama Administration continued to monitor the case and remained attuned to the tribe's sovereign interests.<sup>70</sup> The Administration even temporarily stayed approval of the permit to cross the Missouri River near the Standing Rock reservation so that alternate routes could be considered.<sup>71</sup>

## 2. NHPA and NHPA Section 106 Regulations—Explicit and Implicit References to the Government-to-Government Relationship

NHPA Section 106 and its accompanying regulations also distinguish government-to-government relations and consultation.

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65. See also *id.* § 5(a) (providing consultation greater, exclusive treatment).

66. See Exec. Order No. 13,647, 78 Fed. Reg. 39,539 (July 1, 2013) (establishing the White House Council on Native American Affairs).

67. *Id.* § 1 (discussing areas of development that the new counsel must promote in tribal communities).

68. Press Release, Dep't of Justice, Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (Sept. 9, 2016), <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing>.

69. *Obama Steps in With Major Action Halting Dakota Access Pipeline*, INDIANZ.COM (Sept. 9, 2016), <http://www.indianz.com/News/2016/09/09/obama-steps-in-with-major-action-halting.asp>.

70. Caitlin Yilek, *Obama: We're Examining Options to 'Reroute' ND Pipeline*, THE HILL (Nov. 1, 2016), <http://thehill.com/blogs/blog-briefing-room/energy-environment/303912-obama-were-examining-ways-to-reroute-the-nd>.

71. Gregor Aisch & K.K. Rebecca Lai, *The Conflicts Along 1,172 Miles of the Dakota Access Pipeline*, N.Y. TIMES (Mar. 20, 2017), [https://www.nytimes.com/interactive/2016/11/23/us/dakota-access-pipeline-protest-map.html?\\_r=1](https://www.nytimes.com/interactive/2016/11/23/us/dakota-access-pipeline-protest-map.html?_r=1).

NHPA directly affirms government-to-government duties.<sup>72</sup> Section 101(c)(2) allows a tribe to take on the role of the SHPO.<sup>73</sup> Section 101(d)(6)(A) states that properties of traditional religious or cultural importance to an Indian tribe or Native Hawaiian organization may be considered eligible for inclusion in the National Register.<sup>74</sup> And the next provision states that an agency shall consult about National Register eligibility with Indian tribes or Native Hawaiian organizations who consider a property to be of traditional religious or cultural importance.<sup>75</sup> Section 110(a)(2)—concerning the requirement for each agency to establish a preservation program to identify, evaluate, and nominate sites for the National Register of Historic Places, and to protect historic properties—mandates in subpart (D) that each agency consult “other Federal, State, and local agencies, Indian tribes, Native Hawaiian organizations.”<sup>76</sup> Grouping tribes with government-status entities, rather than with other groups who might simply be entitled to consultation, emphasizes that tribes have greater Section 106 power than other interest groups.<sup>77</sup>

NHPA regulations flesh out government-to-government responsibilities even further. 36 C.F.R. § 800.2, defining the participants in the Section 106 review, identifies consulting parties in subpart (c), and implies the government-to-government relationship.<sup>78</sup> It explains how tribes may assume the position of the SHPO, creates the THPO for the special benefit of tribes, and specifies how the presence or absence of these figures changes how an agency must communicate with a tribe.<sup>79</sup> The regulation requires agencies to be attentive of the unique relationship between the United States and tribes, and another mandates that consultation be conducted in a government-to-government manner.<sup>80</sup> These designations are exclusive to tribes, and they are presented in a section that defines the fundamental characteristics, standing, and prerogatives of consulting groups.<sup>81</sup> Other consulting parties—including local governments and the public at large—are

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72. National Historic Preservation Act §§ 101(c)(2), (d)(6)(A), 110(a)(2), 54 U.S.C. §§ 302504, 302706(b), 306102(b)(4) (2012).

73. *Id.* § 302702.

74. *Id.* § 302706(a).

75. *Id.* § 302706(b).

76. *Id.* § 306102(b)(4).

77. *Id.* § 306102. In fact, other consultation groups are mentioned nowhere in this section.

78. 36 C.F.R. § 800.2(c) (2016).

79. *Id.*

80. *Id.* § 800.2(c)(2)(ii)(B)–(C).

81. See *id.* § 800.2.

mentioned in separate provisions, and without the same level of duty attached as is to tribes.<sup>82</sup>

NHPA and its regulations confirm that the government-to-government standard includes much more than consultation. Jumping immediately to arguments about the adequacy of consultation ignores the fact that the law requires more for tribes than consultation, which is afforded to many interest groups. Further, important provisions included in the government-to-government framework may be overlooked. Indeed, USACE's own summary of the permitting process, with *de minimis* mention of the role of tribes in the process, suggests that USACE operates under the false impression that a tribe is simply another consulting party.<sup>83</sup> The document referred to begins, "[t]he Permit Process consists of a number of steps involving *the applicant, the Corps of Engineers, public and/or private organizations, and Federal, state and/or local agencies.*"<sup>84</sup> Tribes are not mentioned in this passage.<sup>85</sup> In fact, the word "tribe" appears only twice in the document, both times in discussing how the Clean Water Act may apply.<sup>86</sup> In USACE's explanation of pre-application consultations, tribes are not mentioned at all, even though they are supposed to be consulted as early as possible in the review process.<sup>87</sup> However, the document dedicates a substantial segment to public involvement.<sup>88</sup> In its short mention of NHPA and Section 106 review, the document mentions the THPO, but only to say that it and the SHPO may "review and comment" on certain permits.<sup>89</sup> This document demonstrates how extensive the slippage is when the government-to-government relationship is ignored.

To overcome ignorance of duties owed tribes, like that exhibited in USACE's permitting document, a firmer commitment to the government-to-government relationship is necessary. When the government-to-government concept is recognized as a legal foundation, so too are fundamental obligations, including consultation. Under that paradigm, consultation be-

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82. See *id.* § 800.2(d) (concerning the public, members of which are entitled to receive information about undertakings on historic properties and to provide comments). This entitlement affords much less of a role than tribes enjoy. *Id.*

83. See U.S. ARMY CORPS OF ENG'RS, U.S. ARMY CORPS OF ENGINEERS PERMITTING PROCESS INFORMATION, <http://www.lrl.usace.army.mil/Portals/64/docs/regulatory/Permitting/PermittingProcessInformation.pdf>.

84. *Id.* at 1 (emphasis added).

85. *Id.*

86. *Id.* at 5, 9.

87. See, e.g., *Te-Moak Tribe of Western Shoshone v. U.S. Dep't of the Interior*, 608 F.3d 592, 608–09 (9th Cir. 2010); *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of the Interior*, 755 F. Supp. 2d 1104, 1121 (S.D. Cal. 2010); 36 C.F.R. § 800.1.

88. See U.S. ARMY CORPS OF ENG'RS, *supra* note 83.

89. *Id.* at 5.

comes a more important process with respect to tribes than to other interest groups, and the understanding that tribes are owed a higher degree and quality of consultation is recognized.

### 3. Government-to-Government and Other Alternative Paradigm Concepts in Case Law

Standing Rock's counsel heavily relied on *Quechan Tribe v. Department of Interior* to show that agencies must give tribes consultation of the highest quality.<sup>90</sup> But *Quechan Tribe* also employs many alternative paradigm concepts to suggest that the U.S. relationship with tribes stands for more than high-quality tribal consultation.

