INDIGENOUS CONSENT: RETHINKING U.S. CONSULTATION POLICIES IN LIGHT OF THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

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In December 2010, the United States endorsed the United Nations Declaration on the Rights of Indigenous Peoples. The U.N. Declaration articulates a framework of indigenous rights founded in the right to self-determination. Specific corollary rights flow from the right to self-determination. Among these is indigenous peoples' right to "free and informed consent prior to the approval of any project affecting their lands or territories or other resources." Currently, the United States embraces a policy of "meaningful consultation" when federal agencies undertake projects affecting indigenous peoples and their traditional lands. Such consultation is particularly significant in the context of traditional lands that have been classified as "public lands." The consultative processes mandated by statutes such as the National Historic Preservation Act and the National Environmental Policy Act, however, fall short of adequately protecting indigenous interests within the context of large-scale extractive industries. These inadequacies are exemplified by the 30-year struggle waged by the Western Shoshone people, who currently contest a massive, open-pit cyanide heap-leach gold mine on one of their sacred mountains that is located on "public" land in Nevada. This Note proposes that the U.N. Declaration's free, prior, and informed consent standard should be interpreted as a spectrum along which different contexts require different levels of

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indigenous participation. Ultimately, the United States should endorse a shift in policy toward requiring indigenous consent in the limited context of large-scale extractive industries operating on indigenous peoples' traditional lands.

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INTRODUCTION

On December 16, 2010, President Barack Obama announced the United States' endorsement of the United Nations Declaration on the Rights of Indigenous Peoples ("U.N. Declaration").[1] The United States thus became the last of four originally objecting countries to shift positions and endorse the U.N. Declaration—a group that also previously included Canada, New Zealand, and Australia.[2] Announcing the U.S. endorsement, President Obama stated: "[W]hat matters far more than words, what matters far more than any resolution or declaration, are actions to match those words."[3] The U.S. endorsement, applauded by many indigenous advocates, creates a window of opportunity for the United States to match its recently declared change in position on the U.N. Declaration with a transformation of its indigenous consultation policies.

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1. Caren Bohan, *Obama Backs U.N. Indigenous Rights Declaration*, REUTERS (Dec. 16, 2010, 2:18 PM), http://www.reuters.com/article/idUSTRE6BF4QJ20101216; *see also* Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter U.N. Declaration].

2. Valerie Richardson, *Obama Adopts U.N. Manifesto on Rights of Indigenous Peoples*, WASH. TIMES, Dec. 17, 2010, at A1.

3. Bohan, *supra* note 1.

Currently, the United States embraces a policy of "meaningful consultation" with indigenous peoples when federal agencies undertake projects affecting indigenous peoples and their traditional lands.[4] The policy of meaningful consultation is particularly relevant in the context of traditional lands that have been classified as "public lands."[5] Statutes such as the National Historic Preservation Act ("NHPA")[6] and the National Environmental Policy Act ("NEPA")[7] implement this policy by requiring consultation with indigenous peoples in these circumstances. These procedural requirements, however, fall short of adequately protecting indigenous interests within the context of large-scale extractive industries. The example of the Western Shoshone illustrates this inadequacy.

The Western Shoshone have pressed their land claims case for over 30 years, losing in domestic arenas while winning landmark decisions from international bodies.[8] At its heart, the case of the Western Shoshone involves issues of indigenous consultation and consent. In describing the case, Western Shoshone Defense Project attorney Julie Ann Fishel stated:

> The struggle of the Western Shoshone has been a long one, filled with many defeats and successes. The Western Shoshone case directly challenges the U.S. and Western European economic and political systems to respect traditional indigenous ways of viewing the world and to permit Indigenous Peoples to be the decision-makers over their lands and resources.[9]

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4. *See, e.g.*, Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,249 (Nov. 6, 2000).

5. The United States considers "public lands" to be owned by the government. In this Note, I discuss "traditional lands," meaning those traditionally owned, occupied, or used by indigenous peoples. However, my focus is not on reservation lands, to which indigenous peoples have greater rights, but rather on lands considered "public."

6. National Historic Preservation Act of 1966, 16 U.S.C. §§ 470 to 470x-6 (2006).

7. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370 (2006).

8. Subsequent to a ruling by the Indian Claims Commission ("ICC") that Western Shoshone title to the land had been extinguished, in 1979 the United States paid approximately 15 cents per acre to the Secretary of the Interior as compensation. Julie Ann Fishel, *United States Called to Task on Indigenous Rights: The Western Shoshone Struggle and Success at the International Level*, 31 AM. INDIAN L. REV. 619, 626 (2007). Two Western Shoshone sisters, Mary and Carrie Dann, challenged the ICC's ruling on title extinguishment, taking their case to the U.S. Supreme Court, where they lost. *Id.* at 627–28. The Danns later won a favorable decision from the Inter-American Commission on Human Rights ("IACHR"), and the Western Shoshone, as a group, also received a favorable decision from the United Nations Committee on the Elimination of Racial Discrimination ("CERD"). *Id.* at 634–48. The Western Shoshone case is discussed in further detail below. *See infra* Part II.

9. Fishel, *supra* note 8, at 621. Ms. Fishel, who has since changed her name to Julie Cavanaugh-Bill, has worked closely with the Western Shoshone Defense Project since

The United States considers most Western Shoshone traditional lands to be "public" and has permitted, over repeated objections by the Western Shoshone, a massive, open-pit cyanide heap-leach gold mine on Mt. Tenabo, which is sacred to the Western Shoshone. Because U.S. courts have repeatedly found that government agencies, such as the Bureau of Land Management ("BLM"), sufficiently fulfilled their consultation duties,[10] the Western Shoshone case exemplifies the shortfalls of current U.S. consultation policy within the context of large-scale extractive activity on public lands.

Endorsement of the U.N. Declaration provides an opportunity to revisit and rethink U.S. consultation policy. The U.N. Declaration establishes a framework of indigenous rights grounded in the right to self-determination. Specific corollary rights flow from the right to self-determination. Among these is a right to "free and informed consent prior to the approval of any project affecting [indigenous peoples'] lands or territories or other resources."[11] Interpretations of free, prior, and informed consent ("FPIC") range from a minimum of meaningful consultation, as currently adopted by the United States, to bestowing a veto power on indigenous peoples. This Note proposes that the United States should interpret the FPIC requirement as involving a spectrum along which different contexts require different levels of indigenous participation, with large-scale extractive activities on traditional lands requiring indigenous consent.

Part I describes the legal landscape of indigenous consultation requirements in the United States, with particular attention to U.S. mining law, NEPA, and NHPA. Part II then explores the practical impact of this legal framework through the case of the Western Shoshone. Part III describes an alternative approach to indigenous consultation, found in the international arena. This alternative approach involves a consultation–consent spectrum that requires consent for large-scale extractive activities on indigenous peoples' traditional lands. This Note concludes that in operationalizing the principle of FPIC found in the U.N. Declaration, the United States should endorse a shift in policy toward a consent-based approach to indigenous rights in the limited context of large-scale extractive industries.

I. THE U.S. MINING SECTOR AND INDIGENOUS PARTICIPATION

A. The U.S. Standard for Extractive Industries: Meaningful Consultation

Rather than approaching large-scale extractive projects from a consent-based framework, the United States has instead adopted the standard of "meaningful consultation."[12] Executive Order ("E.O.") 13,175, entitled

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1998 in multiple capacities, including as Land Recognition Program Director. *See id.* at 619 n.a1.

10. *See, e.g.*, Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of the Interior, 608 F.3d 592, 596–98 (9th Cir. 2010); S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior, 588 F.3d 718, 723 (9th Cir. 2009) (per curiam).

11. U.N. Declaration, *supra* note 1, art. 32.

12. *See, e.g.*, Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,249 (Nov. 6, 2000).

Consultation and Coordination with Indian Tribal Governments,[13] exemplifies this standard. Issued by President Clinton in November 2000, E.O. 13,175 sought to establish "regular and meaningful consultation and collaboration with tribal officials."[14] Recognizing the "unique legal relationship" between indigenous peoples and the federal government,[15] E.O. 13,175 instructs government agencies to consult with tribes early in the process of developing a proposed regulation that will impact them.[16]

Meaningful consultation remains the U.S. standard for indigenous participation. President Obama issued the Memorandum on Tribal Consultation in November 2009, which was designed to put E.O. 13,175 into effect.[17] This Memorandum charged "executive departments and agencies" with "engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications."[18] There is an emerging international understanding that different levels of consultation are appropriate for different types of projects affecting indigenous peoples.[19] Neither E.O. 13,175 nor President Obama's Memorandum articulates this approach to indigenous participation. Rather, both adopt a minimal international standard of "meaningful consultation."[20] This standard provides the fewest restrictions on government and corporate actors and the least inclusion of indigenous communities in the project-development process.

B. Mining on Public Lands

The standard of meaningful consultation becomes particularly significant in the context of permitting extractive industries, such as mining, on public lands. Although indigenous peoples' consent is required for extractive projects on lands to which they hold title, special conflicts arise when such activities are conducted on their traditional lands that are now classified as "public" and managed by the federal government. Four federal land management agencies administer the approximately 628 million acres of land owned by the federal government,[21] which constitutes approximately 28% of the total U.S. land base.[22] Among these agencies

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13. *Id.*
14. *Id.*
15. *Id.* at 67,250.
16. *Id.*
17. Memorandum from President Barack Obama to the Heads of Exec. Dep'ts and Agencies Regarding Tribal Consultation (Nov. 5, 2009), *available at* http://www.epa.gov/tp/pdf/tribal-consultation-memorandum-09.pdf.
18. *Id.*
19. *See infra* Part III.C.
20. *See infra* Part III.C.
21. These agencies are the Bureau of Land Management, Fish and Wildlife Service, National Park Service, and Forest Service. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-196, FEDERAL LAND MANAGEMENT: FEDERAL LAND TRANSACTION FACILITATION ACT RESTRICTIONS AND MANAGEMENT WEAKNESSES LIMIT FUTURE SALES AND ACQUISITIONS 1 (2008).
22. *Id.*

is the U.S. Department of the Interior's Bureau of Land Management, which administers roughly 256 million of these federal acres,[23] as well as the mineral rights for 700 million acres of land throughout the United States.[24] The BLM is the primary federal agency responsible for managing mining on public lands.[25]

The Federal Land Policy and Management Act of 1976 ("FLPMA") established the framework for BLM management of public lands and governs BLM mining-related actions.[26] Historically, federal land-management policy centered on the sale, development, and occupation of public lands by non-indigenous settlers.[27] Although the 19th century witnessed the rise of preservation efforts, "laws also encouraged rapid settlement and exploitation of western natural resources."[28] Passage of the FLPMA shifted this approach by requiring the BLM to manage lands for multiple, sustainable uses and to balance competing interests in land including environmental, cultural, and resource-development interests.[29]

However, the FLPMA also stated that public lands should be managed with recognition of the country's need for domestic sources of minerals and other resources.[30] As mining attorney Roger Flynn explained: "Thus, by its own language, FLPMA set up an inherent conflict between the need for environmental protection and stewardship and long-standing national policies for resource use and extraction on public lands."[31] The BLM has wide discretion in carrying out its interest-balancing duties, and it has often prioritized economic interests over cultural ones.[32] Additionally, this discretionary latitude makes it difficult for indigenous peoples to effectively challenge BLM decisionmaking.[33]

Within the context of mining, the General Mining Law of 1872 skews the BLM's interest-balancing evaluation by embodying the assumption that mineral

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23. *Id.* at 2.

