

4-1-2016

The Great Sioux Nation v. the "Black Snake": Native American Rights and the Keystone XL Pipeline

Cindy S. Woods

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/bhrlr>



Part of the [Environmental Law Commons](#), [Human Rights Law Commons](#), and the [Indian and Aboriginal Law Commons](#)

Recommended Citation

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 (2016).

Available at: <https://digitalcommons.law.buffalo.edu/bhrlr/vol22/iss1/3>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Human Rights Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

THE GREAT SIOUX NATION V. THE “BLACK SNAKE”: NATIVE AMERICAN RIGHTS AND THE KEYSTONE XL PIPELINE

Cindy S. Woods*

ABSTRACT

The Keystone XL Pipeline has been shrouded in controversy almost since its conception. As a structure intending to cross the Canadian border into the United States, the Pipeline must receive presidential approval before construction can commence. Since 2008, TransCanada has attempted to obtain this approval unsuccessfully. Criticism against the Pipeline has focused largely on the negative environmental impacts that will likely accompany its construction and utilization, and it is precisely these environmental concerns that have ultimately stymied presidential approval and made international headlines. In November 2015, the U.S. government denied TransCanada’s application, effectively killing the Keystone XL project. While the Keystone XL project no longer poses a physical threat to the environment, an overview of the U.S. government’s consideration of the project reveals drastic flaws in process, specifically in regards to the human rights of a substantial portion of individuals who would be negatively affected by the Keystone XL Pipeline—the Sioux Nation.

The Pipeline was set to run through a substantial portion of the Black Hills of South Dakota—the sovereign and treaty lands of the Great Sioux Nation. This “black snake” threatened not only the environment of the Sioux lands, but also sites sacred to the tribes. The Sioux Nation had risen up in defense of their lands, and their right to free, prior and informed consent (FPIC) before the state could undertake projects on their indigenous lands. While the U.S. government maintains it complied with domestic standards regarding Indian consultation and with its perverse interpretation of the right to FPIC protected under the U.N. Declaration of the Rights of Indigenous Peoples, its actions fell drastically short of those expected by the United Nations and required by the Inter-American Human Rights System. This paper argues that under the American Declaration on the Rights and Duties of Man, the U.S. should have obtained the fully informed consent of the Sioux Nation before approving the Keystone XL Pipeline.

* J.D., Georgetown University Law Center; M.Phil., University of Cambridge; B.A., University of Oklahoma. The author would like to thank Professor Harry Sachse for his guidance and comments, and Priya Thangarajah, for everything. © 2015, Cindy S. Woods.

INTRODUCTION

The controversy surrounding TransCanada's Keystone XL Pipeline project has become sustained front-page news in the U.S. A political saga of epic proportions: After a midterm shake up in Congress in late 2014, proponents of the project were determined to approve its construction.¹ While a bill achieving this proposal was narrowly defeated in the Senate in November 2014, Congressional supporters of the multi-billion dollar project vowed to redouble their efforts in the next session.² In February 2015, Congress managed to pass a bill obviating the need for presidential approval in the Keystone context, which was promptly vetoed by President Obama.³ While Congress was unable garner enough support to override the veto, attempts at passing a similar bill in hopes of garnering the numbers necessary to overcome the presidential veto once again continued to cause concern for many affected stakeholders—chief among them, Native American groups. Ultimately, in November 2015, the U.S. government denied TransCanada's application, theoretically putting an end to the Keystone XL controversy.⁴ However, controversy surrounding the Keystone XL Pipeline still persists in regards to the process undertaken by the government to consult affected indigenous groups. While the ultimate harm did not come to fruition, ancillary harm in connection to the indigenous right to free, prior and informed consent did.

The Keystone XL Pipeline is a proposed addition of the Keystone Pipeline system that would carry tar sands oil from Alberta, Canada across the U.S. Great Plains on its way to Nebraska. Along the trail, this “black snake”⁵ would cross over both sovereign and treaty lands of the Great Sioux Nation, threatening not only the sacred sites and burial grounds unfortunate

1. See, e.g., Jamie Henn, What the Midterms Mean for Keystone XL, Huffington Post (Nov. 4, 2014, 4:53 PM), http://www.huffingtonpost.com/jamie-henn/midterms-keystone-xl_b_6102548.html.

2. See, e.g., Paul Kane & Juliet Eilperin, Democrats Block Keystone Pipeline, but GOP Vows New Fight When it Takes Over, Wash Post (Nov. 18, 2014), http://www.washingtonpost.com/politics/democrats-block-keystone-pipeline-but-gop-vows-a-new-fight-when-they-takeover/2014/11/18/bbcff9ce-6f56-11e4-8808-afaa1e3a33ef_story.html.

3. Coral Davenport, Senate Fails to Override Obama's Keystone Pipeline Veto, N.Y. Times (March 4, 2015), http://www.nytimes.com/2015/03/05/us/senate-fails-to-override-obamas-keystone-pipeline-veto.html?_r=0.

4. Coral Davenport, Citing Climate Change, Obama Rejects Construction of Keystone XL Oil Pipeline, N.Y. Times (Nov. 6, 2015), http://www.nytimes.com/2015/11/07/us/obama-expected-to-reject-construction-of-keystone-xl-oil-pipeline.html?_r=0.

5. Winona Laduke, The Black Snake Hears a Song: Declaring War on the Keystone Pipeline, Indian Country Today Media Network (Nov. 21, 2014), <http://indian>

enough to be in its path, but also the well-being of Mother Earth herself, and all those who depend on her.⁶ In order to prevent this environmental and cultural threat from becoming a reality, Sioux tribes from throughout the affected area came together to demand observance of their sovereign rights and stop the Keystone XL project.

Affected Native American tribes demanded that the federal government respect their right to free, prior, and informed consent (FPIC) before approving the Keystone XL project.⁷ According to the Universal Declaration of the Rights of Indigenous Peoples (UNDRIP), states shall obtain the FPIC of affected indigenous peoples before approving projects that may affect them.⁸ The steps undertaken by the U.S. towards fulfilling this non-binding international commitment fell drastically short of international standards. However, Native Americans’ demand that their right to FPIC be respected was more than mere aspiration—it is obligation. The Inter-American Human Rights System, and in particular the Inter-American Commission on Human Rights, has clearly endorsed the indigenous right to informed consent through its jurisprudence.⁹ This paper will illustrate that under the provisions of the American Declaration on the Rights and Duties of Man, the U.S. was obligated to obtain the consent of the Sioux Nation before allowing development on their lands.

Part II introduces the Keystone XL project, describing its proposed implementation and political history. Part III discusses the Native American tribes affected by the proposed pipeline and their main concerns about the pipeline’s construction on their treaty lands. Part IV overviews the existing U.S. domestic law obligations regarding tribal consultations. Part V analyzes U.S. consultation efforts with affected Native American tribes in the Keystone XL case. Part VI presents the consultation requirements under international law of both the United Nations and Inter-American Human Rights System, arguing that regardless of any U.S. obligation under the U.N. Declaration on the Rights of Indigenous Peoples, property rights protected under the American Declaration in the Inter-American Human Rights System obligates the U.S. to obtain Native American consent. Part VII concludes by stating that affected Native American tribes should have been

countrytodaymedianetwork.com/2014/11/21/black-snake-hears-song-declaring-war-keystone-pipeline.

6. Mother Earth Accord, <http://www.ienearth.org/mother-earth-accord/> (last visited Dec. 6, 2014).

7. *Id.*

8. United Nations Declaration on the Rights of Indigenous Peoples, art. 19, 32(2), G.A. Res. 61/195, U.N. Doc. A/RES/61/195 (Sept. 13, 2007) [hereinafter UNDRIP].

9. See generally *infra* Part VI, Section C.

afforded their right to consent to or deny the approval of the Keystone XL Pipeline in their territory.

