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The Unseen Harm: U.S.-Indian Relations & Tribal Sovereignty

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COMMENT

THE UNSEEN HARM: U.S.-INDIAN RELATIONS & TRIBAL SOVEREIGNTY

Mni Wiconi. Water is life.

*GEORGE EMMONS**

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INTRODUCTION

With the stroke of two pens, the fight was over.[1] The Standing Rock Sioux, a federally recognized Indian tribe in North Dakota[2] fought the construction of the Dakota Access Pipeline ("DAPL") to protect its reservation lands and people.[3] On November 1, 2016, after months of protests, supported by environmental and civil rights groups, the Tribe won a small victory: the Obama administration urged consideration of a reroute of the pipeline[4] and for Energy Transfer Partners ("ETP"), the company behind DAPL, to cease its construction of the pipeline pending further consultation.[5] On January 18, 2017, the Army Corps of Engineers considered drafting an environmental impact statement to further investigate ways to protect the Standing Rock Sioux Tribe from the DAPL.[6]

Then, the unexpected happened: on January 24, 2017, President Donald J. Trump signed an executive order authorizing the construction of the DAPL.[7] On February 22, 2017, police executed North Dakota Governor Doug Burgman's emergency evacuation order, arresting protesters who had not already left the camp site at Oceti Sakowin.[8] Af-

[1] Jeremy Diamond, Athena Jones, and Gregory Krieg, *Trump Advances Controversial Pipeline with Executive Action*, CNN (Jan. 24, 2017, 05:57 PM), http://www.cnn.com/2017/01/24/politics/trump-keystone-xl-dakota-access-pipelines-executive-actions/.; Alene Tchekmedyian, *10 Arrested as Authorities Close in on Dakota Access Pipeline Protest Camp*, L.A. TIMES (Feb. 22, 2017, 7:05 PM), http://www.latimes.com/nation/nationnow/la-na-dakota-access-protest-camp-20170222-story.html.

[2] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4, 12 (D.D.C. 2016).

[3] *History*, STAND WITH STANDING ROCK, http://standwithstandingrock.net (last visited Mar. 8, 2018).

[4] Caitlyn Yilek, *Obama: We're Examining Options to Re-Route ND Pipeline,* THE HILL, (Nov. 1, 2016, 11:23 PM), http://thehill.com/blogs/blog-briefing-room/energy-environment/303912-obama-were-examining-ways-to-reroute-the-nd.

[5] Wes Enzinna, *Army Halts Construction of Dakota Access Pipeline*, MOTHER JONES (Nov. 15, 2016, 9:09 PM), https://www.motherjones.com/environment/2016/11/army-corps-dakota-access-pipeline-trump/.

[6] Army Department, *Notice of Intent To Prepare an Environmental Impact Statement in Connection With Dakota Access, LLC's Request for an Easement To Cross Lake Oahe, North Dakota*, FED. REG. (Jan. 18, 2017), https://www.federalregister.gov/documents/2017/01/18/2017-00937/notice-of-intent-to-prepare-an-environmental-impact-statement-in-connection-with-dakota-access-llcs.

[7] Diamond et al., *supra* note 1.

[8] Tchekmedyian, *supra* note 1. Oceti Sakowin is a historic camp for the Standing Rock Sioux Tribe. Throughout the centuries, tribal leaders and supporters have gathered at Oceti Sakowin to protest and conduct prayer services for the tribe and its people. This site holds a special importance

ter months of protesting and over two years of opposition to the pipeline, two pens defeated it all.[9]

The environmental issues raised by the DAPL are intertwined with tribal sovereignty and tribal consultation.[10] The Standing Rock Sioux advocated for improved tribal consultation and protections for its reservation lands and people, in part, because it feared that an oil pipeline could irreparably damage its water supply.[11] Mni Wiconi; water is life.[12] Until tribal sovereignty concerns are addressed, the environmental harms and issues raised by the DAPL will continue to occur and harm American Indian tribes. The DAPL raises concerns about tribal sovereignty in the twenty-first century and provides an opportunity for the United States to re-examine this issue in a way that protects the welfare and safety of tribal peoples and lands. The fight is over and the DAPL is a reality. However, by not addressing the issue of tribal sovereignty, the United States will continue to harm Indian tribes and erode their tribal sovereignty even more over time.[13] Protests garner attention, but only changes in policy and jurisprudence can establish permanent protections.