In *Quechan Tribe*, a tribe sought a preliminary injunction against the Department of Interior (DOI) and the Bureau of Land Management (BLM) decision to enjoin approval of a solar energy project on the grounds that the agencies failed to adequately consult the tribe.<sup>91</sup>

The court highlighted that Section 106 tribal consultation is more than “an empty formality,” and is an obligation to be conducted in a way that recognizes the “government-to-government relationship between the Federal Government and Indian tribes.”<sup>92</sup> Additionally, the court cited the Ninth Circuit decision *Pit River Tribe v. United States Forest Service* for the proposition that agencies have a fiduciary duty to tribes, noting that “at a minimum [this fiduciary duty] means agencies must comply with general regulations and statutes.”<sup>93</sup> This fiduciary duty is part of the “unique relationship” between the United States and tribes, and it is not one that is enjoyed by ordinary interest groups owed consultation.<sup>94</sup>

The court reaffirmed the government-to-government relationship and how it strengthens agencies' duty to consult.<sup>95</sup> It noted specific duties agencies have and privileges of tribes that follow the government-to-government relationship and are required under NHPA.<sup>96</sup> These include early tribal consultation on the most important issues—such as tribal authority to challenge an agency's contrary finding of National Register eligibility—and the

90. See Motion for Preliminary Injunction Request for Expedited Hearing, *supra* note 48, at 20–23.

91. *Quechan Tribe*, 755 F. Supp. 2d at 1106–08. The tribe also argued that the agency's analysis was flawed, but the Court focused on the inadequate consultation claim, finding it most compelling. *Id.* at 1107–08.

92. *Id.* at 1108–09 (citing 36 C.F.R. § 800.2(c)(2)(ii)(A)).

93. *Id.* at 1110 (citing *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006)).

94. *Id.* at 1109–10 (citing 36 C.F.R. § 800.2).

95. *Id.* at 1108–09.

96. *Id.* at 1108–10.

“special consideration” of consulting tribes.<sup>97</sup> The court held that consultation of one tribe does not relieve the agency of consulting another.<sup>98</sup>

As to consultation, the court said:

[w]hile public informational meetings, consultations with individual tribal members, meetings with government staff or contracted investigators, and written updates are obviously a helpful and necessary part of the process, they don’t amount to the type of “government-to-government” consultation contemplated by the regulations. This is particularly true because the Tribe’s government’s requests for information and meetings were frequently rebuffed or responses were extremely delayed as BLM-imposed deadlines loomed or passed.<sup>99</sup>

The court also confirmed that mere “contact” with a tribe does not constitute consultation according to 36 C.F.R. § 800.5(c)(2)(ii).<sup>100</sup> The court emphasized that a government-to-government relationship requires more than procedural consultation.<sup>101</sup> Instead, tribal consultation requires meaningful interaction, which integrates tribal views into decisions.<sup>102</sup>

In order for the higher standard of consultation and duties to tribes to be controlling, courts would need to recognize that the higher standard is plainly apparent in NHPA and regulations, and would need to appreciate the effect that the government-to-government relationship has. The D.D.C. did not do this in considering Standing Rock’s case. Further, courts, administrators, and litigators interpreting Section 106 need to reconsider their understanding of the statute, and recognize the duties to tribes beyond consultation. The government-to-government concept is one of the strongest alternatives to the old paradigm, and its application would greatly benefit tribes. The government-to-government concept would increase the value and rigor of consultation, while supporting many other obligations, including the recognition of tribes’ unique position among consulting parties.

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97. *Id.*

98. *Id.* at 1112.

99. *Id.* at 1119.

100. *Id.* at 1118–19.

101. *Id.* at 1118.

102. *See id.*



### C. *International Law—Strengths, Weaknesses, and the Alternative Paradigm’s Solution*

Some scholars pushing for a consent-based standard jettison domestic law because they perceive domestic law as centered around weakened consultation.<sup>103</sup> They identify significant sources of international law that should bind the United States to the FPIC standard in dealing with tribes.<sup>104</sup> Some of these international legal sources of FPIC may be enforceable indirectly; for example, the United States’ membership in the ILO.<sup>105</sup> Others, such as the UNDRIP, are less certain to bind the United States at all.<sup>106</sup>

Even if these sources were legally binding, they are not enforceable under U.S. domestic law. But they remain persuasive reminders to the United States of its international obligations to honor the FPIC standard. Meanwhile, the alternative paradigm is organic to domestic law, and can still achieve many of the goals of FPIC.

#### 1. Direct but Ignored—Membership in the ILO

One of the most direct and significant legal obligations on the United States to honor the FPIC standard is its membership in the ILO.<sup>107</sup> The ILO has been a champion of indigenous peoples’ rights and a proponent of the utmost respect for and duty-recognition toward indigenous peoples since its formation in 1989.<sup>108</sup> As a member, the United States is legally bound to these standards. But, as DAPL illustrates, the U.S. has not always honored those obligations.

Though it is a leading member, the United States has ratified only 14 of the ILO’s 189 treaties.<sup>109</sup> One of the ILO treaties that the United States

103. See, e.g., Miller, *supra* note 6, at 37; Suagee & Stearns, *supra* note 8, at 61; Woods, *supra* note 8, at 67.

104. See, e.g., Miller, *supra* note 6, at 37; Suagee & Stearns, *supra* note 8, at 61; Woods, *supra* note 8, at 67.

105. International Labour Organization, *Alphabetical List of ILO Member Countries*, ABOUT THE ILO, <http://www.ilo.org/public/english/standards/relem/country.htm> (last visited May 8, 2017).

106. Woods, *supra* note 8, at 89.

107. INT’L LABOUR ORG., *The U.S.: A Leading Role in the ILO*, ABOUT THE ILO, <http://www.ilo.org/washington/ilo-and-the-united-states/the-usa-leading-role-in-the-ilo/lang-en/index.htm> (last visited May 8, 2017).

108. See Lisl Brunner & Karla Quintana, *The Duty to Consult in the Inter-American System: Legal Standards after Sarayaku*, INSIGHTS, Nov. 28, 2012, <https://www.asil.org/insights/volume/16/issue/35/duty-consult-inter-american-system-legal-standards-after-sarayaku>.

109. See Int’l Labour Org., *Ratification for United States*, RATIFICATION BY COUNTRY, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:102871](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102871) (last visited May 8, 2017).

has not ratified is the Indigenous and Tribal Peoples Convention (ITPC).<sup>110</sup> The United States' refusal to ratify the ITPC may be due to the fact that it gives indigenous groups rights to their lands, and defines "lands," as including even those lands that indigenous people merely "use."<sup>111</sup> This definition could be interpreted as giving tribes rights to their ancestral lands, beyond reservation boundaries that the United States has established. Being accountable to an international forum through ratification of the ITPC may raise concerns for the United States because of the impact it would have on the United States' management of the trust relationship.

## 2. Significant but Not Mandatory—UNDRIP

The UNDRIP establishes the FPIC standard in international law.<sup>112</sup> But the UNDRIP's authority for any nation critically depends on whether it has ratified the treaty.<sup>113</sup> At the time the U.N. General Assembly adopted the UNDRIP in 2007, 143 countries supported approval of the treaty, and only four did not.<sup>114</sup> The United States was among the four that did not,<sup>115</sup> although it later conditionally signed the UNDRIP in response to pressures from the international community.<sup>116</sup> In doing so, it maintained that the instrument was not legally binding and that a consultation standard would remain law.<sup>117</sup> These conditions demonstrate the United States' wariness to move from a consultation standard to one based on consent.

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110. See Int'l Labour Org., *Ratification of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, RATIFICATION BY CONVENTION, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312314:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO) (last visited May 8, 2017).

111. INT'L LABOUR STANDARDS DEP'T, INT'L LABOUR ORG., UNDERSTANDING THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (NO. 169) 21 (2013), [http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—normes/documents/publication/wcms\\_205225.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/publication/wcms_205225.pdf).

112. See G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007), [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf); see also *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007); *Sarayaku v. Ecuador*, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012).

113. See JEFFREY DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 60–61 (4th ed. 2015).

114. Press Release, United Nations General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007), <http://www.un.org/press/en/2007/ga10612.doc.htm>.

115. *Id.*

116. Woods, *supra* note 8, at 88–89.

117. *Id.*

Two international judicial decisions—*Saramaka v. Suriname* and *Sarayaku v. Ecuador*—analyze some of the UNDRIP’s most important provisions. Possible enforcement of those provisions may have caused the United States’ wariness about ratifying the UNDRIP.