24. *Solid Mineral Programs on the Nation's Federal Land: "Minimizing the Human 'Footprint' on the Landscape,"* BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, http://www.blm.gov/wo/st/en/prog/more/non-energy_minerals/solid_minerals_brochure.html (last updated Feb. 16, 2010).

25. Christine Knight, Comment, *A Regulatory Minefield: Can the Department of Interior Say "No" to a Hardrock Mine?*, 73 U. COLO. L. REV. 619, 637 (2002).

26. Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1785 (2006); *see also* Erik B. Bluemel, *Accommodating Native American Cultural Activities on Federal Public Lands*, 41 IDAHO L. REV. 475, 537 (2005); Roger Flynn, *Daybreak on the Land: The Coming of Age of the Federal Land Policy and Management Act of 1976*, 29 VT. L. REV. 815, 816 (2005).

27. *See* Bluemel, *supra* note 26, at 481; Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 422 (2002); Knight, *supra* note 25, at 621. Most federal lands are in 11 western states and Alaska. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 2.

28. Zellmer, *supra* note 27, at 422.

29. Flynn, *supra* note 26, at 818; *see also* Bluemel, *supra* note 26, at 537.

30. *See* Flynn, *supra* note 26, at 819.

31. *Id.*

32. Bluemel, *supra* note 26, at 537.

33. *Id.* at 539.

development is the "highest and best use" of public lands.[34] Although the FLPMA generally marked a shift away from 19th-century promotion of land development and settlement, the General Mining Law constitutes a holdover from this earlier era.[35] Passed alongside laws such as the Homestead Act of 1862[36] and the Desert Land Act of 1877,[37] the General Mining Law was likewise designed to encourage settlement of indigenous lands and "fulfill the promise of Manifest Destiny."[38] As one commentator stated:

> The 1872 Mining Law is one remnant of a set of laws, passed in the 19th century, that allowed private persons to obtain title to public lands. By giving land to those who evinced intent to use it, the federal government encouraged the settlement of public lands. Today, however, the remaining public lands are in great demand for many uses. The federal government has tried to choose the proper balance among competing demands under principles of multiple use and sustained yield. However, mining enjoys an absolute preference over all other uses of public lands. In an age of multiple use management, such a preference is an anomaly.[39]

In addition to imposing an absolute preference for mining, the law grants unparalleled subsidies to mining companies by allowing resource extraction without lease or royalty payments to the federal government and by providing the option to purchase mined lands for well below market value.[40] Indeed, part of the policy rationale for the General Mining Law was "to facilitate the passage of federal land from public to private ownership."[41]

Thus, when it comes to the BLM's interest-balancing duties, indigenous peoples continue to lose the substantive evaluation of their objections. Despite procedural safeguards, which are discussed further below,[42] when the BLM balances the interests of extraction versus preservation, the odds are heavily weighted in favor of extraction. Indeed, the very ability of the BLM to deny mining permits has been called into question. For instance, Will Patrick of the

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34. *See* General Mining Law of 1872, 30 U.S.C. §§ 22–47 (2006); *see also* JOHN D. LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION 48 (1987).

35. *See* Heather Noble, *Environmental Regulation of Hardrock Mining on Public Lands: Bringing the 1872 Law up to Date*, 4 HARV. ENVTL. L. REV. 145, 147 & n.20 (1980); Zellmer, *supra* note 27, at 423.

36. Homestead Act of 1862, Pub. L. No. 94-579, 90 Stat. 2787 (repealed 1976).

37. Desert Land Act of 1877, 43 U.S.C. §§ 321–339 (2006).

38. Knight, *supra* note 25, at 621; *see also* Raymond Cross, *Keeping the American Indian Rancher on the Land: A Socio-Legal Analysis of the Rise and the Demise of American Indian Ranching on the Northern Great Plains*, 49 WASHBURN L.J. 745, 750 n.11 (2010); Mineral Policy Ctr., *The Last American Dinosaur... The 1872 Mining Law*, EARTHWORKS 1, http://www.earthworksaction.org/pubs/MPCfs_LastAmericanDinosaur.pdf (last visited Oct. 3, 2011). For a general discussion of Manifest Destiny, see FREDERICK MERK, MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY (1963).

39. Noble, *supra* note 35, at 147 (citations omitted).

40. Knight, *supra* note 25, at 627.

41. *Id.* at 621.

42. *See infra* Part I.C.

Mineral Policy Center stated: "The federal government can place stipulations on how mining will be conducted, but it can't deny a hard rock mining operation if it complies with basic rules of operation—no matter what other values may be negatively affected."[43] Others, meanwhile, have attempted to lay the groundwork for the BLM's ability to reject such plans.[44]

Nonetheless, the BLM's ability to deny mining permits on public lands for policy rather than procedural reasons remains controversial. For example, when President Clinton issued regulations authorizing the BLM to deny mining plans that would result in "substantial irreparable harm" to significant resources, mining industry advocates objected to the new regulations, which they believed unlawfully and unnecessarily bestowed upon the BLM a "mine veto" power.[45] The Bush administration rescinded the provision.[46] Ultimately, the General Mining Law continues to embody the logic of Manifest Destiny, which called for the "consumption of land and resources on an unprecedented scale,"[47] placing federal policy on a "collision course" with the interests of indigenous peoples in the context of mining on public lands.[48]

C. Procedural Consultation Requirements: NHPA and NEPA

Because the odds are heavily weighed against indigenous interests in the BLM's substantive evaluations of whether to issue permits for mining projects on public lands, procedural safeguards designed to ensure meaningful participation are insufficient to protect indigenous interests. When a mining company applies for a permit for activities that affect indigenous peoples' traditional lands, the two primary mechanisms requiring indigenous participation are the National Historic Preservation Act[49] and the National Environmental Policy Act.[50] Both are procedural in nature.[51]

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43. George Wuerthner, *High Stakes: The Legacy of Mining*, NAT'L PARKS, July–Aug. 1998, at 22, 23 (quoting Will Patrick). Earthworks—an organization resulting from the work of the Oil & Gas Accountability Project and the Mineral Policy Center—continues to maintain this position. For example, it has recently stated that "federal land management agencies have consistently argued that they cannot deny hardrock mining proposals because of the 1872 Mining Law." *The General Mining Law of 1872—Polluter of Water, Provider of Pork*, EARTHWORKS, http://www.earthworksaction.org/pubs/EWfs-1872MiningLaw-WaterPolluterPorkProvider-low.pdf (last visited Oct. 3, 2011).

44. *See, e.g.*, Roger Flynn & Jeffrey C. Parsons, *The Right to Say No: Federal Authority over Hardrock Mining on Public Lands*, 16 J. ENVTL. L. & LITIG. 249, 308–20 (2001); Knight, *supra* note 25, at 619.

45. MARC HUMPHRIES, CONG. RESEARCH SERV., IB 89130, MINING ON FEDERAL LANDS 10 (2002). The debate centers on interpreting FLPMA's requirement that the BLM prevent "unnecessary or undue degradation" of public lands. 43 U.S.C. § 1732(b) (2006). For more on this conflict, see Flynn, *supra* note 26, at 832–38, and Knight, *supra* note 25, at 646–70.

46. HUMPHRIES, *supra* note 45, at 10–11.

47. Zellmer, *supra* note 27, at 425.

48. *See id.* (discussing the effects of westward expansion during the 19th century on indigenous peoples as well as wildlife).

49. National Historic Preservation Act of 1966, 16 U.S.C. §§ 470 to 470x-6

NHPA has been described as "the most comprehensive national policy with respect to historic preservation and the protection of cultural sites."[52] NHPA created the National Register of Historic Places ("NRHP") and the Advisory Council on Historic Preservation ("ACHP"), which administers NHPA's protective provisions.[53] NHPA § 106 requires agencies to consult with potentially affected parties prior to commencing a federal "undertaking" that may affect NRHP-eligible property and to consider the undertaking's effect on such property.[54] In 1992, Congress amended NHPA to specifically include properties of traditional religious or cultural significance to tribes among those that may be eligible for inclusion on the NRHP.[55] Within the § 106 requirements is the obligation that federal agencies, including the Bureau of Land Management, consult with indigenous peoples prior to granting permits for activities that may affect properties of traditional religious or cultural significance to indigenous peoples.[56] The intent of § 106 is to ensure good-faith consultation early in project planning in order to avoid or mitigate adverse impacts on such properties.[57]

(2006).

50. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370 (2006). The following materials contain additional discussion involving NHPA and NEPA: Bluemel, *supra* note 26, at 524–30; Michael P. O'Connell, *Indian Tribes and Project Development Outside Indian Reservations*, 21 NAT. RESOURCES & ENV'T 54, 54–55 (2007); Sarah Palmer et al., *Strategies for Addressing Native Traditional Cultural Properties*, 20 NAT. RESOURCES & ENV'T 45, 46–47 (2005).

Other laws also help protect indigenous cultural items, such as the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa–470mm (2006), and the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2006). *See* Zellmer, *supra* note 27, at 439–44. However, these laws do not purport to protect the territory itself. Additionally, while other laws may be applicable in a given circumstance, examining NHPA and NEPA illustrates the shortcomings of a procedural approach to protection of indigenous interests in the context of large-scale resource extraction on traditional lands.