Historically, Indian treaties provided the greatest protections for Indian tribes.[14] The executive branch negotiated formal treaties with Indian tribes, the legislative branch ratified these agreements and the judicial branch interpreted treaty provisions.[15] Courts gave treaties great deference and, when invoked, courts were reluctant to toss aside treaty provisions.[16] This system, by judicial precedent, protected Indian tribes and codified many sovereign rights, including certain water and land rights.[17]

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to the Standing Rock Sioux tribe. *See generally* STAND WITH STANDING ROCK, http://standwithstandingrock.net/oceti-sakowin/Oceti Sakowin (last accessed Feb. 13, 2018).

[9] Diamond, et al., *supra* note 1; Tchekmedyian, *supra* note 1.

[10] Kate Harris and Michael Gonchar, *Battle Over an Oil Pipeline: Teaching About the Standing Rock Sioux Protests*, N.Y. TIMES (Nov. 30, 2016), https://www.nytimes.com/2016/11/30/learning/lesson-plans/battle-over-an-oil-pipeline-teaching-about-the-standing-rock-sioux-protests.html?_r=0.

[11] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4, 7 (D.D.C. 2016).

[12] *Dakota Access Pipeline Standoff: Mni Wiconi, Water is Life*, INDIAN COUNTRY TODAY (Aug. 16, 2016), https://indiancountrymedianetwork.com/news/native-news/dakota-access-pipeline-standoff-mni-wiconi-water-is-life/.

[13] Hope E. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 Utah L. Rev. 443, 460-63 (2005); *see generally* South Dakota v. Bourland, 508 U.S. 679 (1993) (holding that land rights can be abrogated by implication).

[14] *See generally* Winters v. United States 207 U.S. 564 (1908) (water rights); *see generally Bourland*, 508 U.S. 679 (land rights).

[15] *See* U.S. CONST. art. II, § 2; *see also* United States v. Dion, 476 U.S. 734, 740 (1986).

[16] *See* United States v. Dion, 476 U.S. 734, 739 (1986).

[17] *See generally* Winters v. United States, 207 U.S. 564 (1908) (water rights); South Dakota v. Bourland, 508 U.S. 679 (1993) (land rights).

However, this treaty-based system has not been revisited in nearly two centuries.[18] Congress ended the treaty system in an appropriations bill in 1871, creating the present statutory system.[19]

The current system uses a statutory framework to regulate formal relations with Indian tribes, relying heavily on Congressional legislation, executive orders, and a narrow interpretation of treaty provisions in the judicial system.[20] This system is one-sided and does not protect tribal sovereignty. Congress can enact statutes with little or no input from Indian tribes.[21] Even Congressional legislation aimed to protect Indian tribes only protects Indian tribes from certain federal action and is silent when private conduct affects tribal lands.[22] The executive branch, acting through executive orders, creates uncertainty in the government's relations with Indian tribes since administrations can change every four years.[23] Lastly, in recent years, the judicial branch has not asserted its historic role in protecting Indian tribal rights.[24] The Court once was the forum to uphold treaty obligations and provide expansive protections for tribes. Today, courts have been hesitant to broadly interpret treaty provisions, and instead narrowly interpret congressional legislation to the detriment of Indian tribes.[25] The only way to protect Indian tribal sovereignty in the twenty-first century is to reinstate a treaty-based system so that the broad protections that treaties once gave Indian tribes are redrafted in a twenty-first century context.

This article explores tribal sovereignty through the lens of the Standing Rock Sioux and its opposition to the DAPL. The DAPL situation is a symptom of the larger problem of a lack of tribal consultation, which diminishes tribal sovereignty and tribal rights.[26] The current system re-

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[18] *See generally* Babcock, *supra* note 13, at 457.