A. *The Keystone XL Pipeline Project Approval Process*

The Keystone XL Pipeline is a proposed extension to the existing Keystone Pipeline system. The present system consists of over 2,500 miles of pipeline, stretching straight across the U.S., to transport crude oil from Hardisty, Alberta to markets in the Midwest and Gulf Coast.¹⁰ The Keystone System is owned and operated by TransCanada, a Calgary based energy company and one of the continent's largest energy infrastructure providers.¹¹ The proposed Keystone XL expansion, in its ultimate form, would add an additional 1,179 miles of pipeline to the existing system to carry crude oil from Hardisty across the Great Plains to Steele City, Nebraska.¹² The company had been seeking approval for the construction of the Keystone XL expansion since 2008; however, due to political and environmental pressures, their application was ultimately denied in November 2015.¹³

Presidential approval is required before constructing an international pipeline. Under Executive Order 13337, the Secretary of State is empowered with receiving and reviewing applications for cross-border pipeline construction, operation, and maintenance.¹⁴ In reviewing an application, the Secretary of State must consult with numerous other governmental department and agency heads, and may also "consult with such State, tribal and local government officials" as he deems appropriate.¹⁵ The Secretary of State may only issue a Presidential Permit if he finds the proposed project, after due consultation, to "serve the national interest."¹⁶ Additionally, under the National Environmental Policy Act of 1969 (NEPA), all agencies of the Federal Government must conduct an environmental impact assessment of major Federal actions "significantly affecting the quality of the human environment."¹⁷

10. *Keystone Pipeline System*, TRANS CANADA, <http://www.transcanada.com/oil-pipelines.html> (last visited Dec. 6, 2014).

11. *About Us*, TRANS CANADA, <http://www.transcanada.com/about-us.html> (last visited Dec. 6, 2014).

12. *Keystone XL Pipeline Project*, TRANS CANADA, <http://www.transcanada.com/keystone.html> (last visited Dec. 6, 2014).

13. Davenport, *supra* note 4.

14. Exec. Order No. 13337, 3 C.F.R. § 13337.1(b) (2004).

15. *Id.* § 1(e).

16. *Id.* § 1(g).

17. National Environmental Policy Act of 1969 §102, 42 U.S.C. §4332 (2012); For all iterations of the proposed Keystone XL Pipeline, the United States Environmental Protection Agency and Council on Environmental Quality have found the project's

TransCanada first applied for a Presidential Permit to construct Keystone XL in September 2008.¹⁸ The originally proposed route traversed a substantial portion of the Sand Hills region of Nebraska and proposed an additional stretch of pipeline between Cushing, Oklahoma to the Texas Gulf Coast.¹⁹ In the Final Environmental Impact Statement for the first Keystone XL proposal, the Secretary of State determined more information was needed to fully evaluate the application; specifically, more knowledge was required regarding possible alternative routes within Nebraska that would avoid the environmentally important Sand Hills region, a large swath of wetlands that sit atop the Ogallala Aquifer.²⁰ According to President Obama, “because this permit decision could affect the health and safety of the American people as well as the environment, and because a number of concerns have been raised through a public process, we should take the time to ensure that all questions are properly addressed and all the potential impacts are properly understood.”²¹ However, after Congress forced presidential decision-making in December 2011 by passing a rider in the Temporary Payroll Tax Cut Continuation Act compelling President Obama to decide on the Permit decision within sixty days, he was forced to reject the application, citing insufficient time to obtain the additional information necessary to make an informed decision on the project’s effects on the national interest.²²

approval to constitute a major federal action that may have significant environmental impact, thus requiring an environmental impact statement.

18. Kristine L. Delkus, *TransCanada Keystone Pipeline, L.P., Application for Presidential Permit*, (Sept. 19, 2008), <http://keystonepipeline-xl.state.gov/documents/organization/181769.pdf>.

19. U. S. Dep’t. of State Bureau of Oceans & Int’l. Env’tl. & Sci. Affairs, Final Env’tl. Impact Statement for the Keystone XL Project: Executive Summary (2011), <http://keystonepipeline-xl.state.gov/documents/organization/182010.pdf> (last visited Dec. 13, 2014) [Hereinafter Final EIS].

20. *Id.*; Media Note, Dep’t of State, Office of the Spokesperson, Keystone XL Pipeline Project Review Process, Decision to Seek Additional Information, (Nov. 20, 2011), <http://www.state.gov/r/pa/prs/ps/2011/11/176964.htm>.

21. Press Release, The White House Office of the Press Secretary, Statement by the President on the State Department’s Keystone XL Pipeline Announcement (Nov. 10, 2011), <http://www.whitehouse.gov/the-press-office/2011/11/10/statement-president-state-departments-keystone-xl-pipeline-announcement>.

22. Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, § 501 (2011); Media Note, U.S. Dep’t of State, Office of the Spokesperson, Denial of the Keystone XL Pipeline Application (Jan. 18, 2012), <http://www.state.gov/r/pa/prs/ps/2012/01/181473.htm>.

TransCanada submitted a new Presidential Permit application in May 2012,²³ with two major changes. First, it removed the Gulf Coast portion of the originally proposed pipeline.²⁴ Presidential approval of this portion was not necessary because it did not cross an international border.²⁵ Second, the newly proposed pipeline route was mapped to narrowly avoid the Sand Hills Region and other areas identified as having soil and topographic characteristics similar to the Sand Hills.²⁶ This change, contends TransCanada, largely obviates local environmental concerns—"[t]he re-route ensures Keystone XL will have minimal environmental impact by avoiding the area defined as the Nebraska Sandhills, crossing fewer miles of threatened and endangered species habitat and considerably fewer miles of erodible soils."²⁷

As required by NEPA, the Department of State prepared a supplemental Environmental Impact Study (SEIS) for the Keystone XL project, premised on the pipeline's new parameters.²⁸ The final SEIS, published in January 2014, found the project's possible deleterious effects on the environment not significant.²⁹ While many believed the final SEIS to have cleared the way for presidential approval of Keystone XL, in April 2014, President Obama, facing increasing political pressure from environmentalists and industry alike, extended the review process indefinitely.³⁰

Following a shift in political power during the 2014 midterm elections, in which Republicans regained control of the Senate while maintaining con-

23. Kristine L. Delkus, Application of TransCanada Keystone Pipeline, L.P. For a Presidential Permit Authorizing the Construction, Connection, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to be Located at the United States-Canada Border (May 4, 2012), <http://keystonepipeline-xl.state.gov/documents/organization/189504.pdf>.

24. *Id.* at 3.

25. U.S. Dep't. of State Bureau of Oceans & Int'l. Env'tl. & Sci. Affairs, Final Supplemental Env'tl. Impact Statement for the Keystone XL Project: Executive Summary (2014), <http://keystonepipeline-xl.state.gov/documents/organization/221135.pdf> (last visited Dec. 13, 2014) [hereinafter Final SEIS]. Please note that the final Steele City segment re-route was not decided when TransCanada submitted its second Presidential Permit application as it was still being debated by the Nebraska legislature.

26. *Id.*

27. *TransCanada: Nebraska Evaluation Report on Keystone XL Re-route Released*, TRANSCANADA (Jan. 7, 2013), <http://keystone-xl.com/transcanada-nebraska-evaluation-report-on-keystone-xl-re-route-released/>.

28. Final SEIS, *supra* note 25.

29. *See id.*

30. *Obama Administration Delays Keystone XL Pipeline Review*, CBS NEWS (Apr. 18, 2014; 3:53 PM), <http://www.cbsnews.com/news/obama-administration-delays-keystone-xl-pipeline-review/>.

trol of the House, there is renewed energy within Congress to force approval of the Keystone XL Pipeline.³¹ While a bill doing just that was narrowly defeated in the Senate in late November 2014,³² by February 2015, the Republican-controlled Congress had garnered enough support to pass a similar bill—though President Obama promptly vetoed it.³³ Unable to override the veto, the GOP vowed to continue its push towards approval, hoping to overcome the veto with a subsequent, yet similar, bill.³⁴ However, the U.S. Department of State ultimately rejected the application in November 2015.³⁵ Throughout this process, very little attention has been paid towards Native American concerns regarding the project.³⁶

B. *Native American Concerns Regarding Keystone XL*

Native American tribes from across the U.S. stood to be affected by the proposed Keystone XL Pipeline.³⁷ At the time the revised pipeline route was submitted for presidential approval, the Department of State identified eighty-four Indian Tribes for consultation that could be affected by the pipeline.³⁸ Most outstanding in their opposition to the Keystone XL Pipeline was the Great Sioux Nation, whose treaty lands lie directly in the path of the “black snake.”