51. Bluemel, *supra* note 26, at 524–30; O'Connell, *supra* note 50, at 54–55; Palmer et al., *supra* note 50, at 46–47.

52. Palmer et al., *supra* note 50, at 46.

53. 16 U.S.C. §§ 470a, 470i to v-2 (2006); *see also* Palmer et al., *supra* note 50, at 46.

54. 16 U.S.C. § 470f (2006); 36 C.F.R. §§ 800.1(a), 800.2(c)(2) (2011) (requiring consultation with affected parties, including Indian tribes); *see also* O'Connell, *supra* note 50, at 55; Palmer et al., *supra* note 50, at 46; Zellmer, *supra* note 27, at 446–50.

55. National Historic Preservation Act of 1966 § 101(d)(6)(A), 16 U.S.C. § 470a(d)(6)(A) (2006); *see also* O'Connell, *supra* note 50, at 55.

56. 16 U.S.C. § 470a(d)(6)(B) (2006); 36 C.F.R. § 800.2(c)(2) (2011) (implementing legislation for NHPA); *see also* Palmer et al., *supra* note 50, at 45–46.

57. Palmer et al., *supra* note 50, at 46; *see also* 36 C.F.R. § 800.1 (2011) (requiring consultation with affected parties).

Like NHPA § 106, NEPA requires federal agencies to consult with parties that may be affected by proposed federal projects.[58] As the Ninth Circuit Court of Appeals has explained: "NHPA is similar to NEPA except that it requires consideration of historic sites, rather than the environment."[59] NEPA requires agencies to evaluate environmental and social impacts, and this assessment includes analysis of "ecological . . . aesthetic, historic, cultural, economic, social, or health [impacts] whether direct, indirect, or cumulative."[60] Additionally, E.O. 12,898 on Environmental Justice, E.O. 13,007 on Sacred Sites, and federal guidance documents call for evaluating impacts on indigenous communities and their cultural resources during this process.[61] Indigenous communities participate in NEPA impact assessments during a public comment process.[62]

Courts interpret both NHPA and NEPA as "stop, look, and listen" provisions.[63] Thus, under NHPA and NEPA federal agencies are required to make reasonable, good-faith efforts to identify and consider the impacts of proposed projects,[64] and indigenous peoples must be given "a reasonable opportunity" to identify their concerns.[65] As attorney Michael O'Connell has stated: "[Indigenous] participation in these procedures is intended to, and can, have a powerful effect on an agency's decision whether and how to proceed with an 'undertaking' outside an Indian reservation."[66]

However, the fact that NHPA and NEPA provide procedural, rather than substantive, requirements limits the impact of consultations with indigenous peoples. Agencies are required only to conduct consultations and take them into account, but their decisionmaking is not necessarily constrained by the feedback received during these consultations. Critics have therefore denounced NHPA as "mere window dressing for Native Americans trying to save their sacred sites" because it includes "no provisions which Native Americans can use to stop the

58. Bluemel, *supra* note 26, at 529 (citing 42 U.S.C. § 4331(b)(4) (2000)). The Council on Environmental Quality has adopted regulations to implement NEPA. 40 C.F.R. §§ 1500–1508 (2011); *see also* O'Connell, *supra* note 50, at 54.

59. United States v. 0.95 Acres of Land, 994 F.2d 696, 698 (9th Cir. 1993).

60. Zellmer, *supra* note 27, at 452 (quoting 40 C.F.R. § 1508.8 (1977), which defines "effects"); *see also 0.95 Acres of Land*, 994 F.2d at 698; Bluemel, *supra* note 26, at 529–30; O'Connell, *supra* note 50, at 54; Palmer et al., *supra* note 50, at 46; Knight, *supra* note 25, at 638–39.

61. Zellmer, *supra* note 27, at 452–54.

62. O'Connell, *supra* note 50, at 54.

63. Apache Survival Coal. v. United States, 21 F.3d 895, 906 (9th Cir. 1994) (citing Ill. Commerce Comm'n v. Interstate Commerce Comm'n, 848 F.2d 1246, 1261 (D.C. Cir. 1988)).

64. *0.95 Acres of Land*, 994 F.2d at 698; *see also* O'Connell, *supra* note 50, at 55; Zellmer, *supra* note 27, at 448–49.

65. Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of the Interior, 608 F.3d 592, 608 (9th Cir. 2010) (quoting 36 C.F.R. § 800.2(c)(2)(ii)(A) (2000)).

66. O'Connell, *supra* note 50, at 55.

imminent destruction of their land and sacred sites, or to force the abandonment of a project which threatens significant historic property."[67]

Likewise, critics point out that NEPA does not require agencies to adopt the least environmentally or culturally harmful alternative.[68] As the U.S. Supreme Court has noted, NEPA "simply prescribes the necessary process," and as long as agencies have "adequately identified and evaluated" adverse effects, they are "not constrained by NEPA from deciding that other values outweigh the environmental costs."[69] Therefore, although challenges to the sufficiency of an agency's environmental impact assessment may lead a court to invalidate agency actions, all that is required is a thorough reevaluation of environmental impacts before the challenged actions are able to resume.[70] This dynamic has led Professor Erik B. Bluemel to conclude that NEPA "is of limited practical support, except as a tool of delay, for Native American cultural interests."[71]

Thus, the United States' standard of meaningful consultation is insufficient to protect indigenous interests in the context of mining on public lands. U.S. mining law is designed to create a preference for extraction over preservation. Although statutes such as NHPA and NEPA seek to provide procedural safeguards by requiring consultation with indigenous peoples, they do not necessarily change the substantive evaluation of mining projects on public lands. While violations of NHPA and NEPA may result in project delay, they do not provide mechanisms for project denial. Within the high-stakes context of mining on public lands, therefore, the meaningful consultation standard fails to adequately safeguard indigenous interests.

II. U.S. CONSULTATION PROCESSES IN PRACTICE: THE WESTERN SHOSHONE CASE

A. The Creation of Public Lands

The Western Shoshone have struggled to secure title to and prevent degradation of their lands through engagement in both domestic and international legal arenas. Their case illustrates the shortfalls of current consultation practices in the United States involving large-scale extractive industries. Western Shoshone traditional lands comprise approximately 60 million acres of the western United States, including two-thirds of the state of Nevada.[72] However, the United States

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67. Bluemel, *supra* note 26, at 528–29 (quoting David S. Johnston, Note, *The Native American Plight: Protection and Preservation of Sacred Sites*, 8 WIDENER L. SYMP. J. 443, 456 (2002)).

68. *Id.* at 529; Palmer et al., *supra* note 50, at 46; Zellmer, *supra* note 27, at 453; Knight, *supra* note 25, at 639 (discussing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989)).

69. *Robertson*, 490 U.S. at 350.

70. Bluemel, *supra* note 26, at 529.

71. *Id.*

72. This figure is based on Western Shoshone estimates stemming from the Treaty of Ruby Valley. Fishel, *supra* note 8, at 622; Julie Ann Fishel, *The Western Shoshone Struggle: Opening Doors for Indigenous Rights*, 2 INTERCULTURAL HUM. RTS. L.

currently classifies nearly 90% of Western Shoshone lands as "public" lands, creating as a result the largest contiguous public land base in the continental United States.[73]

The United States profits from the sale of Western Shoshone lands now classified as "public." For instance, between 2000 and 2007, the Bureau of Land Management raised over $86 million through the sale of what are primarily Western Shoshone traditional lands located in Nevada.[74] Additionally, these lands, to which the Western Shoshone still maintain they hold title, constitute the third-largest gold-producing area in the world.[75] Efforts to open Western Shoshone traditional lands to mining have proceeded alongside strategies to extinguish their title claims in order to legitimate the classification of these lands as public.[76]

Western Shoshone peoples understand themselves to have originated from their traditional lands, which sustain them and which they believe they have a responsibility to protect.[77] Western Shoshone grandmother Carrie Dann has stated of her homeland:

> As far as the Western Shoshone being here in this valley, they've always been here from forever, I guess. Our stories don't tell us coming here from any place. It tells us that as the Creator went by he planted his children. We've heard that from the time that we were little—it's Western Shoshone land. It's your Earth Mother, she provides for you, you know.[78]

The first non-indigenous fur trappers likely entered Western Shoshone lands in 1827,[79] and by 1829, beavers were nearly extinct.[80] Groups of trappers continued intrusions into Western Shoshone lands during the 1830s, killing Western Shoshone people, further depleting local resources, and damaging the environment.[81] The first party of non-indigenous settlers bound for California passed through Western Shoshone territory in 1841.[82] During the late 1840s and the 1850s, the emigrant wave increased as settlers moved west to California in

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REV. 41, 42 (2007). The Indian Claims Commission placed the figure at 24,396,403. Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1, ¶ 116 (2002). Public lands comprise more than 80% of Nevada's land base. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 1.

73. Fishel, *supra* note 72, at 43–44.

74. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 14.

75. Fishel, *supra* note 72, at 61.

76. *See id.* at 55–61; *see also* Fishel, *supra* note 8, at 630–33.

77. *See* Fishel, *supra* note 8, at 622–23.

78. OUR LAND, OUR LIFE: THE STRUGGLE FOR WESTERN SHOSHONE LAND RIGHTS (Gage & Gage Prods. 2007).

79. INTER-TRIBAL COUNCIL OF NEV., NEWE: A WESTERN SHOSHONE HISTORY 14 (1976). For more information on Western Shoshone life and culture before intrusions by non-indigenous trappers and settlers, see *id.* at 3–13.

80. *Id.* at 16.

81. *See id.* at 17–18.

82. *Id.* at 18.

search of gold.[83] Rising emigration increased environmental degradation as well as conflict with the Western Shoshone.[84]

In 1863, the Western Shoshone signed the Treaty of Ruby Valley with the United States.[85] Rather than constituting a land-cession treaty, this "Treaty of Peace and Friendship" guaranteed the United States safe passage through Western Shoshone territory to gold fields in California.[86] Although the treaty allowed for some small settlements within Western Shoshone territory and provided compensation for railroad and telegraph construction as well as small-scale mining, "the [Western] Shoshone never waived any rights to decisionmaking over the land base or activities affecting their environment and well-being."[87]

Despite the fact that Western Shoshone lands are predominantly classified as public, the theoretical basis for extinguishment of Western Shoshone title has been "gradual encroachment."[88] First posited by the Indian Claims Commission in 1962, the theory of gradual encroachment maintains that the incursions of non-indigenous settlers effectively extinguished Western Shoshone title.[89] The theory was never used before the Western Shoshone case and has not been applied to another group since.[90]

The ICC was established in 1946 to settle indigenous land claims.[91] The main purpose of the Indian Claims Commission Act was "to dispose of the Indian claims problem with finality."[92] However, the ICC could only award monetary compensation for takings of indigenous land.[93] As Daniel Bomberry, founder of the Seventh Generation Fund for Indian Development stated: "The role of the Indian Claims Commission [was] to get the land of tribes who [did] not have puppet governments, or where the traditional people [were] leading a fight to keep land and refuse money."[94]

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83. *Id.* at 21–25.