In *Saramaka v. Suriname*, the Inter-American Commission on Human Rights (ICHR) alleged that the state of Suriname had violated the Saramaka People’s rights by, *inter alia*, failing to adopt “effective measures to recognize their right to the use and enjoyment of the territory they have traditionally occupied and used.”<sup>118</sup> The court found that Suriname was bound to the FPIC standard based on the UNDRIP.<sup>119</sup> The court first noted that Suriname had recently supported the approval of the UNDRIP by the U.N. General Assembly.<sup>120</sup> Article 32.2 of the UNDRIP requires signatories to obtain FPIC of indigenous peoples that may be affected by “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.”<sup>121</sup> The court found that consultation was required, and explained that because Suriname had approved the UNDRIP and was carrying out a large-scale development that would have a major impact within the Saramaka territory—*i.e.*, the taking of land the tribe had traditionally used—Suriname had a duty to obtain the Saramaka People’s FPIC.<sup>122</sup> Because Suriname had not met this duty, the ICHR held that it violated the UNDRIP.<sup>123</sup>

Applying Article 32.2 of the UNDRIP as *Saramaka* did would significantly impact the United States’ obligations if the United States had fully ratified the UNDRIP. Instead, the United States remains unbound by Article 32.2’s requirements despite having “endorsed” the UNDRIP in 2010.<sup>124</sup> The conditional ratification rendered the UNDRIP completely unable to hold the United States to FPIC, even in international forums, and left the United States with essentially unchanged commitments to tribes.

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118. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, at 2 (Nov. 28, 2007). *Saramaka* is interesting on one count because, although it relied greatly on UNDRIP, it also considered Suriname’s membership in the ILO, even though it had not ratified ITPC, as a significant factor in requiring FPIC. *Id.* at 27. By extension, the court would consider the United States bound to FPIC by virtue of its ILO membership. *Id.*

119. *Id.* at 39.

120. *Id.*

121. *Id.*

122. *See id.* at 39–41. The court did not say that Suriname had signed the UNDRIP, however, it considered Suriname bound because of its show of support within the context of many other instances to suggest that FPIC has become an international norm. *Id.*

123. *See id.* at 40.

124. Woods, *supra* note 8, at 89–90.

*Sarayaku v. Ecuador* also endorses FPIC. In *Sarayaku*, the ICHR charged Ecuador with failing to consult the Sarayaku People before granting oil concessions in a contract with an Argentinian oil company.<sup>125</sup> The ICHR held that Ecuador had failed to properly consult the Sarayaku People, in violation of its duty to do so under the UNDRIP, which it had approved in 2007.<sup>126</sup> However, the ICHR also made important observations about consent and its relationship to adequate consultation.<sup>127</sup>

Thorough discussion about consent in *Sarayaku* was unnecessary because consultation—a precursor to consent—did not occur, so the question of consent was not before the court.<sup>128</sup> Nonetheless, the ICHR still addressed consent by acknowledging that the project Ecuador approved in this case was to be a large-scale development with significant impacts on the Sarayaku People.<sup>129</sup> Relying on *Saramaka*, the ICHR found that Ecuador's obligations included not only consultation, but also the Sarayaku People's FPIC.<sup>130</sup> If *pro forma* consultation had been performed, consent would have been an issue, and thus the court's discussion clarified what consent could require under just slightly different circumstances.

*Saramaka* and *Sarayaku* acknowledge that under the UNDRIP, FPIC is a fundamental right owed to indigenous peoples.<sup>131</sup> The United States has been hesitant to accept FPIC as binding. But even without recognition of FPIC in domestic law, FPIC's goals can still be achieved through the alternative paradigm. The alternative paradigm would achieve the central purpose of FPIC—ensuring tribes' rights to self-govern and be shown respect.

### 3. Advantages of Embracing the Alternative Paradigm Over International Standards

The alternative paradigm offers two benefits over international norms: (1) enforceability, and (2) the alternative paradigm's unique benefits grounded in the development of the United States' relationship with tribes.

On enforceability, international law carries less force than domestic law in U.S. courts, and in many cases is not binding. For example, the UNDRIP, because it is simply a General Assembly Resolution, is a non-bind-

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125. Brunner & Quintana, *supra* note 108.

126. *Id.*; United Nations General Assembly, *supra* note 114.

127. Brunner & Quintana, *supra* note 108.

128. *Id.*

129. *Id.* at 39.

130. *Id.*

131. See *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007); see also *Sarayaku v. Ecuador*, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 245, at 2 (June 27, 2012).

ing instrument.<sup>132</sup> Further, United States courts interpreting duties and obligations to tribes look to principles of Federal Indian law, and rarely consult international law.

The alternative paradigm might also provide a gateway for incorporating international norms in U.S. law. As an example, recall the duty under NHPA Section 106 review to “seek concurrence” with a tribe that disagrees with an agency’s finding of “no adverse effects.”<sup>133</sup> This provision to seek concurrence falls under the alternative paradigm. It has independent value because it demands that the agency do more than seek the tribe’s advice through consultation.<sup>134</sup> It also maps on to international law; specifically, the ITPC’s General Policy 6(2) instructs that consultations be conducted “with the objective of achieving agreement or consent to the proposed measures.”<sup>135</sup> The case for seeking concurrence generally is strong if one pairs the fact that the United States is a significantly-contributing member of the ILO with the knowledge that domestic law requires agreement with tribes be sought in in some instances, such as in making adverse effects determinations.<sup>136</sup> By tying international standards and domestic law, United States courts may be more willing to apply those provisions that comport with international standards. The alternative paradigm provides provisions to do so.<sup>137</sup>

On the other hand, looking only to apply international standards might exclude many of the advantages of domestic law. These advantages include the United States’ fiduciary duty to tribes, the government-to-government relationship, and the right of tribes to significantly participate in agency review processes.<sup>138</sup> Because international law only recently recognized indigenous peoples’ rights, the international legal relationship to indigenous peoples has yet to evolve in ways that the United States’ relationship with tribes has.

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132. Woods, *supra* note 8, at 87.

133. 36 C.F.R. § 800.5(c), (c)(2)(iii) (2015).

134. *Id.*

135. CONVENTION CONCERNING INDIGENOUS AND TRIBAL PEOPLES IN INDEPENDENT COUNTRIES art. 6(2), June 27, 1989, 1989 I.L.M. 1384.

136. Int’l Labour Org., *ILO Washington*, ABOUT THE ILO, <http://www.ilo.org/washington> (last visited Apr. 19, 2017); see 36 C.F.R. § 800.5.

137. See *infra* Section III.

138. See *e.g.*, *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep’t of the Interior*, 755 F. Supp. 2d 1104, 1110 (S.D. Cal. 2010); 36 C.F.R. §§ 800.2, 800.6(c).

### III. DAPL PRELIMINARY INJUNCTION: ANALYSIS AND THE ALTERNATIVE PARADIGM

This Part considers the D.D.C.'s denial of Standing Rock's motion for preliminary injunction against DAPL. This section first analyzes the case under the current understanding NHPA Section 106, with a focus on consultation. The D.D.C. found for the agency on these terms, but the case could have come out for Standing Rock.<sup>139</sup> The D.D.C.'s failure to find for the tribe demonstrates the need for additional measures, such as the alternative paradigm, to secure tribes' interests. This Part then discusses how the alternative paradigm would have helped Standing Rock's case. This Part also suggests ideas for future administrative actors, tribes and litigators to utilize the alternative paradigm going forward.

#### *A. How D.D.C. Could Have Found for Standing Rock on the Current Understanding of Section 106 Review's Requirements*

Current understandings of Section 106 review notwithstanding, D.D.C. could have found for Standing Rock by properly evaluating the required scope of agency review. Under NHPA, the required scope of agency review is determined by asking how much "control and responsibility" an agency has over the impact of a project.<sup>140</sup> This term of art determines whether an agency should be accountable for indirect effects of a project over which the agency formally has only partial permitting power. D.D.C. should have found that the entirety of DAPL was within USACE's control and responsibility, which by consequence would have meant that USACE failed to fulfill its obligations to the tribe.

