

Shifting the Balance of Power: Self-Governance and Consultation

Moving from Consultation to Consent



Rob Roy Smith

TICA

November 2021



Terrance Guardipee, "Running Eagle War Party" © 2020

Sovereignty

- Sovereignty is the right of Self-Governance
 - It is the right of a tribal government to make its own laws and to be governed by them
- All federally-recognized Indian tribes have inherent sovereignty
 - This sovereignty is not the result of treaties, executives orders, or statutes
 - Treaties, executive orders and other acts of Congress occurred *because of* inherent tribal sovereignty, not the other way around
 - The U.S. only negotiates treaties with sovereign entities

What is Consultation?

- “Consultation” refers to meaningful and timely discussion in an understandable language with tribal governments during the development of...
 - regulations
 - policies
 - programs
 - plans or other matters
- ...that significantly or uniquely affect federally recognized American Indian and Alaska Native tribes and their governments

Consultation is Inherently Limited

- Tribes are Either Under-Consulted
 - Tribal governments are often not involved in the planning and the decision-making process
 - Agencies write and publish consultation procedures for working with tribal governments that focus on *telling* Tribal governments what is going to happen as opposed to seeking meaningful *input* on the proposed action
 - Agency staff are not trained on fundamentals of consulting with tribal governments
- Or, Tribes are Over-Consulted
 - The Biden Administration push to overhaul the Federal relationship with Tribes

A column by Native American civil rights icons David E. Wilkins and Hank Adams perfectly captures the current reality of tribal relations:

“[W]hat has emerged over the last several years is an empty, distorted version of consultation, whereby outside governments, corporations and other entities claim to have consulted with tribal governments when, in actuality, they have done little more than inform them of an intent to act without input from or notice.”

Consultation is a poor substitute for consent

Tribes have settled for
consultation – but Indian
County can and should
demand better

Free Prior and Informed Consent

- FPIC is an international rights-based norm codified in United Nations Declaration of the Rights of Indigenous People (“UNDRIP”) that governs interactions with indigenous peoples.
- FPIC stands for the principle that all project-affected indigenous peoples have the legal right to be part of decision-making processes for projects that impact their lands and resources.
- FPIC is designed to replace historical processes that excluded indigenous peoples from decision-making regarding activities that occurred on or near their ancestral lands and resources.
- The United Nations General Assembly adopted UNDRIP in 2007, and the United States officially endorsed UNDRIP in 2010.

What is FPIC?

Free from coercion, intimidation, retaliation

Prior to the commencement of any activity, with adequate time accorded for full consideration

Informed about the project, in terms of its likely impacts, its costs and its benefits for the community

Consent in the sense of having a real choice, after due process and consideration

How Does Consent Work?

- FPIC standard empowers indigenous peoples to negotiate the conditions under which a proposed project will be designed, implemented, monitored and evaluated
- The FPIC standard requires that:
 - (i) consent should be sought from tribes before any project, plan or action takes place that may affect them or their lands;
 - (ii) tribes may give or withhold consent, and may revoke consent at any time; and
 - (iii) consent should be independently decided upon and based on accurate, timely and sufficient information provided in a culturally appropriate manner.
- The outcome of a decision-making process guided by the FPIC standard can take several forms: (i) obtaining consent from tribes regarding the proposed activity; (ii) obtaining consent from tribes after negotiations and changes to the conditions under which the project will be planned, implemented, monitored and evaluated; or, (iii) tribes withholding consent for a proposed project

FPIC-Based Decision Making

- Like the federal policies of tribal sovereignty and self-determination, FPIC emphasizes the political equality of tribes
- When applied to the government-to-government relationship between the federal government and tribes, FPIC would empower tribes to say no to a proposed federal action, or at the very least, to require changes to the federal proposal so that the federal government and the affected tribe can agree on the scope of the proposed federal action
- FPIC-based tribal consultation would impose a legal requirement—not just a goal of conducting consultation—on federal agencies to obtain the free, prior and informed consent of affected tribes prior to taking actions that impact tribes, their rights or lands

Making FPIC Part of Consultation

- Under a FPIC-based approach to tribal consultation, federal agencies would not be able to take unilateral action with respect to a tribe's lands, rights or resources
- In order to better facilitate discussions between federal agencies and tribes, a dispute resolution process should be incorporated into the federal government's FPIC-based consultation procedure
- This new tribal consultation policy should also place the burden on the federal agency to demonstrate that it made sufficient efforts to obtain tribal consent, and to clearly explain the reasons why tribal consent to the proposed federal action was not accomplished

Making FPIC Part of Consultation Continued

- FPIC epitomizes federal respect for tribal sovereignty and self-determination, fulfillment of the federal trust responsibility and meaningful and robust tribal consultation—all priorities the Biden Administration has declared it is firmly dedicated to
- Obtaining tribal consent also significantly minimizes the risk of tribal opposition to federal action
- Advancing a federal action without tribal consent almost guarantees prolonged litigation, poses significant threats to the commercial and financial viability of the proposal, and results in additional costs and expenditure of resources

Is FPIC Possible? Yes!

- Initiative 1631 to implement a carbon fee in Washington State
 - Included FPIC in lieu of traditional consultation with tribes with respect to green-energy projects that were to be facilitated through the carbon fee
- I-1631 was defeated in November 2018 as Big, Out of State Oil spent over \$32 million (98% out of state) to sway voters.
- But, I-1631, including the FPIC provisions, were endorsed by the Governor, Attorney General, numerous State leaders, and NGOs
- I-1631 by design succeeded in mainstreaming the concept of FPIC by using a climate initiative to mainstream formerly “radical” but undeniably necessary policies like FPIC

Is FPIC Possible? Yes!

- The Attorney General of Washington State improved its tribal consultation processes by adopting a FPIC-based standard in 2019
 - <https://www.atg.wa.gov/tribal-consent-consultation-policy>
- “The AGO will receive free, prior and informed consent prior to taking certain actions specified in this section that directly and tangibly affect Tribes, rights or tribal lands.”
 - Unless prior consent is received, the AGO will not initiate an AGO program or project that directly affects a Tribe that the AGO undertakes under the independent authority of the Attorney General.”
 - “To the extent consistent with the Rules of Professional Conduct, and with the goal to avoid litigation whenever possible, the AGO will consult with a Tribe prior to filing civil litigation against a Tribe or a business owned by a Tribe.”

Making FPIC a Reality

- Replace consultation with FPIC in contracts with developers/ industry
- Seek to include FPIC in state policies and laws
- Insist the Biden Administration include FPIC in executive agency consultation policies and Executive Order on Consultation

Locations

Counsel to innovative companies and brands around the world

We help leaders create, expand, and protect the value of their companies and most prized assets by bringing an equal balance of business acumen, technical skill, and creative thinking to the opportunities and challenges they face.



Anchorage
Atlanta
Augusta
Beijing
Charlotte
Dallas
Denver

Houston
Los Angeles
New York
Raleigh
San Diego
San Francisco
Seattle

Shanghai
Silicon Valley
Stockholm
Tokyo
Walnut Creek
Washington DC
Winston-Salem