84. *Id.* at 20.

85. Fishel, *supra* note 8, at 623; Fishel, *supra* note 72, at 43.

86. Fishel, *supra* note 8, at 623; Fishel, *supra* note 72, at 43. In fact, Congress told the treaty commissioners not to extinguish Western Shoshone title. John D. O'Connell, *Constructive Conquest in the Courts: A Legal History of the Western Shoshone Struggle—1861 to 1991*, 42 NAT. RESOURCES J. 765, 768 (2002). John D. O'Connell was a lawyer representing the Western Shoshone Sacred Lands Association and Mary and Carrie Dann from 1973 to 1992. *Id.* at 765 n.a1.

87. Fishel, *supra* note 72, at 43; *see also* O'Connell, *supra* note 86, at 768–69.

88. Fishel, *supra* note 72, at 50–51.

89. Shoshone Tribe of Indians of the Wind River Reservation v. United States, 11 Ind. Cl. Comm'n 387, 416 (1962); *see also* Fishel, *supra* note 72, at 50.

90. Fishel, *supra* note 72, at 50.

91. Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70–70v (1976) (repealed 1978).

92. United States v. Dann (*Dann II*), 470 U.S. 39, 45 (1985) (quoting H.R. REP. NO. 79-1466, at 10 (1945)).

93. O'Connell, *supra* note 86, at 770.

94. WARD CHURCHILL, STRUGGLE FOR THE LAND: NATIVE NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE AND COLONIZATION 175 (2002) (citing JERRY MANDER,

In 1951, a group purporting to represent the entire Western Shoshone instituted a claim before the ICC.[95] The Western Shoshone band filing the claim believed they could settle and secure their title through the ICC process. The band later realized that the process was designed to award only monetary compensation in return for land to which Western Shoshone title had been extinguished.[96] As Western Shoshone member Glenn Holly explained: "Most of our people never understood that by filing with the Claims Commission, we'd be agreeing we lost our land. They thought we were just clarifying the title question."[97] The ICC further denied other groups of Western Shoshone intervention when they tried to halt the proceedings.[98] These groups wanted to prevent monetary payments from resulting in the loss of lands they still owned and occupied.[99]

Additionally, the group of Western Shoshone that originally brought the claim before the ICC attempted to revoke their counsel, but were denied.[100] The Western Shoshone had come to believe the lawyers were not acting in their best interest because of counsel's willingness to stipulate to title extinguishment.[101] The Indian Claims Commission Act provided for a 10% commission for attorneys, ostensibly to create incentives for attorneys to represent indigenous clients before the ICC.[102] Thus, attorneys had an incentive to reach a monetary settlement even when clients wanted to seek land restoration.[103] The ICC, however, denied the

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IN ABSENCE OF THE SACRED: THE FAILURE OF TECHNOLOGY AND THE SURVIVAL OF THE INDIAN NATIONS 307–08 (1991)). For information on the Seventh Generation Fund, see *About Us*, SEVENTH GENERATION FUND FOR INDIAN DEV., http://7genfund.org/about_us.php (last visited Sept. 10, 2011).

95. CHURCHILL, *supra* note 94, at 175–76; Fishel, *supra* note 8, at 625.

96. *See* CHURCHILL, *supra* note 94, at 174–77.

97. *Id.* at 175.

98. Fishel, *supra* note 8, at 625–26.

99. *Id.* at 626; *see also* O'Connell, *supra* note 86, at 774–76 (discussing the role of "traditional" people opposed to the ICC proceedings).

100. Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1, ¶ 118 (2002); *see also* Fishel, *supra* note 8, at 626; Fishel *supra* note 72, at 51; O'Connell, *supra* note 86, at 778–80.

101. *See* Fishel, *supra* note 8, at 626; Fishel, *supra* note 72, at 51. The Western Shoshone were represented by the law firm Wilkinson, Cragen, and Barker, which had previously been commissioned by Congress to draft legislation establishing the ICC. *See* CHURCHILL, *supra* note 94, at 174. However, according to several Western Shoshone people, the firm inadequately explained the nature of proceedings before the ICC. As elder Clarence Bottom stated: "[The] land claim was never explained to the people. . . . The government pulled the wool over our eyes. If I had known what was going on, I never would have accepted the attorney contract." *Id.* at 176.

102. *See* Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70–70v (1976) (repealed 1978); *Dann*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, ¶ 118.

103. O'Connell, *supra* note 86, at 771. O'Connell has also stated:

> In land cases, the amount of recovery was directly related to the amount of the Indians' land that the ICC found that the Indians no longer owned, generating a clear conflict of interest between attorneys and clients in those instances where the Indians were still in possession or still had an arguable claim to possession.

Western Shoshone's request to revoke counsel, stating it was too late for them to change litigation strategies.[104] As attorney John D. O'Connell, who represented Western Shoshone clients from 1973 to 1992, explained, there was a "unity of interest in the ICC between the claims attorneys and the government to agree that the Indians' land had been taken" because this saved the ICC from having to determine whether and when specific lands had been taken.[105]

In 1962, the ICC ruled that Western Shoshone title to 22 million acres had been extinguished.[106] Relying on the above-mentioned theory of "gradual encroachment," the ICC observed that "the United States, without payment of compensation, acquired, controlled, or treated these lands as if they were public lands."[107] In 1979, the U.S. government paid the equivalent of 15 cents per acre to the Secretary of the Interior to hold for the Western Shoshone as compensation for their lands.[108] The attorneys for the Western Shoshone were paid $2.6 million in commission.[109] However, the Western Shoshone themselves refused to accept payment for lands they argued they never agreed to cede or sell.[110]

Despite Western Shoshone refusal to accept payment, in 1985 the U.S. Supreme Court ruled in *United States v. Dann* that the U.S. Department of the Interior's ("DOI") acceptance of payment on their behalf barred any further assertions of title.[111] In *Dann*, the DOI sued Western Shoshone grandmothers Mary and Carrie Dann for trespass for grazing cattle on their traditional lands, as their family had always done.[112] The district court held the Danns liable for trespass, reasoning that the ICC had determined that Western Shoshone title was extinguished and that the lands were now the property of the United States.[113] In 1978, the Ninth Circuit Court of Appeals held that the extinguishment issue

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Id. at 770–71.

104. *Dann*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, ¶ 118.

105. O'Connell, *supra* note 86, at 771.

106. Shoshone Tribe of Indians of the Wind River Reservation v. United States, 11 Ind. Cl. Comm'n 387, 416 (1962).

107. United States v. Dann (*Dann I*), 572 F.2d 222, 225 (9th Cir. 1978) (citation omitted).

108. Fishel, *supra* note 8, at 626; Fishel, *supra* note 72, at 50. The amount was based upon the value of the land on July 1, 1872, the date of extinguishment to which the lawyers stipulated. The Western Shoshone have stated that "nothing of significance" happened on this day, arguing instead that the "extinguishment date is pure fiction" arising out of "a compromise between the government's desire to minimize payment for the land and the attorney's desire to maximize the payment and associated legal fees." *Dann*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, ¶ 69.

109. Fishel, *supra* note 8, at 626.

110. *See* Fishel, *supra* note 72, at 50.

111. *Dann II*, 470 U.S. 39, 49–50 (1985); *see also* Fishel, *supra* note 8, at 627–28; Fishel, *supra* note 72, at 52. For a much more detailed account of the Danns' domestic litigation, see O'Connell, *supra* note 86, at 782–98.

112. *See Dann II*, 470 U.S. at 43.

113. *Dann I*, 572 F.2d 222, 223 (9th Cir. 1978). The district court thus ruled the Danns were collaterally estopped from litigating the title question. *Id.*

needed to be fully litigated in the lower court.[114] The following year, the United States made payment to the DOI for Western Shoshone lands, prompting the Supreme Court to rule that this payment prevented the Danns from asserting valid title as a defense to trespass.[115] The Court declined to address the merits of the underlying Western Shoshone land claims issues.[116]

Having exhausted their domestic remedies, the Western Shoshone took their case to the international arena.[117] A former senior staff attorney for the Inter-American Commission on Human Rights, Brian D. Tittemore, wrote:

> The Danns' case is . . . noteworthy because their efforts did not end with the U.S. justice system. Rather, the Danns and their advocates took the bold step of engaging international human rights supervisory mechanisms available against the United States and, in so doing, provided an opening for international human rights law to play an active and informative role in their ongoing search for an effective resolution to their claims.[118]

The Western Shoshone brought claims before both the Inter-American Commission on Human Rights and the United Nations Committee on the Elimination of Racial Discrimination.

In 2002, the IACHR found the United States to be in violation of Western Shoshone rights to due process, equality under the law, and property under the American Declaration on the Rights and Duties of Man ("American Declaration").[119] The IACHR directed the United States to: (1) provide the Danns with an effective remedy to ensure respect for their property rights; and (2) review its domestic laws and policies to ensure indigenous peoples' property rights are in conformity with the American Declaration.[120] Insisting the IACHR lacked jurisdiction, the United States continued asserting extinguishment of Western Shoshone title, and a mere month after the ruling the BLM conducted an armed seizure of over 400 Western Shoshone horses that were grazing on traditional lands.[121]

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114. *Id.* at 226–27; *see also* Fishel, *supra* note 8, at 627.

115. *Dann II*, 470 U.S. at 39; *see also* Brian D. Tittemore, *The* Dann *Litigation and International Human Rights Law: The Proceedings and Decision of the Inter-American Commission on Human Rights*, 31 AM. INDIAN L. REV. 593, 605 (2007).

116. *Dann II*, 470 U.S. at 39.

117. Tittemore, *supra* note 115, at 593.

118. *Id.*

119. The IACHR found the United States in violation of articles II ("equality under the law"), XVII ("right to a fair trial"), and XXIII ("right to property") of the American Declaration. Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1, ¶¶ 131–32 (2002); *see also* Fishel, *supra* note 72, at 65; Tittemore, *supra* note 115, at 605–07.