[19] 25 U.S.C. § 71.

[20] *See generally* South Dakota v. Bourland, 508 U.S. 679 (1993) (finding that congressional legislation extinguished treaty rights by implication and narrow application of past treaty interpretation tenants).

[21] *See generally* MICHAEL LAWSON, DAMMED INDIANS: THE PICK SLOAN PLAN AND THE MISSOURI RIVER SIOUX 1944-1980 (U. Okla. Press, 1st ed. 1982) (arguing that the Pick Sloan Agreement proceeded without adequate consultation with affected Indian tribes).

[22] *See generally* Flood Control Act of 1944, Pub. L. No. 78-534, 58 stat. 887 (codified in scattered sections of 33 U.S.C.), https://www.usbr.gov/power/legislation/fldcntra.pdf.

[23] *See* Diamond, et al., *supra* note 1.

[24] *See generally Bourland*, 508 U.S. 679 (finding that congressional legislation extinguished treaty rights by implication and narrow application of past treaty interpretation tenants).

[25] *See generally id.* (finding that congressional legislation extinguished treaty rights by implication and narrow application of past treaty interpretation tenants). The notion of broad interpretation of treaty rights will be discussed in more detail in Part I.

[26] *See* LAWSON, *supra* note 21; s*ee also* Babcock, *supra* note 13, at 462.

lies on Congressional statutes,[27] narrow interpretation of treaty rights, and executive orders, leaving Indian tribes with few ways to protect their tribal sovereignty and ensure adequate consultation with the federal government and other organizations in the twenty-first century.

Part I discusses the history of tribal sovereignty through an explanation of the domestic dependent status of Indian tribes and the two historic canons of Indian treaty interpretation. The Court's interpretation and application of these canons in the cases of *Winters*,[28] *Dion,*[29] and *Bourland*[30] have a direct relation to the amount of protection given to Indian tribes.

Part II provides a brief history of the Fort Laramie Treaty[31] that created the Standing Rock Sioux Reservation and a factual background for the DAPL protests and legal battles. Part III then proposes the revitalization of a treaty-based system for U.S.-Indian relations and outlines how a treaty might be drafted, using the United Nations Declaration on the Rights of Indigenous People ("UNDRIP")[32] as a framework. It then discusses the benefits of a treaty-based system to Indian tribes and how each branch of government would be involved in this new treaty-based system.

I. INDIAN TREATY INTERPRETATION

A. DOMESTIC DEPENDENT STATUS OF TRIBES

Indian tribes, as domestic dependent nations, have a unique relationship with the United States government.[33] Indian tribes maintain certain sovereign rights but are also subject to the will of the government and rely on it for certain protections.[34] Chief Justice John Marshall, in *Cherokee Nation v. Georgia,*[35] referred to tribes as domestic dependent nations because they were neither foreign nations nor states.[36] Since the Commerce Clause provides Congress with the authority to "regulate com-

[27] *See* Nat'l Hist. Land Preservation Act, 54 U.S.C. 300101 et seq. (2014). These statutes, like the National Historic Land Preservation Act, were written to ensure adequate consultation with Indian tribes. The National Historic Land Preservation Act is outside the scope of this Comment.

[28] Winters v. United States, 207 U.S. 564 (1908).

[29] United States v. Dion, 476 U.S 734 (1986).

[30] South Dakota v. Bourland, 508 U.S. 679 (1993).

[31] Fort Laramie Treaty, Sioux-U.S., Apr. 29, 1868, 15 Stat. 636.