1. The Great Sioux Nation

Numerous tribes of the Sioux Nation banded together to resist the XL Pipeline, which they contend runs through sovereign treaty land. The Sioux Nation consists of three major subdivisions: the Lakota, Dakota and Nakota, or Yankton, which are all further divided into a number of different

31. Henn, *supra* note 1.

32. Kane & Eilperin, *supra* note 2.

33. See Michael D. Shear & Coral Davenport, *Obama Vetoes Bill Pushing Pipeline Approval*, N.Y. TIMES (Feb. 24, 2015), http://www.nytimes.com/2015/02/25/us/politics/as-expected-obama-vetoes-keystone-xl-pipeline-bill.html?_r=0.

34. See Laura Barron-López, *Keystone Veto Override Fails*, THE HILL (March 4, 2015, 2:45 PM), <http://thehill.com/policy/energy-environment/234615-senate-fails-to-override-obama-keystone-veto>.

35. Davenport, *supra* note 4.

36. See *Widespread Lakota Opposition to Keystone XL Pipeline Flies Under National Media Radar*, FREE SPEECH RADIO NEWS (Nov. 27, 2014), <http://fsrn.org/2014/11/widespread-lakota-opposition-to-keystone-xl-pipeline-flies-under-national-media-radar/>.

37. See, e.g., Final SEIS *supra* note 25, Appendix B, <http://keystonepipeline-xl.state.gov/documents/organization/221220.pdf> (identifying the number of Indian tribes identified by the Department of State for consultations).

38. *Id.*

bands.³⁹ The present day Sioux Nation is estimated to cover more than 2,700 square miles in South Dakota and neighboring states; it constitutes one of the largest groups of Native Americans in the U.S.⁴⁰ Nine Sioux tribes live in South Dakota: Cheyenne River Sioux, Crow Creek Sioux, Flandreau Santee Sioux, Lower Brule Sioux, Oglala Sioux, Rosebud Sioux, Sisseton Wahpeton Oyate, Standing Rock Sioux; and Yankton Sioux.⁴¹

As the proposed Keystone XL Pipeline cuts across South Dakota, it purportedly threads its way between existing Sioux reservations.⁴² However, while TransCanada claims its proposed pipeline avoids tribal reservations, both the Rosebud Sioux and Cheyenne River Sioux allege the pipeline cuts within the current exterior boundaries of their reservations.⁴³ In addition, the proposed pipeline runs directly through a Rosebud Sioux spirit camp⁴⁴ and the unceded treaty lands of the Great Sioux Nation, as recognized by the Treaty of Fort Laramie of 1868.⁴⁵

2. Sioux Nation Land Rights Controversy

The Treaty of Fort Laramie of 1868 established the territory of the Great Sioux Nation.⁴⁶ This treaty, signed between the Sioux nation and the U.S., recognized the Black Hills as part of the Great Sioux Reservation and

39. *Understanding the Great Sioux Nation*, AKTA LAKOTA MUSEUM AND CULTURAL CENTER, <http://aktalakota.stjo.org/site/News2?page=newsArticle&id=9017> (last visited Dec. 6, 2014).

40. *Great Sioux Nation*, LEGENDS OF AMERICA, <http://www.legendsofamerica.com/na-sioux2.html> (last visited Dec. 6, 2014).

41. *Sioux Tribes*, TRAVEL SOUTH DAKOTA, <https://www.travelsd.com/About-SD/Our-History/Plains-Indians/Sioux-Tribes> (last visited Dec. 6, 2014).

42. See Steven Mufson, *Keystone XL Pipeline Raises Tribal Concerns*, WASH. POST (Sept. 17, 2012) http://www.washingtonpost.com/business/economy/keystone-xl-pipeline-raises-tribal-concerns/2012/09/17/3d1ada3a-f097-11e1-adc6-87dfa8eff430_story.html.

43. See Bob Berwyn, *Environment: South Dakota Native Americans Describe House Vote on Keystone XL Pipeline As An "Act of War"* SUMMIT CNTY. VOICE (Nov. 15, 2014), <http://summitcountyvoice.com/2014/11/15/environment-south-dakota-native-americans-describe-house-vote-on-keystone-xl-pipeline-as-an-act-of-war/>.

44. Telephone interview with Matthew Rappold, Chief Prosecutor, Rosebud Sioux Tribe (Dec. 4, 2014).

45. See *infra* Part III, Section B.

46. See William T. Sherman, et al., *Treaty with the Sioux*, INDIAN AFFAIRS: LAWS AND TREATIES (Feb. 24, 1869), <http://www.digital.library.okstate.edu/kappler/vol2/treaties/sio0998.htm> (Including: Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee—and Arapaho) [hereinafter Fort Laramie Treaty].

set the area aside for the exclusive use by the Sioux people.⁴⁷ According to Article II, “no persons except those designated herein . . . shall ever be permitted to pass over, settle upon, or reside in the territory.”⁴⁸ In order to cede any portion of Sioux land thus reserved, “at least three-fourths of all the adult male Indians occupying or interested” in the land had to consent to its cession.⁴⁹

These treaty rights, however, were not long respected. In 1872, Secretary of the Interior Columbus Delano, finding that “the occupation of this region of the country is not necessary to the happiness and prosperity of the Indians, and as it is supposed to be rich in minerals and lumber, it is deemed important to have it freed as early as possible from Indian occupancy.”⁵⁰ This policy, in direct contradiction to the terms of the Fort Laramie Treaty, led to the 1874 Custer expedition into the region, and the subsequent discovery of gold in the Black Hills.⁵¹ The Black Hills gold boom brought thousands of white settlers into the sacred and sovereign territory of the Sioux nation.⁵²

This encroachment onto Sioux lands led to the Great Sioux War of 1876, which pitted the U.S. Army against the Lakota Sioux and Northern Cheyenne.⁵³ After the U.S. defeat in the Battle of Little Bighorn, Congress took action against the Sioux by passing the “sell or starve” rider to the Indian Appropriations Act of 1876, which effectively withheld subsistence appropriations until the Sioux relinquished “all right and claim to any country outside the boundaries of the permanent reservation.”⁵⁴ In 1877, Congress ratified the “Agreement of 1877”⁵⁵ which illegally annexed the Black Hills, as the agreement was signed by only ten percent of the adult male Sioux population, far from the requisite three-fourths necessary.⁵⁶

47. *Id.* art. II.

48. *Id.*

49. *Id.* art. XII.

50. *1874 Custer Expedition to the Black Hills*, BLACK HILLS VISITOR, <http://www.blackhillsvisitor.com/old-west.html?pid=880&sid=948:1874-Custer-Expedition-to-the-Black-Hills> (last visited Dec. 6, 2014).

51. *Id.*

52. See Western Frontier History, UNITED STATES DEP’T OF AG. FOREST SERVICE, <http://www.fs.usda.gov/detail/blackhills/learning/history-culture/?cid=stelprdb5115326> (last visited Dec. 6, 2014).

53. See Sioux Wars, ENCYCLOPEDIA OF THE GREAT PLAINS (2011), <http://plainshumanities.unl.edu/encyclopedia/doc/egp.war.044>.