120. *Dann*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, ¶ 130; *see also* Fishel, *supra* note 72, at 68–69; Tittemore, *supra* note 115, at 612.

121. Fishel, *supra* note 72, at 69.

In 2006, the U.N. Committee on the Elimination of Racial Discrimination issued a full formal decision on the Western Shoshone situation under its Early Warning and Urgent Action Procedure.[122] CERD recommended that the United States "respect and protect the human rights of the Western Shoshone peoples," paying "particular attention to the right to health and cultural rights . . . , which may be infringed upon by activities threatening their environment and/or disregarding the spiritual and cultural significance they give to their ancestral lands."[123] CERD further urged the United States to initiate a dialogue immediately with Western Shoshone representatives "in order to find a solution acceptable to them."[124] Pending resolution of such a dialogue, CERD recommended the United States:

> (a) Freeze any plan to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers;
>
> (b) Desist from all activities planned and/or conducted on the ancestral lands of Western Shoshone or in relation to their natural resources, which are being carried out without consultation with and despite protests of the Western Shoshone peoples;
>
> (c) Stop imposing grazing fees, trespass and collection notices, horse and livestock impoundments, restrictions on hunting, fishing and gathering, as well as arrests, and rescind all notices already made to that end, inflicted on Western Shoshone people while using their ancestral lands.[125]

In the face of U.S. non-compliance, CERD reiterated this decision in its entirety in its 2008 Concluding Observations.[126] In September 2009, CERD indicated concern over the slow pace of implementation and called again for "full implementation" of its 2006 decision.[127] CERD continued to express the need for "high-level" U.S. officials to consult with the Western Shoshone concerning resource extraction on Western Shoshone traditional lands.[128]

Despite the IACHR and CERD rulings, the United States has not consulted with the Western Shoshone in order to reach a mutually acceptable

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122. U.N. Comm. on the Elimination of Racial Discrimination, Decision 1(68) on United States of America, U.N. GAOR, 68th Sess., U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006) [hereinafter CERD Decision]; Fishel, *supra* note 72, at 84–85.

123. CERD Decision, *supra* note 122, ¶ 8.

124. *Id.* ¶ 9.

125. *Id.* ¶ 10.

126. U.N. Comm. on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, ¶ 19, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008) (advance unedited version).

127. Update from the W. Shoshone Def. Project to the Comm. on the Elimination of Racial Discrimination 77th Session 1 (Aug. 18, 2010) [hereinafter 2010 Update from the W. Shoshone Def. Project] (citation omitted) (on file with *Arizona Law Review*).

128. *Id.*

resolution to the underlying land-claim issue. Rather, the United States has moved forward with efforts to finalize and legitimate extinguishment of Western Shoshone title. Attempting to overcome Western Shoshone refusal to accept payment for lands over which their title was deemed extinguished by the ICC, on July 7, 2004, President George W. Bush signed into law the Western Shoshone Claims Distribution Act ("Distribution Bill").[129] The Distribution Bill authorizes per capita disbursement of the monies awarded by the ICC and currently held in trust by the DOI.[130] When President Bush signed the Distribution Bill into law, Carrie Dann stated:

> Today the United States government has officially attempted to complete the largest theft of land in United States history. . . .
>
> . . . .
>
> I have said this a thousand times, I am not taking money for this land . . . . In Western Shoshone culture, the earth is our mother. We can not sell it. Taking our land is . . . not only a cultural genocide, it is also a spiritual genocide.[131]

The United States passed the Distribution Bill over the formal objections of 9 of the 11 Western Shoshone elected council governments as well as the opposition of a governing body representing the traditional leadership, the Western Shoshone National Council.[132] The U.S. Department of the Interior's Bureau of Indian Affairs undertook a process of receiving and evaluating applications for payment eligibility in 2007, and disbursement of the first partial payments occurred on March 1, 2011.[133] Significant sectors of Western Shoshone communities, however, continue to oppose distribution of the funds.[134]

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129. Western Shoshone Claims Distribution Act, Pub. L. No. 108-270, 118 Stat. 805 (2004). I have used the short form "Distribution Bill" here because that is how the Act is commonly referred to among many Western Shoshone. For some background on previous efforts to distribute this money, see Thomas E. Luebben & Cathy Nelson, *The Indian Wars: Efforts to Resolve Western Shoshone Land and Treaty Issues and to Distribute the Indian Claims Commission Judgment Fund*, 42 NAT. RESOURCES J. 801, 809–21 (2002).

130. Western Shoshone Claims Distribution Act § 3.

131. Carrie Dann, Statement in Response to President Bush's Signing of the Distribution Bill (July 7, 2004) (transcript available at http://www.h-o-m-e.org/Shoshone/Shoshone%20Docs/Distribution.Dann.htm).

132. Fishel, *supra* note 8, at 631.

133. Bureau of Indian Affairs W. Region, *Western Shoshone Claims Distribution Act*, U.S. DEP'T OF THE INTERIOR, INDIAN AFFAIRS (Sept. 30, 2009), http://www.bia.gov/idc/groups/public/documents/text/idc-002133.pdf; Bureau of Indian Affairs W. Region, *Western Shoshone Partial and Supplemental Distributions*, U.S. DEP'T OF THE INTERIOR, INDIAN AFFAIRS (Apr. 8, 2011), http://www.bia.gov/idc/groups/xregwestern/documents/text/idc013454.pdf. These and other monthly progress reports are available at *Western Shoshone Claims*, U.S. DEP'T OF THE INTERIOR, INDIAN AFFAIRS, http://www.bia.gov/WhoWeAre/RegionalOffices/Western/WeAre/WSC/index.htm (last visited Oct. 3, 2011).

134. For example, the Timbisha Shoshone Tribe filed suit in June 2010 seeking declaratory and injunctive relief to stop the disbursement of funds under the Distribution Bill. Complaint, Timbisha Shoshone Tribe v. Salazar, 766 F. Supp. 2d 175 (D.D.C. 2010)

Western Shoshone land has, therefore, come to be considered public through a process involving treaty violations, a novel theory of title extinguishment, and denial of indigenous "right[s] to property under conditions of equality."[135] Although international bodies have repeatedly emphasized the need for the United States to engage the Western Shoshone to resolve the land dispute, the United States has instead chosen to move forward with extractive and destructive enterprises on traditional lands over Western Shoshone objections.

B. Gold Mining on Public Lands

As the United States continues efforts to legitimate its claim to Western Shoshone traditional lands classified as "public," it has simultaneously opened these lands up to large-scale extractive industries, including gold mining.[136] Escalation of gold mining is occurring alongside numerous other projects involving extractive or destructive activities on Western Shoshone traditional lands. Lithium mining is increasing, and energy extraction and transmission projects are escalating.[137] The latter include oil, gas, solar, geothermal, and wind energy leases as well as approval of an electricity transmission line and a natural gas pipeline.[138] Additionally, proposals involving groundwater extraction and nuclear waste storage threaten the Western Shoshone lands.[139]

Despite Western Shoshone opposition to large-scale gold-mining projects on their traditional lands, BLM officials claim that under the 1872 General Mining Act they cannot stop these mines from proceeding.[140] Disregarding CERD's specific mention of Western Shoshone objections to mining on the sacred Mt. Tenabo,[141] on November 12, 2008, the BLM approved Barrick Gold Corporation's ("Barrick") Cortez Hills Expansion Project.[142] The Cortez Hills Expansion involves the construction of a massive, open-pit cyanide heap-leach gold mine on

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(No. 10-968 (GK)); *see also Timbisha Shoshone Tribe Files Lawsuit to Stop Act of Congress*, INDIAN LAW RES. CTR. (June 10, 2010), http://www.indianlaw.org/content/timbisha-shoshone-tribe-files-lawsuit-stop-act-congress.

135. Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1, ¶ 172 (2002).

136. *See* Update from the W. Shoshone Def. Project to the Comm. on the Elimination of Racial Discrimination 75th Session 2–4 (Aug. 2009) [hereinafter 2009 Update from the W. Shoshone Def. Project] (on file with *Arizona Law Review*); 2010 Update from the W. Shoshone Def. Project, *supra* note 127, at 1–3.

137. 2009 Update from the W. Shoshone Def. Project, *supra* note 136, at 4–7; 2010 Update from the W. Shoshone Def. Project, *supra* note 127, at 3–5.

138. 2009 Update from the W. Shoshone Def. Project, *supra* note 136, at 6–7; 2010 Update from the W. Shoshone Def. Project, *supra* note 127, at 5–6.

139. 2009 Update from the W. Shoshone Def. Project, *supra* note 136, at 5–6; 2010 Update from the W. Shoshone Def. Project, *supra* note 127, at 4–5.

140. Fishel, *supra* note 72, at 62.

141. CERD Decision, *supra* note 122, ¶¶ 5–7.

142. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, CORTEZ HILLS EXPANSION PROJECT: RECORD OF DECISION AND PLAN OF OPERATIONS AMENDMENT APPROVAL 3 (Nov. 2008).

Mt. Tenabo.[143] To access microscopic gold found below the water table, Barrick is in the process of creating a 2200-foot hole in Mt. Tenabo and pumping out what will total 16.5 billion gallons of groundwater.[144]

Barrick treats the extracted ore with a cyanide solution to unleash the microscopic gold from the rock, exposing the Western Shoshone to threats of environmental contamination.[145] Due to the toxic effects of this particular method of gold extraction, several countries, as well as the state of Montana, have banned cyanide heap leaching.[146] In May 2010, the European Parliament passed a resolution urging the European Union to ban the practice as well.[147] In February 2010, the Western Shoshone filed an urgent appeal with the Special Rapporteur on Toxic Wastes due to the effects of cyanide heap leaching on the Western Shoshone peoples, their environment, and their cultural and spiritual sites.[148]

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143. *Id.*

144. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, CORTEZ HILLS EXPANSION PROJECT: FINAL ENVIRONMENTAL IMPACT STATEMENT 3.1-17, 3.1-29 (Sept. 2008). Many cyanide heap-leach mines create holes in the earth so large they can be seen from space. Rebecca Solnit, *The New Gold Rush*, SIERRA, July–Aug. 2000, at 50.