[32] G.A. Res. 61/295, annex, U.N. Declaration on the Rights of Indigenous People (Sept. 13, 2007), http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

[33] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

[34] *Id.*

[35] *Id.*

[36] *Id.*

merce with foreign nations, among the several states, and with the Indian tribes," there is a clear differentiation between foreign nations, states, and Indian tribes; therefore, each group should have a distinct relationship with the United States federal government.[37]

Furthermore, unlike foreign nations, Indian tribes do not hold an absolute sovereign right to their land.[38] Despite retaining some sovereignty to defined lands,[39] they are subject to the will of the United States since they rely on the United States for protection and their territory composes a part of the United States.[40] The founders intended a unique relationship with the Indian tribes and this was codified in the Constitution.[41]

B. TREATY RIGHTS: THE JUDICIARY'S KEY ROLE IN INTERPRETATION

Treaties protect Indian tribes and acknowledge their domestic dependent status.[42] Indian tribes retain certain sovereign rights and cede certain rights to the United States.[43] Treaties and their historic interpretation ensure that this balance is maintained.[44] Judicial interpretation of treaty provisions provides expansive protections for Indian tribes that go beyond the express language of a treaty, interpreting treaty provisions in a way that is most favorable to the Indian tribe.[45] At the same time, Congress can abrogate[46] certain treaty rights when they "clearly and plainly" pass legislation that annuls a past treaty provision.[47] Broad interpretation of treaty rights does not limit Congressional authority to act.[48] Instead, treaty interpretation asks Congress to deliberate and come to a reasoned conclusion before a treaty provision is abrogated.

The judicial branch is essential to the protection of tribal sovereignty and tribal rights.[49] The legislative and executive branches are not consistent and change over time.[50] On the other hand, the judicial branch can

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[37] *Id.* at 18.

[38] *Id.* at 17.

[39] *Id.*

[40] *Id.* at 20.

[41] *See id.*

[42] *See generally* Winters v. United States, 207 U.S. 564 (1908).

[43] *See generally* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

[44] *See generally* United States v. Dion, 476 U.S. 734, 738-40 (1986).

[45] *See generally Winters*, 207 U.S. 564.

[46] To abrogate is to "abolish by authoritative action" or to "treat as nonexistent." *Abrogate*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/abrogate (last visited Mar. 8, 2018).

[47] *See Dion*, 476 U.S. at 738-40 (explicating the clear and plain interpretation doctrine).

[48] *See id*.

[49] *See generally Winter*s, 207 U.S. 564 (holding that water rights were implied in a treaty even though they were not in the language of the treaty).

[50] U.S. CONST., art. 1, § 4; U.S. CONST., amend. XXII.

protect tribal rights over time through legal precedent.[51] However, since the treaty system has not been revisited or revised in over two centuries, this historic protection has been limited and Indian tribes have not received adequate protections.[52]

C. Historic Canons of Treaty Interpretation

The domestic dependent status of Indian tribes led to the adoption of a treaty-based system.[53] Unlike states, Indian tribes were not formally a part of the United States at its founding and held certain sovereign rights.[54] Since Indian tribes had no formal relationship with the United States, a treaty-based system was necessary.[55] Indian treaties established tribal reservations and outlined the negotiated rights and benefits that both the United States and Indian tribes enjoyed.[56]

Early Supreme Court jurisprudence balanced the sovereign interests of Indian tribes against the ability of the federal government to exert control over the United States and the several Indian tribes.[57] Historically, courts utilized two treaty interpretation canons to ensure this balance: (1) interpret treaty rights in a way that is most advantageous to Indian tribes,[58] and (2) be explicit in modifying or abrogating treaty rights.[59] To abrogate a treaty right, Congress must demonstrate, through express statutory language or legislative history, that Congress specifically considered the effect its legislation would have on Indian tribes and nonetheless abrogated said treaty right.[60] These two treaty interpretation canons gave protections to Indian tribes while also protecting Congress' ability to enact legislation.[61]

1. Winters v. United States: A Broad Interpretation of Treaty Rights

The first canon of Indian treaty interpretation is interpreting the treaty in a light most favorable to the Indian tribe.[62] In some circum-

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[51] *See generally Winters*, 207 U.S. 564; *see generally* Menominee Tribe v. United States, 391 U.S. 404 (1968) (holding that certain hunting rights were preserved by an Indian Tribe who had ceased to be recognized by the U.S. government).

[52] *See generally* Babcock, *supra* note 13, at 463.