#### 1. "Control and Responsibility" and its Meaning Under NWP 12

An adequate consultation for NHPA purposes must set the appropriate scope for an agency's Section 106 review.<sup>141</sup> Scope sets the parameters of the project for the purposes of agency review responsibilities, which in turn determines the extent to which a tribe will be consulted to identify historic and cultural sites, as well as to evaluate a project's affect on them.<sup>142</sup> In the Standing Rock case, the question of scope focused on whether the review

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139. See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4 (D.D.C. 2016).

140. See 33 C.F.R. pt. 325, App. B (7)(b)(2) (1990).

141. See 36 C.F.R. § 800.4.

142. *Id.*

process needed to consider the effects of the entire pipeline (entire project analysis), or whether the agency could only be required to review those parts of the project that required permit verification.<sup>143</sup> NHPA regulations require an entire project analysis if a permit is so essential to a project's completion that it could be said that the agency issuing the permit has determinative power over its completion; for example, where a large portion of the project requires permitting.<sup>144</sup> The Standing Rock tribe argued that USACE had control and responsibility over the entire pipeline because NHPA defines the potential effect of an undertaking to include the indirect effects of the permitted activity on historic properties.<sup>145</sup> However, the D.D.C. held the tribe was "miss[ing] the mark" because USACE's regulations only designate control and responsibility as existing for the limited portions of a project requiring permitting or approval.<sup>146</sup> The D.D.C. concluded that since USACE never had authority to regulate the entire pipeline, it also was not responsible for considering the effects of the entire pipeline.<sup>147</sup> The court compared *Sierra Club v. U.S. Army Corps of Engineers*, where the D.D.C. found USACE was not responsible for conducting a NEPA analysis for an entire pipeline, particularly for portions not subject to federal control or permitting.<sup>148</sup>

As a threshold matter, it is important to consider factors implicating the scope of review. Here, DAPL was authorized under Nation-Wide Permit 12 (NWP 12).<sup>149</sup> NWP 12 was issued in 2012.<sup>150</sup> NWP 12 permits are general permits for utility line construction that allow a permittee to construct wherever the permit applies without notifying USACE, unless the specific site requires a "Pre-Construction Notification" (PCN) or "verification."<sup>151</sup> PCNs and verifications trigger site-specific NHPA analyses points.<sup>152</sup> Analysis is deferred until a permittee seeks to build where the PCN or verification applies.<sup>153</sup> Alternatives to general permits are individual permits, which are often required for specific projects, and which require review of the entire project that the permit would allow.<sup>154</sup> NWP 12 allows for utility line crossings where no more than half of an acre of juris-

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143. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 30–32.

144. 33 C.F.R. pt. 325, app. B (7)(b).

145. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 30–31.

146. *Id.* at 31.

147. *Id.* at 31–32.

148. *Id.* at 31.

149. *Id.* at 27.

150. *Id.*

151. *Id.* at 11.

152. *Id.*

153. *Id.* at 29–30.

154. *Sierra Club v. U.S. Army Corp of Eng'rs*, 803 F.3d 31, 38 (D.C. Cir. 2015).

dictional waters will be affected at a given crossing.<sup>155</sup> DAPL's water crossings were covered under the NWP 12 because construction at each crossing was predicted to affect no more than half of an acre of jurisdictional waters.<sup>156</sup> Further, USACE did not consider the effects of the entire pipeline because much of it was covered by the NWP 12 and therefore not subject to PCN or verification.<sup>157</sup>

This permitting framework was central to D.D.C.'s decision, as the court's analysis indicated that NWP 12s and PCNs made it easier to defer to USACE's decision to ignore the effects of the entire project.<sup>158</sup> The court reasoned that construction at many sites was peremptorily, unconditionally authorized.<sup>159</sup> The D.D.C. repeatedly indicated that one of the biggest reasons for not taking a wider scope was because the NWP 12 was authorizing a pipeline for which a large portion was planned to be built on private lands.<sup>160</sup> Under NWP 12, USACE's review also ignored the effects that eventually running crude oil through the pipeline would have.<sup>161</sup> Although pumping crude oil might be viewed as a "reasonably foreseeable environmental effect" of permitting pipeline construction,<sup>162</sup> the Standing Rock case demonstrates that NWP 12 allows USACE to ignore such effects.<sup>163</sup>

## 2. Control and Responsibility

Aside from the NWP 12/PCN issue, the parties argued about how the question of scope relates to control and responsibility alone. Though the D.D.C. did not cite it directly, 33 C.F.R. pt. 325, Appendix B (7)(b) establishes the "control and responsibility" standard and loosely defines it. It states:

The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases

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155. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 11–12.

156. *Id.*

157. *See id.* at 26–27.

158. *See id.* at 26–33.

159. *See, e.g., id.* at 16–17 (describing PCN # 1 as "not subject to the CWA or RHA").

160. *E.g., id.* at 7, 13, 34.

161. *See id.* at 11.

162. *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1064–65 (10th Cir. 2015) (McHugh, J., concurring).

163. *See Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 35 (holding that unless the NWP 12 permit is being sought for dredge or fill activities federal jurisdiction to issue an injunction is not triggered).



where the environmental consequences of the larger project are essentially products of the Corps permit action.

Typical factors to be considered in determining whether sufficient 'control and responsibility' exists include:

- (i) Whether or not the regulated activity comprises 'merely a link' in a corridor type project (e.g., a transportation or utility transmission project).
- (ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.
- (iii) The extent to which the entire project will be within Corps jurisdiction.
- (iv) The extent of cumulative Federal control and responsibility.<sup>164</sup>

The D.D.C., interpreting Appendix C, concluded that USACE did not have control and responsibility over the entire pipeline project.<sup>165</sup> The D.D.C. relied on other cases involving utility lines and Appendix B in order to reach that conclusion.<sup>166</sup> The court cited *Sierra Club v. U.S. Army Corps of Engineers*, a D.C. Circuit opinion, affirming the D.D.C.'s decision that issuing an NWP 12 for a 593-mile pipeline, requiring verifications for only five percent of the pipeline and with water crossings constituting just 2.3 percent of the pipeline, did not require an entire project analysis.<sup>167</sup> The Sierra Club argued that the pipeline could not possibly be completed without USACE granting the permit, and that as a result, the project was within USACE's control and responsibility.<sup>168</sup> The D.D.C. had disagreed, deeming that USACE could not have control and responsibility when such a small percentage of the pipeline required federal permitting.<sup>169</sup> The D.D.C. saw the Standing Rock case similarly, finding that DAPL—a 1,172-mile pipeline, requiring permitting for only three percent of its length and with just one percent of its length within jurisdictional water crossings—did not require enough federal permitting to put the entire project within

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164. 33 C.F.R. pt. 325, app. B (7)(b)(2) (1990).

165. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 31. Appendix C is the sister appendix, providing the procedures under NHPA, to Appendix B, which provides the procedures for the National Environmental Policy Act. 33 C.F.R. pt. 325, App. B, App. C (1990).

166. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 31.

167. *Id.*; *Sierra Club v. U.S. Army Corp of Eng'rs*, 803 F.3d 31, 39, 50 (D.C. Cir. 2015).

168. *Sierra Club*, 803 F.3d at 51.

169. *Id.* at 42.

USACE's control and responsibility.<sup>170</sup> The D.D.C. also cited *Winnebago Tribe of Nebraska v. Ray*, where a permit was sought for construction of an electric utility line.<sup>171</sup> There, the Eighth Circuit found an entire project analysis was not required because a significant portion of the line did not require federal permitting.<sup>172</sup> Again, the D.D.C. drew a connection between DAPL and the electric utility line because both involved projects which required federal permitting for only a small percentage of their lengths, and where the permitted portions were considered mere links.<sup>173</sup>

While D.D.C.'s interpretations of *Sierra Club* and *Winnebago* were reasonable, other interpretations would have been better supported. For example, while *Sierra Club* involved a pipeline, it is inapposite because it did not involve an Indian tribe.<sup>174</sup> This fact is crucial because of the additional Section 106 duties that arise when a tribe is involved; those duties are designed to incorporate tribes' expertise about cultural and historical resources.<sup>175</sup> These additional duties were especially important in considering Standing Rock's motion because the Missouri River was just one of several water crossings along DAPL's route with significant cultural and historical importance to the tribe.<sup>176</sup>

Although *Winnebago* involved a tribe,<sup>177</sup> it is distinguishable from Standing Rock's case because its scope of analysis included a unique feature, which the D.D.C. overlooked. In *Winnebago*, the plaintiffs were concerned about the line's potential effect on certain kinds of eagles that the tribe revered.<sup>178</sup> While the *Winnebago* court did not find that USACE needed to review the effects of the entire line, it did consider whether an electric current running through permitted portions of the line would have adverse effects on the eagles.<sup>179</sup> That approach resembles an "entire project analysis," because running electricity or oil through a line only becomes a consideration if the line as a whole is under review. While *Winnebago* and the Standing Rock case both considered portions of larger projects, only the

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170. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 13, 31.