145. *See* Letter from the W. Shoshone Def. Project to the Special Rapporteur 4–5 (Jan. 3, 2011) [hereinafter W. Shoshone Def. Project Letter] (on file with *Arizona Law Review*). While no data exists on the effects of toxins on the Western Shoshone people, the Western Shoshone have called for independent studies to be conducted, *id.* at 1, and the U.S. Department of Health and Human Services has documented the toxic effects of cyanide as well as other chemicals, such as mercury, released during the mining process, *see, e.g.*, AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, U.S. DEP'T OF HEALTH & HUMAN SERVS., TOXICOLOGICAL PROFILE FOR CYANIDE (2006), *available at* http://www.atsdr.cdc.gov/toxprofiles/tp8.pdf; AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, U.S. DEP'T OF HEALTH & HUMAN SERVS., TOXICOLOGICAL PROFILE FOR MERCURY (1999), *available at* http://www.atsdr.cdc.gov/toxprofiles/tp46.pdf. For information on other contaminants, see *Toxic Substances Portal*, AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, http://www.atsdr.cdc.gov/toxprofiles/index.asp (last visited Oct. 3, 2011).

146. *See Cyanide Bans Worldwide*, RAINFOREST INFO. CTR. (Oct. 2004), http://www.rainforestinfo.org.au/gold/Bans.html. Montana banned cyanide heap leaching in 1998. *Id.*

147. Resolution on a General Ban on the Use of Cyanide Mining Technologies in the European Union, EUR. PARL. DOC. PV 13.55 (2010).

148. W. Shoshone Def. Project Letter, *supra* note 145, at 4–7. The Rapporteur's full title is the Special Rapporteur on the Effects of the Movement of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights. *Id.* at 1. There are two methods to submit information and individual complaints to the Special Rapporteur: urgent appeals and allegation letters. Urgent appeals "are used in cases where the alleged violations are time-sensitive in terms of involving loss of life, life-threatening situations or either imminent or ongoing damage of a very grave nature to victims that cannot be addressed in a timely manner by the procedure of allegation letters." *Submission of Information and Individual Complaints*, OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, http://www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/Complaints.aspx (last visited Oct. 24, 2011).

In addition to the toxic effects of such mining, open-pit cyanide heap leaching is a particularly waste-producing method of gold mining because it was designed to mine low-grade ores.[149] At Mt. Tenabo, it is estimated that a ton of rock must be removed from the earth in order to extract 1.5 ounces of gold.[150] In 2010, Barrick sought to extract over a million ounces of gold from Cortez Hills and the adjacent Cortez Pipeline Project.[151] The tons of waste rock produced have filled in the Snake's Den canyon, which is located at the foot of Mt. Tenabo and is central to Western Shoshone spiritual and cultural traditions.[152]

Permitting mining on Mt. Tenabo over the objections of the Western Shoshone and despite assessment of cultural impacts demonstrates the failure of current consultative and evaluative measures to sufficiently protect indigenous interests in the context of large-scale gold mining on public lands. Western Shoshone efforts to seek recourse through the courts have not been much more successful. In November 2008, the Western Shoshone filed a complaint in federal court and sought an injunction in order to halt mining on Mt. Tenabo pending a full hearing on the merits.[153]

In December 2009, the Ninth Circuit Court of Appeals granted the request in part, finding that the BLM had not sufficiently considered cumulative environmental impacts as required by NEPA.[154] Although the Ninth Circuit concluded that the BLM failed to take "the requisite 'hard look' at the environmental impacts of the proposed project,"[155] the court's analysis revealed the limits of NEPA's requirements. For instance, the court stated:

> As the [BLM's Environmental Impact Statement ("EIS")] concedes, these are significant environmental harms. Though NEPA, of course, does not require that these harms actually be

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149. Cyanide heap leaching arose in the 1970s to mine ore with gold content so low that it would be too inefficient to mine with previously available methods. *See* Scott Fields, *Tarnshing the Earth: Gold Mining's Dirty Secret*, 109 ENVTL. HEALTH PERSP. 474, 476–77 (2001); Patricia Nelson Limerick, *The Gold Rush and the Shaping of the American West*, CAL. HIST., Spring 1998, at 30, 36.

150. *See* 2010 Update from the W. Shoshone Def. Project, *supra* note 127, at 2 (citing *North America*, BARRICK, http://www.barrick.com/GlobalOperations/NorthAmerica/Cortez/default.aspx (last visited Oct. 25, 2011)) (explaining that Mt. Tenabo's low-grade ore is estimated at 1.5 ounces of gold per ton of rock).

151. *Id.*

152. *See* Non-Compliance Report from the Univ. of Ariz. Indigenous Peoples Law and Policy Program to the Inter-Am. Comm'n on Human Rights ¶ 7 (Dec. 17, 2010) [hereinafter Non-Compliance Report] (on file with *Arizona Law Review*). Mt. Tenabo's low-grade ore is estimated at 1.5 ounces of gold per ton of rock. *Id.* (citing *U.S. Gold Corporation Reports Canyon Resources Becomes Shareholder of Mexican Affiliate; Updates Activities at Tonkin Springs*, ALLBUSINESS (Aug. 31, 2004), http://www.allbusiness.com/company-activities-management/company-structures-ownership/5528235-1.html).

153. *See* S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior, 588 F.3d 718, 723 (9th Cir. 2009) (per curiam).

154. *Id.* at 728–29.

155. *Id.* at 726.

> mitigated, it does require that an EIS discuss mitigation measures, with "sufficient detail to ensure that environmental consequences have been fairly evaluated."[156]

As this analysis indicates, finding a NEPA violation merely requires further study. In other words, NEPA only mandates the BLM to take further procedural steps but does not require any substantive change in evaluation or outcome.

The minimal impact of the Ninth Circuit's ruling also exemplifies the limits of the remedies indigenous peoples can expect under statutes such as NEPA. Despite the Ninth Circuit's stated concern for the high "likelihood of irreparable environmental injury,"[157] on remand the district court in Nevada issued a limited injunction at Barrick's request.[158] Pending a revised EIS, Barrick was only constrained from transporting ore offsite for processing and limited to pumping groundwater at levels approved under prior permits.[159] The injunction's narrow scope allowed the mine to reach full operating capacity.[160] The BLM approved Barrick's supplemental EIS in March 2011, allowing Barrick to immediately expand operations on Mt. Tenabo.[161]

The Western Shoshone have also been unsuccessful in using litigation to halt further mine-related degradation of the area surrounding Mt. Tenabo. In June 2010, the Ninth Circuit ruled on Western Shoshone challenges to expanded gold exploration in Horse Canyon, which is adjacent to Mt. Tenabo.[162] The court held that the BLM failed to adequately assess cumulative cultural and environmental impacts, as required by NEPA.[163] However, it ruled that the BLM's consultation with the Western Shoshone, required by NHPA, was sufficient.[164] Other than one letter and two phone messages, BLM consultation consisted only of previous input from the Western Shoshone regarding prior limited exploration plans in the area.[165]

Additionally, stressing the procedural nature of NHPA, the court held that the BLM's determination that the expanded project would have "no effect" on protected Western Shoshone cultural resources was not improper.[166] As in *Cortez*

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156. *Id.* at 727 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989)).

157. *Id.* at 728.

158. Non-Compliance Report, *supra* note 152, ¶ 10.

159. *Id.*

160. *Id.*

161. Press Release, Barrick Gold Corp., Barrick Receives Record of Decision on Cortez Hills (Mar. 16, 2011). As of this publication, the Western Shoshone and local environmental groups continued to challenge the sufficiency of the supplemental EIS and the district court was expected to rule on the matter in early November 2011. *See* Scott Sonner, *Tribal Religion at Center of NV Gold Mine Fight*, S.F. CHRON. (Oct. 22, 2011, 9:01 AM), http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2011/10/22/state/n090120D85.DTL.

162. Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of the Interior, 608 F.3d 592, 596–98 (9th Cir. 2010).

163. *Id.* at 602–07.

164. *Id.* at 610.

165. *Id.* at 608–10.

166. *See id.* at 610–11.

Hills, the BLM was only required to complete further procedural steps to assess cumulative impacts.[167] This additional assessment was completed in December 2010, enabling exploration to move forward.[168]

The Western Shoshone case illustrates that the procedural safeguards provided by the consultation requirements of NHPA and NEPA are not sufficient to protect indigenous interests in the absence of adequate substantive remedies. Within the mining context, this is due in part to the way the General Mining Law and a preference for economic activities skews the BLM's substantive analysis of whether to go forward with mining proposals. Although the case of the Western Shoshone could be interpreted as the United States' failure to engage in good-faith consultation, the United States has articulated a belief in the importance of meaningful consultation with indigenous peoples through both executive and legislative action, as detailed above.[169] Therefore, the Western Shoshone case appears more instructive as an illustration of the limits of procedural consultation requirements in the high-stakes setting of large-scale extractive industries.

III. FREE, PRIOR, AND INFORMED CONSENT IN THE RESOURCE-EXTRACTION CONTEXT

A. Indigenous Peoples' Right to Free, Prior, and Informed Consent

Indigenous peoples' right to free, prior, and informed consent is based on their participation and consultation rights, which arise from the concept of self-determination.[170] Laying the groundwork for later articulations of the right to FPIC, in 1975 the International Court of Justice ("ICJ") recognized that the principle of consent is part of the right to self-determination in the decolonization context.[171] This right of self-determination forms the foundation of instruments that enshrine indigenous rights, such as the U.N. Declaration on the Rights of Indigenous Peoples.[172] As current U.N. Special Rapporteur on the Rights of

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167. *See id.* at 614; Non-Compliance Report, *supra* note 152, ¶ 16.

168. Non-Compliance Report, *supra* note 152, ¶ 16.

169. *See supra* Part I.A.

170. *See* Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 41, Human Rights Council, U.N. Doc. A/HRC/12/34 (July 15, 2009) [hereinafter Anaya, *Promotion and Protection*] (by James Anaya); Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior, and Informed Consent to Development*, 27 BERKELEY J. INT'L L. 570, 571, 576 (2009).

171. McGee, *supra* note 170, at 576. The ICJ made this recognition in a 1975 advisory opinion concerning Western Sahara. Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 32–33 (Oct. 16, 1975); *see also* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 108 (2d ed. 2004). The ICJ was established along with the United Nations following World War II, and it is "the principal judicial organ of the United Nations." U.N. Charter art. 92.