[53] *See generally* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

[54] *See generally* Babcock, *supra* note 13, at 459-60.

[55] *See generally id.* at 457.

[56] *See generally id.* at 464.

[57] *See generally* Winters v. United States, 207 U.S. 564 (1908).

[58] *Id.* at 576.

[59] United States v. Dion, 476 U.S. 734, 740 (1986).

[60] *Id.*

[61] *See generally id*. at 738-39.

[62] *Id.* at 740.

stances, an active judiciary can infer tribal rights not expressly codified in a treaty.[63] For example, in *Winters v. United States,* the Supreme Court established water diversion rights for Indian tribes through a broad interpretation of an Indian treaty.[64]

In *Winters*, the United States sued five defendants on behalf of the Crow Indian Tribe,[65] under an 1888 treaty to enjoin the defendants from diverting water from the Milk River.[66] The 1888 treaty established the Fort Belknap reservation, but did not have specific language regarding tribal water diversion rights,[67] or the right to divert a certain amount of flowing water for the purpose of irrigation or another reservation need.[68] The issue before the Court was whether a treaty that did not expressly grant water diversion rights, gave such rights to an Indian tribe.[69]

The Supreme Court found for the United States and established tribal water diversion rights for Indian tribes.[70] The Court concluded that since the United States forced Indian tribes to occupy reservations, the federal government needed to protect certain tribal water rights.[71] Prior to reservations, Indian tribes were nomadic and hunting communities.[72] Focusing on these origins, the Court reasoned that since the Indian Tribes did not readily exercise their rights to water, the United States government exercised these rights for them in order to direct the Indian tribes to adopt an agrarian way of life on reservations.[73] This new way of life required a stable water supply and the United States needed to protect this water supply on behalf of the Crow Tribe.[74]

The Court applied the first canon of treaty interpretation and resolved the ambiguity of water rights in a light that was most favorable to the Crow Tribe.[75] The Court looked to the circumstances surrounding the

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[63] *See* Winters v. United States, 207 U.S. 564, 565 (1908).

[64] *See id.* (inferring reserved water rights to the Crow Indian Tribe).

[65] The Crow Indian Tribe are a federally recognized Indian tribe that is located in Montana. They have a long history in the Yellowstone River Valley and were widely recognized for their matriarchal society where women held significant positions of power within the tribe. *See generally Crow Indians*, INDIANS.ORG, http://indians.org/articles/crow-indians.html (last accessed Feb. 13, 2018).

[66] *See Winters*, 207 U.S. at 577. The Milk River is a tributary of the Missouri River and spans over 729 miles in length, spanning much of the state of Montana. *See generally Feature Detail Report for: Milk River*, U.S. GEOLOGICAL SERV., https://geonames.usgs.gov/apex/f?p=gnispq:3:0::NO::P3_FID:774213 (last accessed Feb. 13, 2018).

[67] *See Winters*, 207 U.S. at 575-76.

[68] *Id.* at 576.

[69] *Id.* at 577.

[70] *Id.* at 576.

[71] *Id.*

[72] *See id.*

[73] *Id.* at 575-76.

[74] *Id.* at 576.

[75] *Id.*

1888 agreement and decided that the Tribe would not have relinquished all water rights at the time of this treaty.[76] An Indian reservation located on arid land was valueless and uninhabitable without a stable water supply.[77] The Tribe enjoyed and used a larger area of land before negotiating the treaty,[78] but nevertheless, entered into an agreement which limited its land use to a smaller tract of land.[79] The Court reasoned that the Crow Tribe would not have entered the 1888 agreement if the tribe believed it would be unable to access the Milk River and its water supply.[80] Therefore, the 1888 agreement was written under the assumption that the Crow Tribe would have broad control over the water diversion of the Milk River, even though these water rights were not stated explicitly in the treaty.[81]