171. *Id.* at 31.

172. *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 272–73 (8th Cir. 1980). The section 10 permit sought in *Winnebago* would allow the 67-mile line to cross only 1.25 miles of permit-required area. *Id.*

173. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 31.

174. *See Sierra Club*, 803 F.3d 31.

175. 36 C.F.R. § 800.4(c)(1) (2016).

176. Motion for Preliminary Injunction Request for Expedited Hearing, *supra* note 48, at 8–9. One of the most contested locations was the confluence of the Cannon Ball and Missouri Rivers, where there are perfectly rounded stones the tribe holds sacred. *Id.*

177. *Winnebago*, 621 F.2d at 269.

178. *Id.* at 274.

179. *Id.*

D.D.C. and USACE in Standing Rock's case limited review to the consequences of construction of the portions.<sup>180</sup> *Winnebago* was not supportive to the D.D.C. because USACE review in *Winnebago* appropriately considered the tribes' interests, while USACE review for DAPL did not consider Standing Rock's interests.

Along with its incomplete interpretations of *Sierra Club* and *Winnebago*, the D.D.C. also ignored reasonable, alternative interpretations of Appendix B and C to part 325. Under Appendix B § 7(b)(1), the district engineer is directed to establish scope based on what is in USACE's "control and responsibility."<sup>181</sup> Appendix B § 7(b)(2) adds that USACE's "control and responsibility" extends *beyond the limits of USACE jurisdiction* where Federal involvement is sufficient to turn an essentially private action into a federal action.<sup>182</sup> In DAPL's case, then, USACE had control and responsibility of the whole project based on how indispensable permits were to the construction of DAPL. It is questionable, if not impossible, that the pipeline could have been completed without the permits.<sup>183</sup> And if the segments could not have connected any other way, there would be no point in Dakota Access LLC building segments of line in the 97 percent of space in between the permit stretches.<sup>184</sup> Because USACE's approval was so crucial to DAPL's completion, Appendix B suggests that the district engineer should have extended review "beyond the limits of USACE jurisdiction."<sup>185</sup> This means that USACE should have consulted Standing Rock about surveying non-permit sites that could be affected, particularly ancestral lands where historical properties were likelier to be.

The fullest view of Appendix C similarly goes against the D.D.C.'s reasoning because it mandates that the district engineer take into account the effects of an undertaking on historic properties both within and *beyond jurisdictional waters*.<sup>186</sup> Additionally, where the undertaking may adversely impact any National Historic Landmark, the district engineer is to condi-

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180. See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4 (D.D.C. 2016).

181. 33 C.F.R. pt. 325, app. B (7)(b)(1) (1990).

182. *Id.*

183. Complaint for Declaratory and Injunctive Relief at 15–16, *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), 2016 WL 4033936. The pipeline would have had to avoid over 200 sites where verifications were required and would have had to go around the end of the 2,341 mile Missouri River. *Id.*

184. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 13 (stating that permitting was required for only three percent of DAPL's length).

185. See 33 C.F.R. pt. 325, app. B (7)(b)(1).

186. *Id.* at app. C(2)(a).

tion any permit to minimize harm to such landmark.<sup>187</sup> *Pye v. United States* interpreted this latter portion to apply to any historic sites, not only National Historic Landmarks.<sup>188</sup> There, the Fourth Circuit found that USACE had violated Appendix C by ignoring the effect of authorizing a road to be built adjacent to an historic African-American cemetery, when the cemetery was eligible for inclusion in the National Register.<sup>189</sup>

The important contrast between these interpretations of Appendix B and Appendix C and the D.D.C.'s interpretations of them is that the D.D.C.'s interpretations failed to account for USACE's *responsibility* for adverse effects beyond its authority or jurisdiction; the D.D.C.'s interpretations focused solely on control.<sup>190</sup> The D.D.C. gave an incomplete representation of the regulations by conforming to USACE's view that jurisdictional control is the sole determinant of control and responsibility.<sup>191</sup>

Finally, the D.D.C. failed to consider two other important cases—*Save our Sonoran, Inc. v. Flowers* and *White Tanks Concerned Citizens, Inc. v. Strock*—to interpret control and responsibility. *Sonoran* clarified the difference between authority and responsibility.<sup>192</sup> As mentioned in discussing Appendix B and Appendix C to part 325, the D.D.C. seemed unconcerned about equating these two terms.<sup>193</sup> In the D.D.C.'s view, USACE was not required to conduct an entire project analysis given its limited authority.<sup>194</sup> *Sonoran* shows that the regulations do not justify that logical leap. As *Sonoran* put it, “while it is the development’s impact on jurisdictional waters that determines the scope of the Corps’ permitting *authority*, it is the impact on the environment at large that determines the Corps’ NEPA *responsibility*.”<sup>195</sup> Thus, USACE bore responsibility for the risks DAPL posed to the environment or historic properties beyond the scope of its authority.

Here, DAPL did pose risks of harm to historical and environmental resources beyond the permitting area. This is apparent from the travesty already mentioned, where DAPL mowed over sacred tribal burial grounds

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187. *Id.*

188. *Pye v. United States*, 269 F.3d 459, 470 (4th Cir. 2001) (holding plaintiff's interests to be “within the zone of interests targeted by the National Historic Preservation Act”).

189. *Id.* at 462, 470.

190. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 30–31 (D.D.C. 2016); *see id.* at 23–24, 25.

191. *Id.*

192. *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1122 (9th Cir. 2004).

193. *See Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 31.

194. *Id.* at 32.

195. *Save Our Sonoran*, 408 F.3d at 1122 (discussing Appendix C) (emphasis added). For our purposes you could substitute “NHPA” for “NEPA,” and “impact on historical and cultural resources” for “impact on the environment at large.”

on ancestral lands.<sup>196</sup> If USACE had fulfilled its duties according to Appendix B and Appendix C, it would have made avoiding those burial grounds a condition for approving DAPL permits. But because USACE focused its review solely on the exact jurisdictional bounds of the permits, the agency was not performing due diligence and consulting tribes about what historic properties could be beyond the permit area.

The second case the D.D.C. ignored, *White Tanks Concerned Citizens, Inc. v. Strock*, explains USACE's increased responsibility as it becomes clearer that "a development could not go forward without a permit."<sup>197</sup> *White Tanks'* interpretation of "control and responsibility" offers a more comprehensive way to think about the Standing Rock case, where the permits for DAPL might be characterized as "mere links."<sup>198</sup> *White Tanks* imagined the scope of review for any case as falling along a spectrum.<sup>199</sup> At one end of the spectrum are "capillary" scenarios, which existed in *Sonoran* and *White Tanks* because the permitting was required for wetlands which naturally spread the permit sites throughout the project area.<sup>200</sup> On this end of the spectrum, a project would be impossible without permitting.<sup>201</sup> At the other end are mere "link" scenarios, where the permits are not essential to completion of the project, such that it would be easy to build around the site where a permit is sought.<sup>202</sup>

DAPL falls closer to the capillary end of the *White Tanks* spectrum, as it would have been practically impossible to build the pipeline around the end of the 2,341-mile Missouri River,<sup>203</sup> and to avoid over 200 water body cross-

196. Alexander Sammon, *A History of Native Americans Protesting the Dakota Access Pipeline*, MOTHERJONES (Sept. 9, 2016), <http://www.motherjones.com/environment/2016/09/dakota-access-pipeline-protest-timeline-sioux-standing-rock-jill-stein>.