54. Act of Aug. 15, 1876, 19 Stat. 176, ch. 289 (Indian Appropriations Act of 1876).

55. Act of Feb. 28, 1877, 19 Stat. 254 (Agreement of 1877).

56. See Fort Laramie Treaty, *supra* note 46; *United States v. Sioux Nation of Indians*, 448 U.S. 371, 371 (1980); *The History and Culture of the Standing Rock Oyate*,

For over a century, the Sioux Nation has claimed that the U.S. unlawfully abrogated the Fort Laramie Treaty of 1868.⁵⁷ Members of the Sioux nation were instrumental in the passage of a special jurisdiction act in 1920, which provided them a forum for adjudicating this claim; however, in 1942, their claim was dismissed.⁵⁸ In 1946, with the passage of the Indian Claims Commission Act, Sioux Nation members resubmitted the Black Hills claim to the Indian Claims Commission, which it adjudicated over the course of decades, finally holding that the Sioux were entitled to approximately \$17 million USD in compensation, not including over a century's worth of interest, for the 1877 taking of their land.⁵⁹ In 1980, the U.S. Supreme Court upheld the Commission's findings.⁶⁰ Shortly after the Supreme Court decision, the Sioux Tribal Council, as a unanimous action, refused to accept the money, arguing that the court decision be "vacated on the grounds that the Tribe was not represented in those proceedings."⁶¹ The Sioux Nation has never accepted the monetary compensation for the taking of the Black Hills, instead demanding their return to the Tribe.⁶² The Sioux considers the Black Hills and the rest of the treaty land not ceded in the Fort Laramie Treaty of 1868 to be their sovereign land.

3. Main Concerns

On September 16, 2011, the Black Hills Sioux Treaty Council and the nine member reservations (Cheyenne River, Crow Creek, Fort Peck, Lower Brule, Pine Ridge, Rosebud, Standing Rock, and Santee) along with dozens of native and non-native groups signed the Mother Earth Accord.⁶³ In it, Sioux nations expressed their concern that the Keystone XL Pipeline would "impact sacred site and ancestral burial grounds, and treaty rights throughout traditional territories, without adequate consultation on these impacts"

NORTH DAKOTA STUDIES, http://www.ndstudies.org/resources/IndianStudies/standing_rock/historical_blackhills.html (last visited Dec. 6, 2014).

57. *Sioux Nation*, 448 U.S. at 374.

58. *Id.* at 371, 384. The Court of Claims dismissed the claim holding that it was unauthorized to question "whether the compensation afforded the Sioux in the 1877 Act was an adequate price for the Black Hills." *Id.* at 384.

59. *Id.* at 390.

60. *Id.* at 423-24.

61. Edward Lazarus, *Black Hills/White Justice: The Sioux Nation versus the United States, 1775 to the Present* 404-06 (1999).

62. Maria Streshinsky, *Saying No to \$1 Billion: Why the Impoverished Sioux Nation Won't Take Federal Money*, THE ATLANTIC (March 2011), http://www.theatlantic.com/magazine/archive/2011/03/saying-no-to-1-billion/308380/?single_page=true.

63. Mother Earth Accord, *supra* note 6.

and that oil spills from the proposed pipeline would destroy “life-sustaining water resources, including the Ogallala Aquifer.”⁶⁴

The Ogallala Aquifer underlies eight states in the heart of the Great Plains.⁶⁵ It is the “single most important source of water in the High Plains region” and provides a majority of the water for residential, industrial, and agricultural use.⁶⁶ It is also sacred water, which the Sioux peoples rely on “physically, culturally and spiritually.”⁶⁷ Although the second proposed Keystone XL route avoided the ecologically important Sand Hills region, this move does not obviate fears that a pipeline leak could contaminate the aquifer.⁶⁸ The new route still crosses areas with high water tables and multiple rivers and streams where water lies very close to the ground.⁶⁹ Additionally, it is highly likely that a spill will occur. According to the States Department’s original Environmental Impact Study (EIS), there is a “substantial risk of a major oil spill” resulting from the construction of the Keystone XL Pipeline.⁷⁰ Additionally, not only were there over 1,500 pipeline incidents during the six month period studied by the EIS, TransCanada’s own original Keystone pipeline has leaked at least fourteen times since its construction in 2010.⁷¹

64. *Id.*

65. *Ogallala Aquifer*, WATER ENCYCLOPEDIA, <http://www.waterencyclopedia.com/Oc-Po/Ogallala-Aquifer.html> (last visited Dec. 6, 2014).

66. *Id.*

67. Lynne Peeples, *Keystone XL and Native America: South Dakota Tribes Fight the ‘Black Snake’* HUFFINGTON POST (Apr. 17, 2013, 7:15 PM), http://www.huffingtonpost.com/2013/04/17/keystone-xl-native-americans-tribes_n_3102454.html.

68. Lisa Song, *New Keystone XL Route: Out of the Sandhills, but Still in the Aquifer*, INSIDE CLIMATE NEWS (Apr. 26, 2012), <http://insideclimatenews.org/news/20120426/keystone-xl-nebraska-sandhills-ogallala%20aquifer-heineman-transcanada>.

69. *Id.*

70. Final SEIS, *supra* note 25; Roy L. Hales, *Oil Spills Are Keystone XL’s Greatest Threat To Environment, Limited US State Department Report Concludes*, CLEAN TECHNICA (Feb. 2, 2014), <http://cleantechnica.com/2014/02/02/oil-spills-keystone-xls-greatest-threat-environment-us-state-department-concludes/>; *see also* Dave Saldana, *Keystone PipeLIES Exposed: The Facts on Sticky Leaks, Billion Dollar Spills, and Dirty Air*, PRWATCH (Feb. 26, 2014) <http://www.prwatch.org/news/2014/02/12401/keystone-pipelies-exposed-sticky-oil-leaks-billion-dollar-spills-and-human-health>. The State Department estimates that the Keystone XL Pipeline could spill up to a hundred times during its lifetime. Noah Greenwald, *America’s Disastrous History of Pipeline Accidents Shows Why the Keystone Vote Matters*, HUFFINGTON POST (Nov. 18, 2014, 10:06 AM), http://www.huffingtonpost.com/noah-greenwald/pipeline-accidents_b_6174082.html.

71. Greenwald, *supra* note 70.

According to Rosebud Sioux Tribal President Cyril Scott, “the Lakota people have always been stewards of this land” and have a duty to protect it, both spiritually and environmentally.⁷² The Mother Earth Accord insists that the U.S. afford the Sioux people “full consultation under the principle of “free, prior and informed consent,” as established by the United Nations Declaration on the Rights of Indigenous Peoples.⁷³ The Great Sioux Nation continues to rally around the idea that the U.S. government must receive their free, prior and informed consent before the Keystone XL Pipeline is approved.⁷⁴ In May 2013, the Nation passed a resolution declaring, “the Great Sioux Nation did not give free, prior, informed consent to this KXL pipeline passing through [their] Treaty Territory.”⁷⁵ When the House passed the Keystone XL bill in late November 2014, President Scott declared the vote an “act of war.”⁷⁶ According to the Native leader, “the Rosebud Sioux Tribe will not allow this pipeline through our lands. . . . We will close our reservation borders to Keystone XL.”⁷⁷ Sioux tribes never ceased in their demand for the U.S. government to respect their right to consent or reject the construction of the Keystone XL Pipeline on their territory.

C. *Domestic Obligations To Consult Native American Tribes*

The U.S. views Native American tribes as “domestic dependent nations under its protection.”⁷⁸ As such, Native America tribes “exercise inherent sovereign powers over their members and territory.”⁷⁹ Officially, the U.S. “recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.”⁸⁰ In a 1994 executive memorandum, President Clinton first outlined governmental responsibilities of consultation with tribal governments, establishing the duty of the Federal

72. Berwyn, *supra* note 43.

73. Mother Earth Accord, *supra* note 6.

74. The Great Sioux Nation issued a declaration which resolved the “Council Fires of the Great Sioux Nation did not give free, prior, informed consent to this KXL pipeline.” DECLARATION OF THE GREAT SIOUX NATION OPPOSING THE KEYSTONE XL PIPELINE (May 2013), <http://www.oweakuiinternational.org/blog-updates—press-release/declaration-of-the-great/> (last visited Dec. 7, 2014).