2. United States v. Dion: Congressional Abrogation of Treaty Rights

The second canon of treaty interpretation is that Congress must explicitly modify and abrogate treaty obligations.[82] The rationale for this canon is that treaties should be given deference and not cast aside without deliberation.[83] In *United States v. Dion*, the Court applied this canon to the abrogation of a past treaty provision that allowed Indian tribes to sacrifice bald eagles for ceremonial purposes.[84] The issue was whether the Bald Eagle Protection Act, which banned the killing of bald eagles, abrogated a past treaty provision which allowed for the Yankton Sioux Tribe[85] to hunt bald eagles for non-commercial purposes.[86]

The Court held that Congress abrogated a treaty provision that allowed for the ritual sacrifice of bald eagles by enacting the Bald Eagle Protection Act.[87] Justice Marshall reiterated the long-standing legal stan-

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[76] *Id.* at 575-76.

[77] *Id.* at 576.

[78] *Id.*

[79] *Id.* at 576-77.

[80] *Id.* at 575-76.

[81] *Id.* at 576.

[82] *See generally* United States v. Dion 476 U.S. 734, 738-39 (1986).

[83] *Id.*

[84] *Id.* at 736-37.

[85] The Yankton Sioux are a sub group of the Sioux Nation. The tribe would sacrifice bald eagles and use their feathers for certain rituals and ceremonies. *See generally* LAWSON, *supra* note 21. *See also* Henry J. Reske, *Lawyers Tell High Court Indian Treaty Allows Eagle Hunting*, UNITED PRESS INT'L (Mar. 26, 1986), https://www.upi.com/Archives/1986/03/26/Lawyer-tells-high-court-Indian-treaty-allows-eagle-hunting/6054512197200/; *see also Dion*, 476 U.S. at 741-42 (explaining how amendments and legislative action over time demonstrated that Congress considered the ramifications the act would have on Indian tribes).

[86] *Dion*, 476 U.S. at 736.

[87] *Id.*

dard of explicit abrogation of treaty provisions and that "an act of Congress, passed in the exercise of its constitutional authority . . . if clear and explicit, must be upheld by the courts . . . ."[88] Specific statutory language and legislative history demonstrated that Congress considered the tribes when enacting the Bald Eagle Protection Act, and after deliberation, decided to abrogate a treaty provision.[89]

The power to abrogate treaty provisions is significant but not without limits.[90] Congress should demonstrate deliberation and thought behind abrogating a treaty provision and specifically consider the effect their actions would have on Indian tribes.[91] At the same time, Congress cannot be blocked from abrogating treaty provisions should circumstances or the interests of the United States change over time.[92] This interpretive canon strikes a necessary balance to protect Indian tribes and allows Congress to act in the best interests of the United States.[93]

3. South Dakota v. Bourland: Departure from Historic Canons of Treaty Interpretation

Recent Supreme Court jurisprudence has shifted considerably from the above mentioned canons of treaty interpretation.[94] Specifically, the Court has held that the effect of a statute can abrogate a treaty provision rather than requiring express language or legislative history to abrogate the provision.[95] In *South Dakota v. Bourland*, the Court held that the Flood Control Act of 1944 and the Cheyenne River Act abrogated a past treaty provision through its effect on the disputed land, not the language or legislative history of the statutes.[96]

The *Bourland* Court considered whether the Flood Control Act of 1944 and the Cheyenne River Act abrogated a Fort Laramie Treaty right, which gave considerable tribal authority over the use of the lands along Lake Oahe,[97] a reservoir that was created after the Flood Control Act of

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[88] *Id.* at 738.

[89] *Id.* at 740-41.

[90] *See generally id.*

[91] *See generally id.* at 738-39.

[92] *See generally id.*

[93] *See generally id.*

[94] *See* South Dakota v. Bourland, 508 U.S. 679, 687-88 (1993).

[95] *Id.*

[96] *Id.* at 697-98.

[97] *Id.* at 681-82, 688 (holding that Article 2 of the Fort Laramie Treaty gave absolute use and occupation to the Sioux Nation of their reservation lands, the implicit power to exclude others from reservation areas, and regulate use of fishing land along the reservation).

