



THE PERMANENT MISSION
OF THE
UNITED STATES OF AMERICA
TO THE
UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS
IN GENEVA

March 8, 2018

Expert Mechanism on the
Rights of Indigenous Peoples (EMRIP)
Office of the High Commissioner for Human Rights

Dear Sir/Madam:

Attached is the U.S. response to letters from the Office of the High Commissioner for Human Rights, referencing HRC resolution 33/25 on achieving the ends of the UN Declaration on the Rights of Indigenous Peoples. EMRIP will prepare a study on free, prior, and informed consent (FPIC) and invites member states to submit input for the report. The United States appreciates the opportunity to highlight a number of U.S. policies on this subject.

Sincerely,

A handwritten signature in blue ink that reads "Jason Mack".

Jason R. Mack
U.S. Deputy Permanent
Representative to the UN Human
Rights Council

SUBJECT: U.S. Response to EMRIP Questionnaire, on Free, Prior, and Informed Consent (FPIC)

1) Overarching U.S. government approach

As acknowledged, *inter alia*, in the World Bank Environmental and Social Framework, Environmental and Social Standard 7 on indigenous peoples, “[t]here is no universally accepted definition of [Free, Prior, and Informed Consent (FPIC)].” The U.S. position on FPIC in the UN Declaration on the Rights of Indigenous Peoples (UN Declaration) is explained in the December 2010 “Announcement of U.S. Support for the UN Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship and Improve the Lives of Indigenous Peoples”: “[T]he United States recognizes the significance of the Declaration’s provisions on free, prior, and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.” U.S. government agencies take this approach in their interactions with federally recognized Indian tribes in the United States.

As a matter of U.S. domestic law and policy, the U.S. Constitution and federal treaties, statutes, executive orders, and policies speak to the federal government’s engagement with federally recognized Indian tribes. Consultation with federally recognized tribes occurs on a government-to-government basis in light of the sovereign nature of federally recognized tribes under our constitutional system. Processes established pursuant to these treaties, statutes, executive orders, and policies fall within the U.S. interpretation of “meaningful consultation” with tribal leaders in furtherance of U.S. commitments regarding FPIC in the UN Declaration.

Of particular importance, Executive Order (E.O.) 13175 entitled “Consultation and Coordination with Indian Tribal Governments” aims at the establishment of regular and meaningful consultation and collaboration with tribal officials in federal policies that have tribal implications. Section 5 of E.O. 13175 provides for each

relevant federal agency to have an accountable process that ensures “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”

2) Examples of the many ways in which U.S. federal agencies consult with Indian tribes include the following:

-- Department of the Interior (DOI). DOI’s Policy on Consultation with Indian Tribes was developed to ensure that all bureaus and offices within DOI comply with federal laws, regulations and policies, including E.O. 13175. The Policy on Consultation provides a consultation framework to complement existing laws, rules, statutes, and regulations that guide consultation with Indian tribes. Broadly, the policy requires government-to-government consultation between appropriate tribal officials and Departmental representatives and identifies opportunities for affected Indian tribes to participate in a consultative process for Departmental Actions that have tribal implications. The Policy on Consultation explicitly outlines the stages and processes to be followed, in order to establish uniform practices and common standards for all bureaus and offices. While the Department initiates the consultation process, an Indian tribe may request that DOI initiate a consultation when an Indian tribe believes that a bureau or office is considering a Departmental Action that has tribal implications.

-- Advisory Council on Historic Preservation (ACHP). Section 106 of the National Historic Preservation Act (54 U.S.C. § 306108) and its implementing regulations at 36 C.F.R. Part 800 require federal agencies to consult with Indian tribes and Native Hawaiian organizations (NHOs) when projects to be carried out, funded, or licensed by federal agencies may impact historic properties of religious and cultural significance to them. Consultation is required throughout the planning process, thereby providing Indian tribes and NHOs the opportunity to influence federal decision-making. However, the statute and regulations do not require federal agencies to obtain the agreement of Indian tribes and NHOs on their decisions. In deference to tribal sovereignty, when the project is located, or will affect historic properties, on tribal lands, tribal agreement is required on the steps

to resolve such effects, if such steps will be used by the federal agency to demonstrate compliance with Section 106. Absent tribal concurrence with such steps, the federal agency demonstrates compliance with Section 106 through the consideration of, and response to, ACHP comments by the head of the agency before he or she makes a final decision on the project. Such consideration cannot be delegated by the head of the agency. Tribal lands are defined as all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