197. *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1040 (9th Cir. 2009).

198. 33 C.F.R. pt. 325, app. B (7)(b)(2).

199. *White Tanks*, 563 F.3d at 1040.

200. *Id.*; see *Save Our Sonoran*, 408 F.3d at 1113.

201. *White Tanks*, 563 F.3d at 1040.

202. *Id.*

203. Motion for Preliminary Injunction Request for Expedited Hearing, *supra* note 48, at 8; Dakota Access LLC was well aware of this problem. Initially, DAPL was to cross the Missouri near Bismarck, but after Bismarck residents voiced complaints about safety concerns, Energy Transfer Partners changed the pipeline's route southward to pass the Missouri River adjacent to the Standing Rock reservation. Catherine Thorbecke, *Why a Previously Proposed Route for the Dakota Access Pipeline was Rejected*, ABC NEWS (Nov. 3, 2016), <http://abcnews.go.com/US/previously-proposed-route-dakota-access-pipeline-rejected/story?id=43274356>. Looking at a map, it is clear that the ravine is narrower next to Bismarck, which means that less length of the pipeline would be running under the river if it crossed at the point near Bismarck. Such instances of environmental racism against Natives are nothing new. Omar Saleem, *Overcoming Environmental Discrimination: The Need for a Disparate Impact*

ings which required verifications.<sup>204</sup> Despite the fact that 97 percent of DAPL was to be built on land beyond federal jurisdiction,<sup>205</sup> it is nearly certain that the pipeline could not have connected from the Bakken oil fields in North Dakota to the refinery in Illinois without federal permitting.<sup>206</sup> The water bodies DAPL crosses are scattered across the Midwestern terrain in a fashion that is more capillary-like than link-like on the *White Tanks* spectrum. More importantly, the crossing at the Missouri River was indispensable to completing the pipeline.<sup>207</sup>

On the other hand, this discussion of “authority” versus “responsibility” could have been inconsequential if the D.D.C. were committed to deferring to agency decision making.<sup>208</sup> This framework would lead a court to be less concerned about ensuring that agencies fulfill their duties to tribes, and the Section 106 review process would be viewed as another instance of procedural duties which agencies have a wide amount of discretion in deciding how to meet. On these terms, the D.D.C. was well positioned to defer to USACE’s judgment, because doing so conformed with the increasingly deferential stance courts take toward agencies’ expertise.<sup>209</sup> This watering down of Section 106 duties may not be completely due to a disrespect for tribes. Rather, it could reflect the courts’ commitment to deferring to agencies.

Prioritizing agency deference is only a viable approach so long as the alternative paradigm is ignored. The alternative paradigm refocuses judicial review to acknowledge tribes as parties to whom the agency and the court both owe deference. Put another way, the alternative paradigm is a reminder that Section 106 review is not just another example of congressionally delegated procedural requirements that the agency alone has vast discretion to interpret and control. Under the alternative paradigm, Section 106 treats tribes as additional stakeholders with significant say, such that the APA framework, on which the D.D.C. significantly relied,<sup>210</sup> would not always be appropriate to resolve Section 106 conflicts.

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*Test and Improved Notice Requirements in Facility Siting Decisions*, 19 COLUM. J. ENVTL. L. 211, 221, 223 (1994).

204. See Complaint for Declaratory and Injunctive Relief, *supra* note 183, at 11.

205. *Supra* note 184 and accompanying text.

206. See Complaint for Declaratory and Injunctive Relief, *supra* note 183.

207. Motion for Preliminary Injunction Request for Expedited Hearing, *supra* note 48, at 8.

208. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 205 F. Supp. 3d at 30–32 (D.D.C. Sept. 9, 2016).

209. JAMES T. O’REILLY, *ADMINISTRATIVE RULEMAKING: STRUCTURING, OPPOSING, AND DEFENDING FEDERAL REGULATIONS* § 18.2 (2d ed. 2016).

210. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 30.

## B. *Standing Rock's Brief with the Alternative Paradigm*

The Standing Rock tribe litigators could have made arguments with a stronger emphasis on law falling under the alternative paradigm. While they did make mention of some of that law, they failed to elaborate on the specific demands of those pieces of law and show how USACE failed to meet them. Instead, they focused solely on consultation. While it is good to highlight consultation duties, without alternative paradigm concepts, USACE's argument was nearly equally as strong as Standing Rock's on the question of adequate consultation, because this concept has become nothing more than a *pro forma* checkbox. Before deferring to the agency, the D.D.C. found that it only needed to confirm that USACE had checked the consultation box. This section discusses how emphasizing alternative paradigm provisions would have weighed in Standing Rock's favor.

Primary sources of the alternative paradigm include:

- 1) NHPA Section 106 regulations requiring agencies to "seek concurrence" and giving tribes the right to be MOA signatories, and
- 2) The government-to-government relationship and NHPA Section 106 and case law applications of the relationship in substantive form.<sup>211</sup>

Neither the D.D.C.'s opinion nor Standing Rock's motion for preliminary injunction mentioned the "seek concurrence" provision.<sup>212</sup> This provision is valuable to the goal of NHPA Section 106 under the alternative paradigm—respecting tribes' active role in the identification and review of historic sites.<sup>213</sup>

The D.D.C. and Standing Rock counsel also failed to highlight the independent value of the government-to-government relationship.<sup>214</sup> Properly administered, NHPA Section 106 review recognizes both higher-quality procedural review and substantive differences in review triggered in response to the government-to-government relationship.<sup>215</sup> But the D.D.C.'s opinion ignored these provisions, and instead analyzed NHPA Section 106 as another case of procedural-level review, without recognizing

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211. See *supra* Part II.A-B.

212. See *Standing Rock Sioux Tribe*, 205 F. Supp. 3d 4; see also Motion for Preliminary Injunction Request for Expedited Hearing, *supra* note 48.

213. See *supra* Part II.A.

214. See *Standing Rock Sioux Tribe*, 205 F. Supp. 3d 4; see also Motion for Preliminary Injunction Request for Expedited Hearing, *supra* note 48.

215. See, e.g., Exec. Order No. 13,175, § 3(b)–(c), 65 Fed. Reg. 67,249 (Nov. 6, 2000) (instructing agencies to give tribes administrative power and deference where appropriate); 36 C.F.R. § 800.2(c) (2016).

the unique obligations to tribes Section 106 creates.<sup>216</sup> For example, the D.D.C. said it could not “conclude that the Corps does not have the ability to promulgate these general permits at all. As a result, the Corps’ effort to speak with those it thought might be concerned was sufficient to discharge its NHPA obligations.”<sup>217</sup> This quote is one of many<sup>218</sup> in the opinion that is so revealing because it shows that USACE and the D.D.C. viewed tribes as no more than some of “those [USACE] thought might be concerned,” —in other words, as just another interest group.

This quote from the D.D.C.’s opinion is also interesting because it closely precedes a reference to 36 C.F.R. § 800.4(b)(1).<sup>219</sup> That provision discusses the added level of effort USACE is expected to put forth in identifying historic properties.<sup>220</sup> The D.D.C. focused on Section 800.4 as a reason to defer to the agency,<sup>221</sup> but Section 800.4 actually concerns the THPO, tribes, and special duties owed to them.<sup>222</sup> In particular, Section 800.4 lays out requirements for involving tribes in identifying properties of cultural or historic significance.<sup>223</sup> Given the regulation’s deference to tribes, the D.D.C.’s citation of it to support agency deference was misleading. The fullest reading of Section 800.4 suggests a goal of assigning active roles to the THPO and tribes in identifying cultural and historic properties.<sup>224</sup> The regulation creates greater procedural and substantive duties that align with the government-to-government relationship enjoyed by tribes, unique among interest groups.<sup>225</sup>

216. See *Standing Rock Sioux Tribe*, 205 F. Supp. 3d 4.

217. *Id.* at 28.