1944.[98] Before the enactment of the Flood Control Act and the Cheyenne River Act, the land in question was part of the Cheyenne River Sioux Indian Reservation, and the Fort Laramie Treaty gave considerable control over the land to the tribes for hunting and grazing.[99] After the enactment of these statutes, the land was flooded and certain hunting, timber salvaging, and fishing rights were given to the Cheyenne River Tribe.[100] The *Bourland* Court considered whether the Cheyenne River Sioux tribe could restrict the use of the shoreline along Lake Oahe to Indian tribal use only and exclude non-Indian hunters and fisherman by not recognizing South Dakota State fishing and hunting licenses.[101]

The Court found that the Flood Control Act extinguished previous treaty obligations since it gave enforcement authority to the Army Corps of Engineers and diminished some regulatory authority from the Cheyenne River Sioux Tribe.[102] Justice Thomas, writing for the majority, concluded that the Flood Control Act and Cheyenne River Act clearly and expressly abrogated previous treaty rights.[103] By building a dam, all past rights were no longer in force "regardless of whether land is conveyed pursuant to an Act of Congress for the homesteading or for flood control purposes."[104] This decision gave broad deference to Congress to extinguish Indian treaty rights and found that congressional statutes can abrogate treaty obligations by effect, even without specific legislative language or legislative history that abrogates a treaty right.[105]

The Supreme Court was not unanimous in its interpretation of the clear and plain abrogation doctrine.[106] In a spirited dissent, Justice Blackmun articulated the historic treaty interpretation canon.[107] He noted, "Tribes possess 'inherent powers of a limited sovereignty which has never been extinguished.'"[108] Blackmun reasoned that just because the United States government wished to build a dam, that does not mean that it wished, or intended, to extinguish all treaty rights and authority over the land that it took for the construction of a dam.[109] Congress

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[98] *See generally* LAWSON, *supra* note 21. The Flood Control Act and Cheyenne River Act designed to reclaim land from the Sioux Tribe for the purpose of controlling the flow of the Missouri River and developing water projects along the Missouri River. *Id.*

[99] Fort Laramie Treaty, Sioux-U.S., art. 2, Apr. 29, 1868, 15 Stat. 636.

[100] *Bourland*, 508 U.S. at 683-84.

[101] *Id.* at 685.

[102] *Id.* at 696.

[103] *Id.* at 687, 694.

[104] *Id.* at 689, 692.

[105] *Id.* at 692-94.

[106] *See id.* at 698 (1993) (Blackmun, J., dissenting).

[107] *Id.* at 698-99.

[108] *Id.* at 699 (quoting *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (emphasis omitted)).

[109] *Id.* at 698.

needed to make clear that it wished to extinguish all hunting and fishing authority over the land taken for the dam project in order for a treaty right—tribal authority over use of fishing lands—to be extinguished.[110] Blackmun argued that the Tribe retained its rights under the Fort Laramie Treaty because the United States did not demonstrate the requisite clear showing.[111]

D. TREATY INTERPRETATION: THE CURRENT STATE OF AFFAIRS

The precedents set in *Winters*[112] and *Dion*[113] demonstrate that the historic canons of treaty interpretation provide a system that protects Indian tribes and the federal government's ability to adapt and change over time. Treaties should be interpreted in a way that is most advantageous to the Indian tribes.[114] Indian tribes are unique as domestic dependent nations and therefore, their relationships with the United States government must necessarily be different than those of a state or foreign nation.[115] Indian tribes are protected when treaty ambiguities are resolved to their benefit. Also, there should be a clear and plain abrogation of treaty rights.[116] Congressional abrogation is permissible but historically has been narrowly defined by the above-mentioned standards.[117] Congress is not hindered by enacting legislation and treaties do not hinder Congressional ability to abrogate treaty provisions, if necessary.[118] Express language and legislative history that demonstrates a consideration of past treaty obligations is enough to justify abrogation of treaty rights.[119]