75. *Id.*

76. Berwyn, *supra* note 43.

77. Husna Haq, *Sioux Tribe Calls Keystone XL Approval ‘Act of War.’ What Does That Mean?*, CS MONITOR (Nov. 18, 2014), <http://www.csmonitor.com/Environment/2014/1118/Sioux-tribe-calls-Keystone-XL-approval-act-of-war.-What-does-that-mean-video>.

78. Exec. Order No. 13175, 65 Fed. Reg. 67,249 § 2(a) (Nov. 9, 2000).

79. *Id.*

80. *Id.*

Government to operate within “a government-to-government relationship with federally recognized Native American tribes.”⁸¹ The memorandum ordered that all executive departments and agencies “consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect [] tribal governments.”⁸²

1. Executive Order 13175

Executive Order 13175 (EO 13175), Consultation and Coordination with Indian Tribal Governments, issued by President Clinton in 2000 continued to delineate standards that federal agencies must adhere to when formulating and implementing policies that have tribal implications.⁸³ Under EO 13175, agencies “shall respect Indian tribal self-government and sovereignty” and honor tribal treaty rights to the extent permitted by law.⁸⁴ As part of ensuring this respect, each agency “shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”⁸⁵ The two consultation provisions of EO 13175 that are relevant to our discussion are:

§5 (c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early on in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation . . . provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency’s prior consultation with tribal officials, a summary of the nature of their concerns and the agency’s position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

§5 (d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should

81. Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 85 (May 4, 1994), http://www.justice.gov/archive/otj/Presidential_Statements/presdoc1.htm (last visited Dec. 7, 2014).

82. *Id.*

83. Exec. Order No. 13175, *supra* note 78.

84. *Id.* § 3(a).

85. *Id.* § 5(a).

explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.⁸⁶

Pursuant to these requirements, tribal consultation regulations were imposed on existing statutory frameworks, including both NEPA and the National Historic Preservation Act (NHPA).

2. National Environmental Policy Act (NEPA)

While the statutory language of NEPA itself does not require agencies to consult with affected Native American tribes, subsequent Council on Environmental Quality (CEQ) regulations require tribal consultation.⁸⁷ CEQ Regulation section 1501.2 requires that federal agencies consult early with affected Indian tribes regarding planned actions by private applicants when federal actions in the project is reasonably foreseeable.⁸⁸ CEQ Regulation section 1501.7 requires that, as part of the scoping process in preparing an EIS, the lead agency invite the participation of affected Indian tribes.⁸⁹

3. National Historic Preservation Act (NHPA)

Regulations pursuant to NHPA also provide for consultation with affected Native American tribes. NHPA was enacted in 1966 in order to protect and preserve historic properties representing the “irreplaceable heritage” of the U.S.⁹⁰ Section 106 of NHPA requires that prior to the issuance of any funding or licensing that may affect protected sites, the Advisory Council on Historic Preservation (ACHR) be given reasonable opportunity to comment with regard to the proposed project.⁹¹ This process seeks to ensure consultation among agency officials and other parties with an interest in the effects of the proposed project on historic properties.⁹² Along these lines, federal agencies must consult with any Indian tribe that “attaches religious and cultural significance to historic properties that may be affected by an undertaking.”⁹³ Native American tribes may be represented by a Tribal Historic Preservation Officer (THPO), which has been elected under the NHPA to represent the interests of the tribe and its mem-

86. *Id.* § 5(c)-(d).

87. 40 C.F.R. § 1500.1 (2005).

88. *Id.* § 1501.2.

89. *Id.* § 1501.7.

90. National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.* (2012).

91. *Id.* § 470f

92. *See* 36 C.F.R. § 800.1 (2004).

93. *Id.* § 800.2.

bers, or by a designated representative of the tribe, if no THPO has been appointed.⁹⁴

The agency shall ensure that the consultation process provides the affected tribe “reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties . . . articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.”⁹⁵ In conducting consultations, federal agencies “must recognize the government-to-government relationship” that exists between Native America tribes and the federal government.⁹⁶ In recognizing an Indian tribe’s sovereign authority on tribal lands, the regulations not only provide a tribe the opportunity to review a proposed project, but to “concur in or object to” agency findings and determinations.⁹⁷ If adverse effects are found likely, affected tribes may consult in the development of alternatives or modifications to the project.⁹⁸ If an agreement is reached in regards to mitigation plans, a memorandum of agreement (MOA) is signed.⁹⁹ Affected tribes who do not accept the mitigation plans may terminate consultation; however, refusal by some, but not all, of the affected Indian tribes does not invalidate a MOA.¹⁰⁰ If no agreement is reached, the implementing agency is bound solely by the ACHR’s final comments.¹⁰¹

In addition to the regular section 106 procedures, agencies may opt to undertake alternative procedures in certain contexts.¹⁰² The ACHR and implementing agencies may instead negotiate a programmatic agreement to govern the implementation or resolution of adverse effects from certain complex projects.¹⁰³ Programmatic agreements are acceptable alternatives for projects when, *inter alia*, effects on historic properties are similar and repetitive or are multi-state in scope; effects on historic properties cannot be fully determined; and nonfederal parties are delegated major decision-making responsibilities.¹⁰⁴ In developing a programmatic agreement that has ef-

94. *See id.*

95. *Id.*

96. *Id.*

97. *Consulting with Indian Tribes in the Section 106 Review Process*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, <http://www.achp.gov/regs-tribes.html> (last visited Dec. 7, 2014).

98. 36 C.F.R. § 800.6 (2004).

99. *Id.*

100. *Consulting with Indian Tribes*, *supra* note 97.

101. *See id.*

102. 36 C.F.R. § 800.14 (2004).

103. *Id.*

104. *Id.*

fect on historic properties of importance to Indian tribes, agencies must consult with THPOs or tribal representatives as appropriate.¹⁰⁵ Most importantly, a programmatic agreement shall take effect on tribal lands “only when the THPO, Indian tribe or a designated representative of the tribe is a signatory to the agreement.”¹⁰⁶ If, when developing programmatic agreements for complex or multiple undertakings, an agreement cannot be reached, the agency shall comply with the regular section 106 procedures for each individual undertaking not agreed upon.¹⁰⁷ The results of any consultations will be submitted to the Council, which takes these views into account in reaching a final decision on the proposed program alternative.¹⁰⁸ Again, failure to reach consensus through the normal section 106 process does not deny an agency the right to act; the implementing agency is bound only by the ACHR’s comments.¹⁰⁹

As this overview demonstrates, various tribal consultation requirements exist within U.S. domestic law. While the egalitarian rhetoric of the U.S. government’s commitment to tribal sovereignty, self-determination and self-government is regularly included as a preface to such consultation rights, the significance of these words are not reflected in the existing regulatory framework. The NEPA requirement only mandates agencies to invite affected tribal communities to comment and the ability under the NHPA for the Advisory Council to override tribal objections undermines attempts at meaningful consultations. These mere consultation requirements only create the shallow guise of respect for tribal sovereignty and the rights accompanying it. Without the ability to give pause to agency decision-making, when tribal authorities do not concur with proposed projects affecting their rights, these oft-touted autonomous rights are illusory. This truth is illustrated in a review of the U.S. government’s tribal consultation process undertaken in the Keystone XL case.

D. *Federal Consultations in the Keystone Case: The Government’s Failings*

An overview of the Department of States consultation process regarding the Keystone XL project demonstrates the current regulatory scheme’s failings in ensuring, at the least, meaningful consultation. As a project that constituted a major federal action that could have a significant environmental impact, and that was likely to affect historic property, the Department of

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Consulting with Indian Tribes, *supra* note 97 at 10-11.