218. Another, for example, concerned programmatic agreements, which the regulations say tribes are supposed to play a crucial role in: “There is, indeed, no indication that such a requirement would even be feasible for a nationwide permitting scheme given the sheer number of possible consulting parties.” *Id.* at 29.

219. See *id.* at 33.

220. 36 C.F.R. § 800.4(b)(1).

221. See *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 33.

222. See 36 C.F.R. § 800.4(b)(1).

223. See *id.* § 800.4.

224. Just before the provision the court cites, Section 800.4(a)(4) says that the agency shall “[g]ather information from any Indian tribe or Native Hawaiian organization identified pursuant to § 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register.” *Id.* § 800.4(a)(4). Later in the section, Section 800.4(c)(1) instructs that “[t]he agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.” *Id.* § 800.4(c)(1). Section 800.4(c)(2) goes even further, saying that the THPO’s opinion on whether a property is eligible or ineligible has decisive power, and that a tribe disagreeing with a determination may request that ACHP instruct the agency official to obtain a determination of eligibility. *Id.* § 800.4(c)(2).

225. See 36 C.F.R. § 800.4.



Standing Rock's litigators did not sufficiently highlight Section 800.4's empowering aspects or even its ties to the government-to-government relationship.<sup>226</sup> Because of this, their arguments about the importance of Section 800.4's provisions favoring tribes fell flat when compared to the regulation's agency-deferential provisions.<sup>227</sup> The only time Standing Rock litigators presented Section 800.4's empowering aspects was by quoting *Quechan Tribe*, and even then, the quote it used was did not directly address the power tribes have in the review process.<sup>228</sup> In its complaint for declaratory and injunctive relief, Standing Rock litigators used the phrase "government-to-government" just once, and weakened its impact by mentioning that the regulations set duties to the public.<sup>229</sup> Besides failing to tie the government-to-government concept to substantive provisions, this context of public duties erased the unique obligations owed tribes among other stakeholders. While counsel included "government-to-government" more often in its motion for preliminary injunction, its references were vague and only observed "government-to-government" in quotes or parentheticals about other cases, rather than taking ownership of the phrase for Standing Rock's argument.<sup>230</sup> Finally, Standing Rock litigators left out any mention of "government-to-government" in its Emergency Motion for Injunction Pending Appeal.<sup>231</sup>

Both the D.D.C. and Standing Rock litigators ignored *Quechan Tribe* to establish government-to-government relationship duties. The D.D.C. mentioned *Quechan Tribe* just twice, toward the end of the opinion, without mention of the phrase "government-to-government."<sup>232</sup> Even those refer-

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226. See Complaint for Declaratory and Injunctive Relief, *supra* note 183, at 8–9; see also Motion for Preliminary Injunction Request for Expedited Hearing, *supra* note 48, at 4, 25, 33.

227. See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 49–50 (D.D.C. 2016).

228. Motion for Preliminary Injunction Request for Expedited Hearing, *supra* note 48, at 31. The motion discusses how *Quechan Tribe* characterized tribes' views as being owed "special consideration" *Id.* It also illustrates that Section 800.4 "alone requires at least seven issues about which the Tribe as a consulting party, is entitled to be consulted before the project was approved." *Id.* As mentioned earlier, however, *Quechan Tribe* applied the government-to-government relationship in its reasoning so thoroughly that tying it as a theme to all of the regulations would have increased the value of consultation. See *supra* Part II.B.3.

229. Complaint for Declaratory and Injunctive Relief, *supra* note 183, at 33.

230. See *id.* at 11, 13, 22, 25. *But see id.* at 32 (providing an argument closer to harnessing "government-to-government").

231. See Emergency Motion for Injunction Pending Appeal, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4 (D.D.C. 2016) (No. 16-5259); Motion for Preliminary Injunction Request for Expedited Hearing, *supra* note 48.

232. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 32–33. It is also worth noting that the court mentioned the phrase "government-to-government" just four times throughout the

ences to *Quechan Tribe* seemed designed to discredit its value, which the D.D.C. may have found necessary because Standing Rock counsel so heavily referenced the case (for purposes other than to establish the government-to-government relationship) in its motions and briefs.<sup>233</sup> Standing Rock attorneys made no mention of *Quechan Tribe* in their Complaint, but mentioned the case sparsely in their Emergency Motion for Injunction Pending Appeal, and throughout their memo in support of the Expedited Hearing Request.<sup>234</sup> In the Emergency Motion for Injunction, counsel's most powerful argument touched upon empowering tribes, though it did not use the phrase "government-to-government."<sup>235</sup> Instead, counsel quoted *Quechan Tribe* to highlight the special roles of tribes as sovereigns in the preservation of historic properties.<sup>236</sup> This was a step in the right direction, but was not used enough to establish a strong theme of government-to-government obligations. Counsel's Motion for Preliminary Injunction primarily relied on *Quechan Tribe* to affirm consultation and to establish that DAPL posed irreparable harm.<sup>237</sup> The case would have carried more weight if *Quechan Tribe* had been referenced to evidence the power of tribes through the government-to-government relationship, rather than casting them as victims owed mere consultation.

Counsel failed to argue that Section 106 empowers tribes, which would have rebutted agency deference. USACE practices *pro forma* tribal consultation, which does not achieve meaningful consultation as Section 106 intends: consultation that reflects the government-to-government relationship. An argument under the alternative paradigm would have pushed for greater procedural responsibility from USACE, as well as increased substantive rights of Standing Rock.

The D.D.C. clearly did not find Section 106 to require much procedural rigor:

[N]either the NHPA nor the Advisory Council regulations require that any cultural surveys be conducted for a federal undertaking.

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whole opinion, twice in the context of relaying the account of USACE's failure to engage in a government-to-government relationship, and twice to take note of USACE's lip-service. *Id.* at 9, 19, 20, 28.

233. See *Standing Rock Sioux Tribe*, 205 F. Supp. 3d 4; see also Motion for Preliminary Injunction Request for Expedited Hearing, *supra* note 48; Emergency Motion for Injunction Pending Appeal, *supra* note 231.

234. Emergency Motion for Injunction Pending Appeal, *supra* note 231, at 15, 19, 20; Motion for Preliminary Injunction Request for Expedited Hearing, *supra* note 48.

235. Emergency Motion for Injunction Pending Appeal, *supra* note 231, at 19–20.

236. *Id.*

237. See Motion for Preliminary Injunction Request for Expedited Hearing, *supra* note 48.

The regulations instead demand only that the Corps make a “reasonable and good faith effort” to consult on identifying cultural properties, which “may include background research, consultation, oral history interviews, sample field investigations, and field surveys.” 36 C.F.R. § 800.4(b)(1). It goes without saying that ‘may’ means may.<sup>238</sup>

Again, Section 800.4 suggests it involves significant tribal involvement in the identification process.<sup>239</sup> While the D.D.C. may have been correct that a “good faith effort” does not need to include all of the due diligence measures listed in Section 800.4(b)(1), the regulation cannot dispense with soliciting tribes and taking seriously their views about how to best identify historic properties.<sup>240</sup>

The broad wording and generous preference for tribes throughout NHPA Section 106 presents ample opportunity to apply the alternative paradigm, which should have occurred in Standing Rock’s case.<sup>241</sup> By preferring agency deference, the D.D.C. disregarded the long-standing Indian law canons of construction, which mandate that treaties and statutes be interpreted in favor of tribes.<sup>242</sup> By ignoring this interpretative approach, the D.D.C. read Section 106 review to regard tribes as deserving no more respect and roles than any other interest group.

### C. Implementing the Alternative Paradigm

Many actors must work together for the alternative paradigm to be implemented. First, agencies must reformulate or revitalize their policies to empower tribes. They should focus in particular on policies recognizing the government-to-government relationship. Understanding what duties are owed tribes has not been consistent across agencies; agencies with more robust policies should lead the way.<sup>243</sup> Oversight agencies, like ACHP, should press for greater compliance with best practices. Second, tribes and advocates should incorporate alternative paradigm concepts whenever possi-

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238. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 33 (quotations omitted).

239. *See* 36 C.F.R. § 800.4 (2016).