ACHP has extensive guidance to assist federal agencies, Indian tribes and NHOs in effectively engaging in consultation and developing long-term working relationships. ACHP has adopted policies that commit the agency to support tribal sovereignty; uphold its government-to-government and trust responsibilities to Indian tribes; and, support tribal participation in the national historic preservation program. ACHP also has a policy acknowledging the importance of Native Hawaiian heritage preservation and committing the agency to continue assisting NHOs in consultation under Section 106. While Section 106 does not afford Indian tribes and NHOs the right to veto federal agency decisions, the ACHP's policies and guidance support their full and meaningful involvement in consultation with federal agencies.

-- Department of State. In the lead-up and follow-up to the September 2014 World Conference on Indigenous Peoples, the Department held consultations on goals in the UN Declaration that U.S. tribal leaders identified as priorities. These were: 1) enhancing indigenous peoples' participation in UN sessions, by advocating for institutional changes that would allow indigenous peoples to voice their concerns more effectively in a larger number of UN bodies; 2) implementing the objectives of the UN Declaration, including through revitalizing the UN Expert Mechanism on the Rights of Indigenous Peoples to help member states achieve the Declaration's goals; 3) addressing violence against indigenous women and girls; and 4) repatriating culturally significant items and human remains. Department of State-hosted consultations were organized to take place shortly before UN meetings and processes aimed at implementing these objectives in the World

Conference Outcome Document. These include the 2016 HRC process aimed at reforming EMRIP, as well as the 2015-2017 UN General Assembly process looking into ways to enable the participation of indigenous representatives and institutions in meetings of relevant UN bodies on issues affecting them. Tribal input informed many of the positions advanced by the United States during these processes.

-- Environmental Protection Agency (EPA). EPA recognizes the importance of the UN Declaration in the EPA's Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous People. This environmental justice policy guides EPA in working with federally recognized tribes and all other indigenous peoples to address their environmental and public health priorities. In addition to this policy, EPA's Policy for the Administration of Environmental Programs on Indian Reservations and EPA's Policy on Consultation and Coordination with Indian Tribes guide EPA's actions and decisions affecting federally recognized tribes. EPA continues to work with federally recognized tribes and other indigenous peoples to address environmental and human health concerns in Indian country, as well as in areas of interest to tribes and other indigenous peoples throughout the United States.

-- Department of Justice (DOJ or the Department). DOJ's policy on consultation with federally recognized Tribes implements the requirements of E.O. 13175, and provides DOJ guidance on the formal process through which the Department seeks tribal input regarding the development of new or amended policies, regulations, and legislative actions initiated by the Department. The policy statement establishes a formal process through which DOJ components must seek tribal input regarding the development of new or amended policies, regulations, and legislative actions initiated by DOJ that may affect Indian tribes. The principle of consultation has its roots in the unique relationship between the Federal Government and the governments of federally recognized tribes. This government-to-government relationship has a more than 200-year history, and is built on the foundation of the U.S. Constitution, treaties, legislation, executive action, and judicial rulings. Coordination between Tribes and DOJ encompasses a

variety of forms of communication that include formal consultation, listening sessions, meetings with individual tribes, and informal discussions with tribal leaders. DOJ's policy focuses on the more formal aspects of consultation, but communication between tribes and DOJ is not limited to formal consultation. The policy commits DOJ to consult with federally recognized tribes before adopting policies that have tribal implications. The term "policies" includes: (1) regulations or regulatory policies; (2) proposed legislation; (3) decisions regarding whether to establish Federal standards; and (4) other policies for which DOJ determines consultation is appropriate and practicable. The term "policies" does not include matters that are the subject of investigation, anticipated or active litigation, or settlement negotiations. Nor does it include individual grants or contracts. E.O. 13175 explains that policies have tribal implications if they "have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."