172. For example, Article 3 of the U.N. Declaration provides: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine

Indigenous Peoples,[173] S. James Anaya has stated: "The right of self-determination is a foundational right, without which indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed."[174]

The right of self-determination is, at its core, an articulation of the right of indigenous peoples to be in control of their own destinies. From this right flow specific corollary rights regarding participation in decisionmaking affecting their communities. The U.N. Declaration enshrines this principle at its most general level in Article 19, which provides: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[175] Additionally, the U.N. Declaration references a right to consultation or consent in ten other articles.[176]

With regard to decisions affecting indigenous lands, the U.N. Declaration establishes a framework of rights regarding indigenous land that gives rise to consultation and consent rights. Article 32 of the U.N. Declaration requires states to "consult and cooperate in good faith" to obtain indigenous peoples' "free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[177] Articles 25, 26(1)–(2), and 28(1) lay the groundwork for this consultation right by establishing indigenous rights to lands, territories, and resources traditionally owned, occupied, or used by indigenous peoples.[178]

The U.N. Declaration's articulation of indigenous consultation rights reflects the notion that FPIC in the context of land rights is based on indigenous constructions of property rights.[179] The U.N. Declaration also reflects the current trend in international law to view such property rights as human rights.[180]

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their political status and freely pursue their economic, social and cultural development." U.N. Declaration, *supra* note 1, art. 3.

173. The Human Rights Council adopted a resolution shortening the Special Rapporteur's title to the Special Rapporteur on the Rights of Indigenous Peoples in 2010. Human Rights Council Res. 15/14, Human Rights and Indigenous Peoples: Mandate of the Special Rapporteur on the Rights of Indigenous Peoples, 15th Sess., U.N. Doc. A/HRC/RES/15/14 (Sept. 30, 2010).

174. Anaya, *Promotion and Protection*, *supra* note 170, ¶ 41.

175. U.N. Declaration, *supra* note 1, art. 19.

176. These articles address rights to consultation or consent in more specific contexts. *Id.* arts. 10, 11, 15, 17, 28, 29, 30, 32, 36, 38; Anaya, *Promotion and Protection*, *supra* note 170, ¶ 38.

177. U.N. Declaration, *supra* note 1, art. 32.

178. *Id.* arts. 25, 26(1)–(2), 28(1).

179. *See* McGee, *supra* note 170, at 579–83 (articulating that the right to FPIC is also based on indigenous property rights).

180. Lillian Aponte Miranda, *The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law*, 11 LEWIS & CLARK L. REV. 135, 141–47 (2007).

Numerous international fora have recognized indigenous peoples' right to FPIC for development projects on traditional lands to the extent that "an international consensus on the obligatory nature (if not the precise content) of the principle of FPIC is emerging."[181]

B. The United States' Position on the Declaration and FPIC

The United States' initial rejection of the U.N. Declaration's language recognizing FPIC rights rested in part on arguments that mirrored U.S. concerns about the U.N. Declaration's language recognizing self-determination.[182] The United States seemed to fear indigenous groups would seek autonomy or independent statehood based upon the language of self-determination in the U.N. Declaration.[183] This language of self-determination mirrors that found in Article 1 of the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[184]

States have long voiced objections to use of the self-determination concept in indigenous contexts, warning of fragmentation and destabilization.[185] As Anaya has written:

> At bottom, the resistance toward acknowledging self-determination as implying rights for literally all peoples is founded on the misconception that self-determination in its fullest sense means a right to independent statehood, even if the right is not to be exercised right away or is to be exercised to achieve some alternative status.[186]

Within the context of the U.N. Declaration, "an express affirmation of indigenous self-determination [was] slow to command a broad consensus among governments . . . mostly as a result of the misguided tendency to equate the word *self-determination* with decolonization procedures or with an absolute right to form an independent state."[187]

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181. Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69, 93 (2008). These international fora include U.N. treaty bodies such as the Human Rights Committee and the Committee on the Elimination of Racial Discrimination, the International Labour Organization Convention No. 169, and both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. *Id.* at 93–95.

182. *See* S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 73–75 (2009); Press Release, U.S. Mission to the United Nations, Explanation of Vote by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, to the U.N. General Assembly (Sept. 13, 2007), *available at* http://www.usun-ny.us/press_releases/20070913_204.html.

183. *See* Press Release, U.S. Mission to the United Nations, *supra* note 182.

184. *See* ANAYA, *supra* note 171, at 73–74; McGee, *supra* note 170, at 577–78; Press Release, U.S. Mission to the United Nations, *supra* note 182.

185. *See* ANAYA, *supra* note 171, at 97–98.

186. *Id.* at 103.

187. *Id.* at 110–11.

Similarly, objections to FPIC focused on the threat to state integrity that could result from bestowing a veto power on a sub-national group.[188] As U.S. Advisor Robert Hagen stated in his explanation of the United States' vote against adopting the U.N. Declaration: "The text also 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)."[189] Although the United States cited Article 19 as an example of its concern, the fact that this objection was made in a section entitled "Land, Resources, & Redress" indicates the particular significance of land and resource issues to U.S. concerns over the implications of FPIC.[190] The United States appears to fear losing control over lands and resources considered indigenous.

However, just as warnings of fragmentation due to invocation of the concept of self-determination have not been borne out,[191] FPIC has not led to the undemocratic consequence of giving sub-national groups veto power over legislative processes during the time since the U.N. Declaration was adopted in 2007.[192] In fact, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People explicitly stated of Article 19: "This provision of the Declaration should not be regarded as according indigenous peoples a general 'veto power' over decisions that may affect them . . . ."[193]

Additionally, nothing in Article 32, which concerns land and resources, explicitly articulates a veto power as part of its consent requirement.[194] Only two articles of the U.N. Declaration mandate that governments obtain indigenous consent as a result of FPIC: Article 10, which addresses forced relocations, and Article 29(2), which deals with storage or disposal of hazardous materials.[195] In contexts other than these two limited situations, the type of participation and consultation mandated by the term "consent" is not settled, resulting in a spectrum of interpretations of the concept ranging from requiring procedural consultation with indigenous peoples to endorsing indigenous peoples' exercise of absolute veto power.

The proliferation of FPIC interpretations that do not require indigenous consent in all circumstances has, perhaps, helped lead the four original objecting states to reconsider and endorse the U.N. Declaration.[196] As countries adopt and

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188. *See* Press Release, U.S. Mission to the United Nations, *supra* note 182.

189. *Id.*

190. *See id.*

191. *See* ANAYA, *supra* note 171, at 58–76; ANAYA, *supra* note 182, at 110–15.

192. *See* Anaya, *Promotion and Protection*, *supra* note 170, ¶ 46.

193. *Id.*

194. U.N. Declaration, *supra* note 1, art. 32; *see also* McGee, *supra* note 170, at 592.

195. U.N. Declaration, *supra* note 1, arts. 10, 29(2); Anaya, *Promotion and Protection*, *supra* note 170, ¶ 47; *see also* McGee, *supra* note 170, at 592.

196. Canada, Australia, New Zealand, and the United States originally objected to the U.N. Declaration, but all four have since announced their endorsement. Richardson, *supra* note 2.

seek to implement the U.N. Declaration, they must decide, as matters of both law and policy, what level of participation and consultation the principle of FPIC evokes in various contexts, including that of mining on indigenous lands.[197]

C. The Consultation–Consent Spectrum and Its Application to Extractive Industries

Although an international consensus has emerged about the importance of the principle of FPIC, there remains no singular, commonly accepted definition of the term "consent" as it is used in articulating the principle.[198] Rather, a spectrum of interpretations of the principle of FPIC has developed in addition to the emerging view that different contexts invoke different obligations along this spectrum.[199] Thus, operationalizing FPIC requires examining the types of activities a state considers implementing and their likely or possible consequences.

At a minimum, states have a duty to engage in prior, meaningful consultation in good faith with indigenous peoples concerning activities that affect them.[200] The more a particular activity or development project affects indigenous peoples and their lands, the greater the required level of participation and consultation.[201] Special Rapporteur Anaya stated:

> Necessarily, the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of consent.[202]

Thus, although most proposed legislative and administrative actions may only give indigenous peoples a right to meaningful participation, there are situations in

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197. The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People stated in the conclusions and recommendations of his 2009 annual report: "Notwithstanding the necessarily variable character of consultation procedures in various contexts, States should define into law consultation procedures for particular categories of activities . . . in, or affecting indigenous territories." Anaya, *Promotion and Protection*, *supra* note 170, ¶ 67.

198. McGee, *supra* note 170, at 589, 591; *see also* Laplante & Spears, *supra* note 181, at 93.

199. Anaya, *Promotion and Protection*, *supra* note 170, ¶¶ 45–47. "The specific characteristics of the consultation procedure that is required by the duty to consult will necessarily vary depending upon the nature of the proposed measure and the scope of its impact on indigenous peoples." *Id.* ¶ 45.

200. Miranda, *supra* note 180, at 151–52; Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WIS. INT'L L.J. 51, 86–87 (2009).

201. Anaya, *Promotion and Protection*, *supra* note 170, ¶¶ 45–47.

202. *Id.* ¶ 47.

which FPIC may bestow a veto power on indigenous peoples due to the severe impacts associated with the activity involved.

As mentioned above, the U.N. Declaration explicitly recognizes a state duty to obtain full consent before moving ahead with a project only in the contexts of forced relocation and storage or dumping of toxic materials.[203] Nonetheless, there are strong arguments, based on both law and policy, that states should also obtain full consent in other situations, including that of large-scale extractive activities on indigenous lands. FPIC becomes a central issue in situations involving resource extraction on indigenous land due to the "catastrophic consequences of unwanted and actively opposed development that stems from violations of the FPIC right."[204] FPIC's importance in such contexts is also heightened because conflicts over land and resource rights often involve high stakes and can crystallize into zero-sum situations—meaning that one side wholly wins while the other suffers a complete loss because a project either goes forward or is shut down.[205]

Due to the nature of large-scale extractive activities, there seems to be a shift in the international arena toward viewing states' duty to consult with indigenous peoples as falling on the consent end of the consultation–consent spectrum. Some argue that, where activities directly impact indigenous peoples' right to "use, enjoy, control, and develop their traditional lands," there is a norm developing that recognizes that full consent, rather than just meaningful consultation, is required.[206] For instance, former Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People Rodolfo Stavenhagen has stated that "[t]he free, informed and prior consent, as well as the right to self-determination of indigenous communities and peoples, must be considered as a necessary precondition" for "major development projects" affecting indigenous lands.[207] Such "major development projects" include "the large scale exploitation of natural resources including subsoil resources."[208] Stavenhagen has argued that indigenous peoples have the "right to say no" to certain development projects.[209]

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203. *See supra* text accompanying note 195.