State was bound to consult affected Native American tribes under both NEPA and NHPA.¹¹⁰ According to the EIS, the State Department fulfilled its NEPA obligations through its NHPA section 106 consultations.¹¹¹ Recall that NHPA consultations are focused specifically on the protection of historic property. Because the Keystone XL project is multi-state in scope, the State Department chose to apply the section 106 exception and develop a Programmatic Agreement (PA).¹¹² Both the original and amended PA for the Keystone XL project describes the States Department’s tribal consultation process.¹¹³

1. State Department Consultations¹¹⁴

During the development of the original PA drafted in connection to TransCanada’s first application for Presidential Permit, forty-five out of ninety-five affected Native American tribes who were contacted responded to requests for consultations.¹¹⁵ Of these forty-five, nineteen participated in Traditional Cultural Property Studies.¹¹⁶ The Department of State also held fifteen group consultation meetings and webinars with Indian tribes, including six “government-to-government” meetings along the proposed Project route.¹¹⁷ The bulk of the government’s consultation action occurred during this first period. According to the State Department, it conducted “considerable discussion with Indian tribes and THPOs on cultural resources” including discussions regarding “cultural resource surveys, TCPs and TCP surveys, effects to cultural resources, and mitigation.”¹¹⁸ The Department also reportedly “conducted its government-to-government consultation as an open forum to listen to tribal views on the proposed Project and its po-

110. See Final SEIS, *supra* note 25, at 1-3.

111. *Id.* at 20.

112. *Id.* at 1, 20-21.

113. U.S. Dep’t. of State, Bureau of Oceans and Int’l. Env’tl. and Sci. Affairs, Final Environmental Impact Statement, Appendix S: Programmatic Agreement and Record of Tribal Contact (2011) [hereinafter 2011 PA]; U.S. Dep’t. of State, Bureau of Oceans and Int’l. Env’tl. and Sci. Affairs, Final Supplemental Environmental Impact Statement: Appendix E: Amended Programmatic Agreement and Record of Consultation (2014) [hereinafter 2014 PA].

114. The following is an overview of the State Department’s version of events regarding tribal consultations.

115. 2011 PA, *supra* note 113, Attachment G.

116. *Id.*

117. *Id.*

118. *Id.*

tential impacts on the environment, cultural resources, and the tribes themselves.”¹¹⁹

TransCanada’s reapplication for a Presidential Permit in 2012 introduced 875 new miles of pipeline, which was taken into consideration in the drafting of an amended PA.¹²⁰ The State Department invited eighty-four tribes to consult on the amended PA, of which thirty-five participated.¹²¹ The State Department held government-to-government consultation meetings in October 2012 to discuss the Native American role in the consultation process.¹²² An additional government-to-government meeting was held in May 2013 to “update Indian tribes concerning the Draft Supplemental EIS and the proposed Project, status of the Section 106 consultation process, [and] discussion on amending the PA. . . .”¹²³ This meeting was followed up with a government-to-government conference call in July 2013, to discuss amending the PA.¹²⁴ The majority of the consultation process took place through letters, emails and phone calls; and only two in-person meetings were held during the second consultation process.¹²⁵

In regards to tribal concerns of the projects non-cultural impacts, such as environmental impacts, and the tribal consultation processes, the State Department “gathered these issues and concerns and [] evaluated opportunities to address them as part of the tribal consultation and cultural resources process.”¹²⁶ The State Department asked all participating tribes to sign the Programmatic Agreement, as an indication that the Department had fulfilled its consultation duties.¹²⁷

2. Complaints Of The Sioux Nation Regarding “Consultations”

The State Department’s tribal consultation process took place only within the boundaries of a NHPA section 106 consultation, with a focus on identifying and mitigating harms to possibly affected historical property. The tribes of the Sioux Nation were never directly consulted regarding other possible concerns, including the fact that the proposed Keystone XL

119. *Id.*

120. 2014 PA, *supra* note 113, Attachment G.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Shield the People Project, *RST Opposes the Keystone XL Pipeline*, LAKOTA VOICE (Feb. 27, 2013), <http://lakotavoice.com/2014/02/27/rst-opposes-the-keystone-xl-pipeline/>.

Pipeline would run directly through their treaty lands. The consultation process was not presented as one in which affected Native Americans could weigh in on the project’s approval or implementation, but one where the project route was presented as more or less fixed, and consultation discussions focused solely on mitigating its probable negative effects to historical objects.

Many consulted Native American tribes were disenchanted with the consultation process and viewed the PA consultations as “too large, too short and often inaccessible for too many.”¹²⁸ According to Indian law attorney Jennifer Baker, there was “no way” for affected tribes to fully express their concerns in the short time allotted for consultations.¹²⁹ During the May 2013 in-person consultation, eleven tribes, including all seven Sioux tribes in the pipeline’s path, walked out of the meeting in protest, declaring they “would not participate in what was designed to appear to be a negotiation with Red Nations.”¹³⁰ These “government-to-government” talks were seen as a “sham,” as only low level leadership was present; the sovereign nations invited to consult did not recognize the meeting as a “valid consultation on a ‘nation to nation’” level.¹³¹ The protesting tribes have since invited government officials to partake in true “government-to-government dialogue” with high-level members of the executive, including the President, Vice-President, and Secretary of State, to no avail.¹³²

In response to tribal concerns that their voice was not being heard, the State Department invited tribal members to “provide input” during the public comment period, the period where any interested individual can submit comments to implementing agencies for their review.¹³³ This invitation undermines Native Americans special status as sovereigns over their treaty and reservation lands. Consultations with the sovereign owners of land on

128. Peeples, *supra* note 64.

129. *Id.*

130. Brenda Norrell, *Native Americans Shut Down US State Dept ‘Consultation’ on Keystone XL*, THE NARCOSPHERE (May 17, 2013; 1:15 PM), <http://narcosphere.narcosnews.com/notebook/brenda-norrell/2013/05/native-americans-shut-down-us-state-dept-consultation-keystone-xl>.

131. *Id.*; *Chiefs Declare Keystone XL Consultation Meeting Invalid, Walk Out on State Department Officials*, INDIAN COUNTRY TODAY MEDIA NETWORK (May 17, 2013), <http://indiancountrytodaymedianetwork.com/2013/05/17/chiefs-declare-keystone-xl-consultation-meeting-invalid-walk-out-state-department>.

132. Jacob Devaney, *Sovereign Nations Walk Out of Meeting with U.S. State Department Unanimously Rejecting Keystone XL Pipeline*, HUFFINGTON POST (May 7, 2013; 7:21 AM), http://www.huffingtonpost.com/jacob-devaney/sovereign-nations-walk-ou_b_3289501.html.

133. Peeples, *supra* note 67.

which proposed projects will be implemented should take precedent over general public comment.

In addition, multiple tribes of the Sioux Nation have spoken out against the Department of State's generous restatement of their tribal consultation efforts. According to Faith Spotted Eagle, tribal elder of the Yankton Sioux (who participated in the State Department consultation process), "consultation is not concluded. In fact, it is has [sic] not even started with General Council. . . . They say that an e-mail to a tribe counts as consultation, or a phone call [does], but that isn't meaningful consultation. They need to talk to tribal councils as a whole."¹³⁴ In both the original and amended PA, the State Department not only lists e-mails, phone calls, and notices as instances of adequate tribal consultation, but also meetings with THPOs, which are regulatory in nature, and not representative of tribal nations/tribal counsels as a whole.¹³⁵ Additionally, there has been controversy surrounding the PA's cultural preservation survey statistics.¹³⁶ In one instance, the Department of State wrongly specified that the Yankton Sioux had performed these evaluations, when in fact, they had not.¹³⁷ Tribes who took part in State Department consultations, such as the Rosebud Sioux, have gone as far as passing tribal council resolutions stating that the tribe "objects to and refuses to sign" the PA; seeing the PA as an insincere attempt on behalf of the U.S. government to comply with its tribal consultation requirements.¹³⁸

E. *Consultation Requirements Under International Law*

The concept that indigenous peoples maintain unique cultural rights, as distinct from generally applicable human rights, is a staple of international law. Both the United Nations and the Inter-American Human Rights System, in addition to other international bodies like the International Labor Organization, have conferred special rights and protections upon indigenous peoples and groups which speak to their right to communal and ancestral

134. Rob Capriccioso, *Exaggerated Consultation Claims, Factual Errors in State Department's Keystone XL Environment Report Rankle Natives*, INDIAN COUNTRY TODAY MEDIA NETWORK (Mar. 15, 2013), <http://indiancountrytodaymedianetwork.com/2013/03/15/exaggerated-consultation-claims-factual-errors-state-departments-keystone-xl-environment>.