240. *See id.* § 800.4(b)(1) (the last two sentences assert that tribal views should be considered in identification and for any confidentiality concerns a tribe may have).

241. *See, e.g., id.*

242. Jacob Schuman, *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1100–01 (2013).

243. EPA’s policies tend to be more robust, for example, EPA’s document on consultation with tribes encourages relying on treaties, while USACE’s policies tend to be less robust, or fail to take tribes into account at all. *Compare* EPA, EPA POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES (2011), <https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>, *with* U.S. ARMY CORPS OF ENG’RS, *supra* note 83.

ble, in order to empower tribes and reaffirm their rights to “seek concurrence,” serve as signatories to MOAs, and engage in meaningful government-to-government relations. Finally, litigators need to embrace alternative paradigm concepts as substantive provisions of law, in order to appreciate that tribes are entitled to greater participation and owed greater deference than other interest groups in Section 106 review.

## 1. Agencies

Although CEQ and ACHP regulations advise agencies on how to engage in government-to-government relations and meaningfully consult tribes, those agencies must establish their own policies.<sup>244</sup> It is worth reviewing existing agency policies, both to identify best practices and note room for improvement.

First, agencies should recognize the difference between consultation and government-to-government obligations. Meaningful consultation is a necessary piece of government-to-government obligations, but it is not the entire picture. The Bureau of Indian Affairs (BIA), distinguished these concepts helpfully in a 2000 memorandum: “it is through [the government-to-government] relationship,” that the duty to consult arises.<sup>245</sup> Once the distinction between the two concepts is recognized, tribal consultation itself gains significance, and a larger picture of duties owed tribes emerges. The BIA memo reflected this as well, defining consultation as “a process of government-to-government dialogue between the Bureau of Indian Affairs and Indian tribes regarding proposed Federal actions in a manner intended to secure meaningful and timely tribal input.”<sup>246</sup> The memo provides some examples of how this goal can be accomplished.<sup>247</sup> The memo’s advice on tribal consultation characterizes the process as more than the notice and comment process that other interest groups engage in.<sup>248</sup> This picture of tribal consultation is at odds with the view conveyed in a USACE document on the permitting process, which affords tribes only *de minimis* mention and limits tribal participation to having the opportunity to “review and comment.”<sup>249</sup>

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244. 40 C.F.R. § 1507.3; Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (Apr. 29, 1994).

245. Memorandum from Kevin Gover, Assistant Sec’y of Indian Affairs, Bureau of Indian Affairs Government-to-Government Consultation Policy § 1 (Dec. 13, 2000), <https://www.bia.gov/cs/groups/public/documents/text/idc-002000.pdf>.

246. *Id.* § 4.

247. *See id.*

248. *Id.*

249. *See* U.S. ARMY CORPS OF ENG’RS, *supra* note 83.

Government-to-government obligations must not be limited to consultation; the current, weak view of consultation is a result of agencies' failure to see relations beyond it. A recent article by Robinson Meyer demonstrates that failing to distinguish consultation and government-to-government relations results in a reduced importance and value of the latter.<sup>250</sup> Meyer, claiming to convey the "legal case" for Standing Rock, treats consultation and government-to-government relations as equivalent:

Crucially, as well, federal agencies must approve projects in a "government-to-government" way. A local tribe is not supposed to be hustled in at the end for a rubber stamp, but included throughout the process as a collaborative body. It is *this* right—the right to be consulted—that the Standing Rock Sioux and their legal team assert was infringed.<sup>251</sup>

If the government-to-government concept is to be of value, it needs to be distinguished from tribal consultation.

Executive agencies are likely the most effective avenues for reaffirming government-to-government practices, because each agency has a mandate to effectuate government-to-government relations.<sup>252</sup> An EPA guidance document exemplifies this by encouraging agency reliance on treaties during tribal consultations.<sup>253</sup> Relying on treaties recognizes that the present government-to-government relationship is a continuation of a government-to-government relationship that has existed from the earliest contacts with tribes, and also provides firmer ground for deferring to tribes as governments, in accordance with the Indian Hard Look Doctrine.<sup>254</sup> Additionally, ACHP advises agencies to rely on the special expertise of tribes to identify historic properties of religious and cultural significance.<sup>255</sup>

To account for the possibility of agencies giving mere lip service to government-to-government relations, or failure to be consistent across practices, oversight agencies should seek to enforce greater consistency of poli-

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250. Robinson Meyer, *The Legal Case for Blocking the Dakota Access Pipeline*, THE ATLANTIC (Sept. 9, 2016), <https://www.theatlantic.com/technology/archive/2016/09/dapl-dakota-sitting-rock-sioux/499178/>.

251. *Id.*

252. 40 CFR § 1507.3; Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (Apr. 29, 1994).

253. EPA, EPA POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES: GUIDANCE FOR DISCUSSING TRIBAL TREATY RIGHTS 3, 6 (2011), [https://www.epa.gov/sites/production/files/2016-02/documents/tribal\\_treaty\\_rights\\_guidance\\_for\\_discussing\\_tribal\\_treaty\\_rights.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf).

254. Choctaw Nation of Indians v. United States, 318 U.S. 423, 431–432 (1942).

255. Advisory Council on Historic Pres., *Consulting with Indian Tribes in the Section 106 Review Process*, WORKING WITH SECTION 106, <http://www.achp.gov/regs-tribes.html> (last updated Aug 22, 2005).

cies within and between agencies and departments. For NEPA, this oversight role is assigned to CEQ in the field of environmental protection.<sup>256</sup> NHPA delegates oversight to ACHP in the area of historic preservation.<sup>257</sup> Oversight bodies should aim to ensure that their constituent agencies apply best practices. For example, USACE's "Tribal Nations Program" attempts to implement that agency's own procedures for complying with government-to-government relations. Unfortunately, that policy is not as robust as those of other departments and agencies,<sup>258</sup> and the USACE's compliance with its own program is inconsistent at best.<sup>259</sup>

## 2. Tribes and Advocates

Tribes and advocates should seek to affirm tribes' rights as sovereigns, and use some of the alternative paradigm sources identified in this Note to pursue that end. These sources include the tribal prerogative to be signatory to MOAs, and to demand that agencies "seek concurrence" when tribes disagree with findings about adverse effects.<sup>260</sup> For institutional support, tribes should recognize their ability to bring in ACHP as a consultation party.<sup>261</sup> ACHP could, for example, deter other agencies from abusing their Section 106 review discretion.<sup>262</sup> ACHP began to take on this role in the Standing Rock case, but may have acted too late in the process to make a difference, or may have lacked appreciation for tribes' rights beyond consultation.<sup>263</sup>

## 3. Litigators and Courts

As illustrated above, Standing Rock's counsel could have better highlighted alternative paradigm concepts, and the D.D.C. should have acknowledged them.<sup>264</sup> In every Section 106 case involving tribes, litigators should begin with the premise that tribes have significant roles to play in the identification and decision-making process, and that this is because of their sovereignty and expertise in identifying culturally and historically sig-

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256. 40 C.F.R. § 1500.1 (2016).

257. See 54 U.S.C. § 306108 (2012).

258. See, e.g., *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 23–24 (D.D.C. 2016) (discussing the ACHP's "skepticism" with the Corp's determination and consulting process).

259. *Id.*

260. See *supra* Part II.A.

261. Advisory Council on Historic Pres., *Section 106 Regulations: Section-by-Section Questions and Answers*, WORKING WITH SECTION 106, <http://www.achp.gov/106q&a.html#800.6> (last updated Aug. 30, 2013).

262. *Id.*

263. See *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 23–24.

264. See *supra* Part III.B.

nificant properties. Between these principles and the Indian law canons of construction, the alternative paradigm appears to be the correct understanding of the law.

#### IV. CONCLUSION

The *Standing Rock* case clearly demonstrates how consultation, as currently conducted, does not adequately protect tribal interests. Although some have assumed that a consent-based standard presents the only reasonable alternative, this Note identifies existing, enforceable sources of U.S. law that could improve agency accountability to tribes. These alternative provisions have not been as widely discussed as consultation—but if they were enforced, they would strengthen agencies' obligations to tribes.