204. McGee, *supra* note 170, at 571–72.

205. *See id.* at 574.

206. Miranda, *supra* note 180, at 153. As Anaya has noted: "A norm of customary international law emerges—or *crystallizes*—when a preponderance of states (and other actors with international legal personality) converge on a common understanding of the norm's content and expect future behavior to conform to the norm." ANAYA, *supra* note 182, at 80.

207. Pasqualucci, *supra* note 200, at 88 & n.201 (citing Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Indigenous Issues*, ¶¶ 36, 73, U.N. Econ. and Soc. Council, Comm'n on Human Rights, U.N. Doc. E/CN.4/2003/90 (Jan. 21, 2003) [hereinafter Stavenhagen, *Indigenous Issues*] (by Rodolfo Stavenhagen)).

208. *Id.* at 88 n.201 (quoting Stavenhagen, *Indigenous Issues*, *supra* note 207, ¶ 6).

209. *Id.* at 88–89 (quoting Stavenhagen, *Indigenous Issues*, *supra* note 207, ¶ 66).

Furthermore, there are strong arguments for why, even if such a norm has not yet crystallized, states should adopt this interpretation of FPIC for large-scale extractive activities. First, the power to withhold consent can be seen as necessary to enforce other important indigenous rights beyond rights of consultation and participation.[210] This is particularly true in the context of extractive industries, whose projects implicate numerous other indigenous rights due to their ability to threaten indigenous peoples' physical and cultural survival.[211] For instance, the ability to withhold consent allows indigenous communities to enforce their community property rights, protect their sacred spaces, and maintain their culture and relationship with the land.

Additionally, there are reservations about how "meaningful" indigenous participation can be in the absence of the power to withhold consent.[212] As Professor Brant McGee comments: "Absent the ability to walk away from the bargaining table, indigenous groups would simply be participating in a meaningless exchange of views designed to fulfill a legal requirement."[213] Given the stakes and zero-sum potential of large-scale extractive projects, "[t]here is no such thing as partial consent in this context."[214] Therefore, indigenous peoples must be equipped with the ability to withhold consent in order to engage in meaningful negotiation. Special Rapporteur Anaya has stated: "[T]he principles of consultation and consent are aimed at avoiding the imposition of the will of one party over the other, and . . . instead striving for mutual understanding and consensual decision-making."[215] Yet without the power to withhold consent in zero-sum situations where destructive impacts on indigenous lands and culture are high, indigenous people are left with little bargaining power and therefore may be unable to participate in meaningful consultation.

Promoting an interpretation of FPIC that gives indigenous peoples the right to withhold consent in the context of large-scale extractive projects is also good policy from the state and corporate perspectives because it can make projects more successful. Professor Lisa J. Laplante and attorney Suzanne A. Spears propose that extractive industries can diffuse costly opposition to projects by engaging in community "consent processes."[216] Conflicts with communities can

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210. *See* McGee, *supra* note 170, at 589; Anne Perrault et al., *Partnerships for Success in Protected Areas: The Public Interest and Local Community Rights to Prior Informed Consent (PIC)*, 19 GEO. INT'L ENVTL. L. REV. 475, 479–80 (2007).

211. *See* Secretariat of the Permanent Forum on Indigenous Issues, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices*, ¶¶ 2, 48, Dep't of Econ. and Soc. Affairs, Div. for Soc. Policy and Dev., U.N. Doc. PFII/2004/WS.2/8 (Jan. 17–19, 2005) (contribution by Parshuram Tamang).

212. McGee, *supra* note 170, at 594.

213. *Id.*

214. *Id.*

215. Anaya, *Promotion and Protection*, *supra* note 170, ¶ 49.

216. Laplante & Spears, *supra* note 181, at 70–71. Laplante and Spears focus their analysis on "the developing world." *Id.* at 71. However, their findings appear to be

create obstacles for a particular project as well as for the corporation itself.[217] Global campaigns against particular companies have been waged—as exemplified by "ProtestBarrick.net," which is a campaign entirely devoted to publicizing opposition to Barrick Gold Corporation.[218] Such campaigns can damage a company's reputation, which Laplante and Spears refer to as "an extractive industry company's lifeblood."[219] Additionally, opposition can be costly due to the public relations campaigns corporations must launch in response to community opposition,[220] legal costs to fend off efforts to shut down projects, and losses in profitability. For example, after the Ninth Circuit Court of Appeals issued a limited injunction against Barrick in the Cortez Hills case, the company's stock dropped 8.43%, despite the fact that the project did not ultimately shut down.[221]

Thus, when states believe a development project is in the public interest, they should seek to engage the community in consent processes, rather than consultation processes, both to protect the rights of indigenous peoples and also to promote the long-term benefit of the project itself. As Laplante and Spears explained:

> Whereas consultation processes require only that extractive industry companies [or the state] hear the views of those potentially affected by a project and then take them into account when engaging in decision-making processes, consent processes require that host communities actually participate in decision-making processes. Consent processes give affected communities the leverage to negotiate mutually acceptable agreements under which projects may proceed . . . .[222]

Interpreting FPIC as respecting the right of indigenous peoples to withhold consent for large-scale extractive projects, therefore, gives communities the tools necessary to protect their rights as well as to bargain with state and corporate actors in order to move forward with development projects on mutually beneficial terms.

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applicable to state–corporate–community relations in the broader indigenous context as well.

217. *Id.* at 72–75. Community opposition, even when it does not derail a project, can be quite costly. For instance, when the Ninth Circuit ordered the district court to issue a limited injunction against Barrick Gold Corporation in *South Fork Band Council v. U.S. Department of the Interior*, 588 F.3d 718 (9th Cir. 2009) (per curiam), Barrick's stock dropped immensely. *See* Ross Marowits, *Barrick Gold Evaluating Impact of a U.S. Court Ruling on Its Cortez Hills Mine in Nevada*, SAVVY INVESTOR (Dec. 4, 2009), http://www.savvyinvestor.com/barrick-gold-evaluating-impact-of-a-u-s-court-ruling-on-its-cortez-hills-mine-in-nevada.

218. PROTESTBARRICK.NET, http://protestbarrick.net (last visited Oct. 3, 2011).

219. Laplante & Spears, *supra* note 181, at 73.

220. For illustration, see Barrick's corporate social responsibility literature. *Corporate Responsibility*, BARRICK, http://www.barrick.com/CorporateResponsibility/Community/default.aspx (last visited Oct. 3, 2011).

221. *See* Marowits, *supra* note 217.

222. Laplante & Spears, *supra* note 181, at 87–88.

In sum, within the context of large-scale extractive industries, it is in the best interest of states to take a consent-based approach to operationalizing the principle of FPIC found in instruments such as the U.N. Declaration.

CONCLUSION: SHIFTING TOWARD A CONSENT-BASED FRAMEWORK

The United States has articulated a commitment to the importance of indigenous consultation both through its endorsement of the U.N. Declaration on the Rights of Indigenous Peoples and its domestic policies, such as E.O. 13,175 and President Obama's Tribal Consultation Memorandum. However, in order to fully realize this commitment, the United States should embrace a policy shift away from the currently articulated meaningful consultation standard. U.S. law and policy should move toward viewing indigenous consultation as involving a spectrum of requirements—with good-faith, meaningful consultation as a minimum and with consent required in certain contexts, including large-scale extractive industries. Rather than being in conflict with U.S. law, a consent-based framework for large-scale extractive industries better reflects the sound policies already at the heart of indigenous consultation requirements.

In moving toward a consent-based framework within the limited context of large-scale extractive projects on indigenous peoples' traditional lands, the United States has many existing tools and strategies at its disposal, including changes in law and policy. For instance, there have been efforts to change the United States' legislative landscape. In April 2010, Congressman Raul Grijalva (D-AZ) introduced H.R. 5023, entitled *Requirements, Expectations, and Procedures for Executive Consultation with Tribes Act.*[223] Though ultimately unsuccessful, the bill would have instituted a requirement that federal agencies make a good-faith effort to end the scoping stage of projects with a memorandum of agreement with affected tribes.[224]

However, although such measures could bolster consultation requirements generally, procedural mechanisms alone are insufficient to ensure the United States meets its duty of "meaningful consultation" within contexts such as large-scale mining projects. Given the substantive content of U.S. mining law and the BLM's tendency to prioritize economic interests, such a law would be unlikely to result in a different outcome for the Western Shoshone. Additionally, there have been numerous efforts to reform the General Mining Law.[225] Nevertheless, without a change in the way the United States engages indigenous peoples in decisionmaking processes involving large-scale mining projects, such reforms would be unlikely to change the Western Shoshone story.

Opportunity exists for legislating stronger consultation requirements, including a requirement of engaging in good-faith consultation to obtain the

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223. H.R. 5023, 111th Cong. (2010).

224. *Id.*

225. *See, e.g., Interior Chief: 1872 Mining Law Needs Fixing*, MSNBC.COM (July 14, 2009, 3:11 PM), http://www.msnbc.msn.com/id/31910387/ns/us_news-environment.

consent of indigenous peoples for large-scale extractive projects on their traditional lands. Such laws would not necessarily cripple mining and other industries, as evidenced by the fact that large-scale extractive industries exist in many places where indigenous peoples do hold a veto power, such as reservations.[226] Rather, consent-based laws would require greater negotiation between the government, indigenous peoples, and mining corporations. This, in turn, would benefit all parties and operationalize the best practices articulated by both governments and corporations.

Even without a change in law, however, the United States could move toward such consent-based decisionmaking. Current requirements such as those mandated by NEPA and NHPA set a procedural minimum rather than limiting the field of possible consultative and participatory measures available to administrative agencies. Increased use of alternative dispute resolution with third-party mediators or internal policies requiring memoranda of understanding between agencies and indigenous peoples before projects come under consideration could be the first steps toward a consent-based model of decisionmaking within the context of large-scale extractive industries.

Ultimately, to be truly effective, changes in law and administrative practice require a concomitant shift in policy. As the United States looks toward implementing the U.N. Declaration, the country should attempt to move away from an approach that narrowly interprets the Declaration's articles. Rather, the United States should use its endorsement of the U.N. Declaration on the Rights of Indigenous Peoples as an opportunity to embrace a consent-based approach to indigenous rights within the context of large-scale extractive industries.

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226. *See* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 231 (1996) ("[T]he extractive industries, such as coal, uranium, oil, and gas, have played a major role in reservation economic development.").