135. *Id.*

136. See *id.*

137. *Id.*

138. Shield the People Project, *supra* note 127; Press Release, Oyate Wahacanka Wocun (Shielding the People) (Feb. 26, 2013), <http://www.shieldthepeople.org/wp-content/uploads/2014/03/PR-2-2-28-2014.pdf>.

property—rights which the U.S. are morally and legally obligated to uphold.

1. The U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP)

The most definitive restatement of the rights of indigenous populations is the UNDRIP.¹³⁹ The UN General Assembly adopted UNDRIP in September 2007, after more than twenty-five years in the making.¹⁴⁰ After establishing the Working Group on Indigenous Populations (WGIP) in 1982, the initial draft of UNDRIP was submitted to the UN Commission on Human Rights in 1994, where a robust, albeit slow, international dialogue worked towards consensus.¹⁴¹ Widespread international consensus was achieved: when UNDRIP was put to a vote, the General Assembly overwhelmingly supported the initiative, with 143 countries voting in favor, 11 abstentions and only 4 voting against.¹⁴²

While not a legally binding instrument under international law, it is the most comprehensive and definitive restatement of international legal norms affecting indigenous peoples.¹⁴³ UNDRIP is based primarily on the concept of indigenous self-determination, which it defines as freedom to both determine political status, and freely pursue economic, social and cultural development.¹⁴⁴ In exercising their right to self-determination, indigenous peoples have the right, *inter alia*, “to autonomy or self-government in matters relating to their internal and local affairs.”¹⁴⁵ Stemming from this overarching right is the right to FPIC. UNDRIP expressly refers to the indigenous right to FPIC in a number of contexts.¹⁴⁶ Most pertinent to our discussion, UNDRIP establishes that that “states shall consult and cooperate in good faith with the indigenous peoples concerned through their own rep-

139. UNDRIP, *supra* note 8.

140. *Id.*

141. Economic and Social Council Res. 1982/34, U.N. Doc. E/RES/1982/34 (May 7, 1982); Economic and Social Council Res. 1995/32, U.N. Doc. E/RES/1995/32 (July 25, 1995).

142. Press Release, General Assembly Adopts Declaration on Rights of Indigenous Peoples: ‘Major Step Forward’ Towards Human Rights for All, Says President (Sept. 13, 2007), <http://www.un.org/press/en/2007/ga10612.doc.htm>. The four countries to vote down UNDRIP were Australia, Canada, New Zealand and the United States. *Id.*

143. Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples, UNITED NATIONS, http://www.un.org/esa/socdev/unpfii/documents/faq_drips_en.pdf (last visited Dec. 7, 2014).

144. UNDRIP, *supra* note 8, introduction and art. 3.

145. *Id.* art. 4.

146. *Id.*

representative institutions” in order to obtain their FPIC before “adopting and implementing legislative or administrative measures that may affect them”¹⁴⁷ or approving “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.”¹⁴⁸ While as provisions of the Declaration, these rights are only aspirational, their applicability in international law is grounded in previously promulgated international treaties.¹⁴⁹ Although there has been much debate regarding whether UNDRIP represents customary international law, or just the beginning of the consensus needed to start the development of customary international law, it is clear to all parties that UNDRIP expresses at least the aspirations towards which all state parties should strive.¹⁵⁰

2. UNDRIP and the U.S.

The U.S. was one of only four countries to vote against UNDRIP.¹⁵¹ Although the U.S. was an active participant in the long negotiation process that led to the final draft, it ultimately found the final text to be “confusing, and risk[] endless conflicting interpretations and debate about its application.”¹⁵² Among the key concerns of the U.S. were UNDRIP’s provisions on self-determination and FPIC. In relation to the FPIC provisions, the U.S. worried that:

The text [] could be misread to confer upon a sub-national group a power of veto over the laws of a democratic legislature by requiring indigenous peoples, free, prior and informed consent before passage of any law that “may” affect them (e.g. Article 19). We strongly support the full participation of indigenous peoples in democratic decision-making processes, but cannot accept the notion of a sub-national group having a “veto” power over the legislative process.¹⁵³

Between 2009 and 2010, the other three countries that originally opposed UNDRIP, Australia, Canada, and New Zealand, changed course and

147. *Id.* art. 19.

148. *Id.* art. 32.

149. See Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples’ Participation Rights Within International Law*, 10 NW J. INT’L HUM. RTS. 54, 66 (2011).

150. *Id.*

151. Press Release, *supra* note 142.

152. Press Release, *Position of the United States on the Rights of Indigenous Peoples* (Sept. 13, 2007), <http://www.ucs.louisiana.edu/~ras2777/indianlaw/usresponse.htm> (last visited Dec. 7, 2014).

153. *Id.*

endorsed the Declaration.¹⁵⁴ Faced with mounting pressure, in December 2010, the U.S. acquiesced and “fully endorsed” UNDRIP.¹⁵⁵ While the U.S. maintains that UNDRIP is “not legally binding or a statement of current international law,” it does express “aspirations that th[e] country seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.”¹⁵⁶ However, at the same time the government endorsed UNDRIP’s aspirations on FPIC, it also gutted them of any meaning. In its announcement in support of UNDRIP, the State Department conveyed that while “the United States recognizes the significance of the Declaration’s provisions on free, prior and informed consent” it understands these provisions to “call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.”¹⁵⁷ This interpretative stance stripped UNDRIP’s FPIC provisions of their true meaning, allowing the U.S. to continue upholding the status quo of mere consultation, regardless of substantive quality or result, when Native American tribal rights, sovereignty, or cultural heritage are on the line.

3. The Indigenous Right to Consent Under The American Declaration

The U.S. cannot hide behind UNDRIP’s nonbinding nature and its inimical interpretation of the UNDRIP’s FPIC provisions to deny affected Native American groups their right to meaningful consultation. Assuming, arguendo, that the UNDRIP has not reached the level of customary international law, the U.S. is still obliged under the Inter-American Human Rights System to obtain the Sioux Nation’s consent before approving the Keystone XL project. The Inter-American Human Rights System is predicated on both the American Declaration of the Rights and Duties of Man (American Declaration)¹⁵⁸ and the American Convention on Human Rights (American

154. Four Arrows, *The US “Rethinks” the UN Declaration on Indigenous Rights, Maybe*, TRUTHOUT (Jan. 23, 2011; 1:49 PM), <http://truth-out.org/archive/component/k2/item/94044:the-us-rethinks-the-un-declaration-on-indigenous-rights-maybe>.

155. Position of the United States on the Rights of Indigenous Peoples, *supra* note 152.

156. Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples, U.S. DEP’T. OF STATE, <http://www.state.gov/documents/organization/153223.pdf> (last visited Dec. 7, 2014).

157. *Id.*

158. Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948).

Convention)¹⁵⁹ and composed of both the Inter-American Commission on Human Rights (IACHR)¹⁶⁰ and the Inter-American Court on Human Rights (IACtHR).¹⁶¹ While the American Declaration is not a legally binding document, both the IACHR and IACtHR view it as “a source of international legal obligations for member states of the Organization of American States (OAS).”¹⁶² All member states of the OAS are signatories to the American Declaration and subject to the jurisdiction of the Inter-American Commission, which is competent to accept petitions on behalf of aggrieved citizens of member states.¹⁶³ Only those member nations that have ratified the American Convention are subject to the jurisdiction of the IACtHR.¹⁶⁴ Because the U.S. has not ratified the American Convention, it is not subject to the Court’s jurisdiction, nor bound by its findings.¹⁶⁵ While substantive steps towards the creation of the right to FPIC have been taken by both the Commission and the Court, further discussion of the Court’s actions in this regard is outside the scope of this analysis, as it does not apply to the U.S.¹⁶⁶

Recent Inter-American Commission jurisprudence has established that under the American Declaration’s Article XXIII right to property, indigenous groups are not to be deprived of their property interest in their traditional lands without their “fully informed consent, under conditions of equality, and with fair compensation.”¹⁶⁷ In the 2002 case, *Mary and Carrie Dann v. U.S.*, the IACHR recognized that any determination with regard to

159. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

160. *What is the IACHR?* ORGANIZATION OF AMERICAN STATES, <http://www.oas.org/en/iachr/mandate/what.asp> (last visited Dec. 13, 2014).

161. *I/A Court History*, CORTE INTERAMERICANA DE DERECHOS HUMANOS, <http://www.corteidh.or.cr/index.php/en/about-us> (last visited Dec. 13, 2014).

162. *See, e.g.*, Maya Indigenous Community of the Toledo District v. Belize, Case 12.053, Inter-Am. Comm’n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. ¶ 1 (2004) [hereinafter *Maya Indigenous Community*].

163. International Norms and Standards Relating to Disability: Part III. The Regional Human Rights System in the Americas, UNITED NATIONS, <http://www.un.org/esa/socdev/enable/comp302.htm> (last visited Dec. 13, 2014).

164. *Id.*

165. *American Convention on Human Rights “Pact of San Jose, Costa Rica” Signatories and Ratifications*, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Dec. 13, 2014).

166. *See, e.g.*, The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

167. *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. Comm’n H.R., Report No. 75/02, doc. 7, rev. ¶ 131 (2002).

indigenous land rights must be “based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole,” requiring “at a minimum,” that all members “are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.”¹⁶⁸ The *Danns*, members of the Western Shoshone tribe, contended that the U.S. had illegally confiscated their ancestral lands outside Crescent Valley, Nevada.¹⁶⁹ They claimed, *inter alia*, that the U.S. had violated their right to property, as established in the American Declaration, by steadily expropriating ancestral Shoshone lands since 1863.¹⁷⁰ In analyzing the case, the Commission took into consideration the “evolving rules and principles of human rights law in the Americas and in the international community more broadly,” including “the developing norms and principles governing the human rights of indigenous peoples.”¹⁷¹ The Commission found articles eighteen and twenty-three of the American Declaration to obligate member states “to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole.”¹⁷² In other words, under the Inter-American Human Rights System, that state must ensure “mutual consent between the state and respective indigenous peoples” in regards to a change in title of indigenous lands.¹⁷³ The U.S. government was thus obligated to obtain the *Dann*’s informed consent before utilizing their ancestral land.

In the 2004 case, *Maya Indigenous Community of the Toledo District v. Belize*, the Commission continued to build on the concept of informed consent in relation to property rights.¹⁷⁴ The Maya communities claimed that the State had violated their rights under the Declaration in respect to their traditional lands by granting logging and oil concessions within their territory without meaningful consultations with the Maya people.¹⁷⁵ The Commission, in keeping with its broad interpretive approach, as outlined in the *Dann* case, found the State to have violated the Maya people’s Article XXIII property right by failing to hold effective consultations and receive

168. *Id.* ¶ 1.

169. *Id.* ¶ 140.

170. *Id.* ¶¶ 35-39.

171. *Id.* ¶ 124.

172. *Id.* ¶ 140.

173. *Id.* ¶ 130.

174. *See generally* *Maya Indigenous Community*, *supra* note 162.

175. *Id.* ¶ 136.

the informed consent of the Maya people before granting concessions to third parties to utilize Mayan lands.¹⁷⁶ The Commission stated:

[T]he jurisprudence of the system has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition. Consistent with this approach, the Commission has held that the application of the American Declaration to the situation of indigenous peoples requires the taking of special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation.¹⁷⁷

With these two cases, the IACHR has established that under the American Declaration, indigenous peoples have the right to grant or deny their fully informed consent before their government appropriates or grants development rights within their communal property.

4. The Inter-American Standard and the United States

Jurisprudence exists within the Inter-American Commission to maintain that the U.S. is obliged to receive the Sioux Nation's consent before allowing the undertaking of any projects on their land. While the U.S. is notorious for its aversion to accepting and considering international law in domestic issues, it has directly engaged with Commission rulings on multiple occasions.¹⁷⁸ For example, in response to the Commission's findings in the *Dann* case, the U.S. Department of State participated in a working group to discuss compliance with the decision. The State Department ultimately "recognized the legitimacy of the international body" by sending the Commission's decision to the local authorities in an attempt to secure compliance.¹⁷⁹ While local authorities ultimately did not comply with the Commission's decision,¹⁸⁰ this episode shows not only the U.S.' recognition of the IACHR's authority, but also its acceptance of the *Dann* holding. Therefore, regardless of the U.S.' position on the UNDRIP, under the American Declaration and within the Inter-American Human Rights System, the De-

176. *Id.* ¶ 94.

177. *Id.* ¶ 117.

178. *See, e.g.*, Caroline Bettinger-López, *The Inter-American Human Rights System: A Primer*, 42 J. POVERTY L. & POL'Y 581, 588 (2009).

179. *Id.*

180. *Id.*

partment of State must receive the Sioux Nation’s fully informed consent before allowing the construction of any pipeline upon the sovereign and treaty lands of the Sioux.

CONCLUSION

Under the Inter-American Commission’s interpretation of property rights protected by the American Declaration on the Rights and Duties of Man, the U.S. was obligated to obtain the informed consent of the tribes of the Great Sioux Nation before allowing the Keystone XL Pipeline to cross through their sovereign treaty lands. While the Sioux people have advocated for this right under the UNDRIP, which the U.S. signed in 2013, member nations are not, as of yet, obliged to uphold the provisions of the Declaration. The UNDRIP is purely aspirational; however, the American Declaration has been interpreted by both autonomous organs of the Organization of American States as a source of international legal obligations. The indigenous people of the Americas are not to be deprived of their lands with their fully informed consent.

Although there is controversy surrounding the ownership of the Black Hills, the Sioux Nation has long maintained that the U.S. accession of land ensured to the Sioux Nation by the 1868 Treaty of Fort Laramie through the Agreement of 1877 was an illegal abrogation of the treaty. As such, the original treaty lands granted to the Sioux remain in their possession. Therefore, in protection of their communal property rights as protected by the American Declaration, the U.S. must obtain the Sioux nation’s fully informed consent before approving construction of a pipeline across their sovereign and treaty lands.

Even if the U.S. were to argue that its interpretation of what “consent” means in the context of UNDRIP—“a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken”—applies as well to the Inter-American Commission’s interpretation of Article XXIII, as an overview of the state’s implementation of existing domestic consultation regulations in the Keystone XL Pipeline case illustrates, the U.S. has much work to do in raising the level of its tribal consultations from farcical to meaningful. Affected Native American tribes deserve to be consulted on whether or not a project that affects them comes to fruition, not just on how adverse effects will be mitigated when projects that affect them are implemented.

While the U.S. government ultimately denied TransCanada’s application to construct the Keystone XL Pipeline, this does not absolve it from its shortcomings in ensuring the human rights of affected indigenous peoples

were respected. As this paper illustrates, before TransCanada's Keystone XL Pipeline project could become a reality, the U.S. government was obligated in the least to afford the Great Sioux Nation meaningful consultation, and, at the most, and in full accordance with the interpretation of the rights of indigenous peoples by the Inter-American Commission on Human Rights, to receive the Sioux Nation's informed consent.