These canons of treaty interpretation have not been applied by the Supreme Court in recent years. The *Bourland* decision demonstrates that, without these canons, Indian tribal sovereignty and tribal treaty rights are less protected.[120] With outdated treaties and a broad interpretation of the abrogation of treaty provisions, Indian tribes are at the mercy of Congressional legislation. By not adhering to the historic canons of treaty interpretation and the treaty-based system, tribal sovereignty and, consequently, tribal consultation are eroded and Indian tribes have limited

[110] *Id.* at 700.
[111] *Id.*
[112] Winters v. United States, 207 U.S. 564, 576 (1908).
[113] United States v. Dion, 476 U.S. 734, 740-41 (1986).
[114] *Bourland*, 508 U.S. at 699 (Blackmun, J., dissenting).
[115] *See generally* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).
[116] *See generally Dion*, 476 U.S. 734; *Winters*, 207 U.S. 564.
[117] *See Winters*, 207 U.S. at 576; *Dion*, 476 U.S. at 738, 740.
[118] *See generally Dion*, 476 U.S. 734.
[119] *Bourland*, 508 U.S. at 692-94.
[120] *See id.* at 692-94.

ways to protect their sovereign rights. It is in this context that the Standing Rock Sioux sought legal recourse.[121]

II. BACKGROUND: THE STANDING ROCK SIOUX AND THE DAPL

The Standing Rock Sioux trace its treaty rights to the Fort Laramie Treaty of 1868.[122] The Fort Laramie Treaty created a formal relationship between the Sioux Tribe and the United States, establishing certain reservation lands.[123] The Sioux were a nomadic tribe that traversed vast stretches of the Midwest.[124] The Fort Laramie Treaty restricted its land holdings, but granted exclusive dominion over its granted area of land, also known as unceded territory.[125] The Sioux were allowed to control its reservation land, those who settled in it, and had broad hunting, fishing, and irrigation rights."[126] Furthermore, its land holdings could not be changed or taken away without consent of three-fourths of adult males of the tribe.[127]

The Fort Laramie Treaty created certain benefits for the tribes and certain benefits for the government.[128] For example, while the United States agreed to build certain structures on Indian reservation land, the Indian tribes agreed to allow the United States to construct a national railroad without interference.[129] In exchange for the construction of the railroad, some of which would cross and affect tribal land, the government would provide just compensation for the harms done by this project.[130] While the treaty gave certain Indian Tribal lands, the 5th Amendment provided that just compensation must be given for any land taken by the U.S.[131]

A central aspect of the Fort Laramie Treaty is just compensation for actions affecting tribal land or traversing tribal land.[132] In fact, just com-

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[121] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4, 12-17 (D.D.C. 2016) (factual background to permitting and consultation process).

[122] *See generally* LAWSON, *supra* note 21.

[123] *See generally id.* (The Sioux Tribe has since developed into several distinct groups including the Standing Rock, Cheyenne River, Fort Belknap, Brule and Yankton Sioux Tribes).

[124] *See id*.

[125] Fort Laramie Treaty, Sioux-U.S., art. 2, Apr. 29, 1868, 15 Stat. 636.

[126] *Id.* at arts. 2, 8-9, 16.

[127] *Id.* at art. 12.

[128] *See id.* at arts. 2, 11.

[129] *Id.* at arts. 4, 11.

[130] *See id.* at arts. 2, 11; U.S. CONST., amend. V.

[131] *See* Fort Laramie Treaty, Sioux-U.S., art. 2, Apr. 29, 1868, 15 Stat. 636; U.S. CONST., amend. V.

[132] *See* Fort Laramie Treaty, Sioux-U.S., art. 2, Apr. 29, 1868, 15 Stat. 636; U.S. CONST., amend. V. Part III will further explain that this notion of just compensation should apply to a modern treaty. The Fort Laramie Treaty considered the effect of projects on tribal land. *Id.* In the twenty-first

pensation underlies the entire treaty.[133] The United States explicitly agreed to give the Tribe goods and build certain institutions and structures within the reservation in exchange for non-interference with a national railroad.[134]

Moving to the present day, the route of the DAPL was not always an issue for Energy Transfer Partners ("ETP") and the Standing Rock Sioux.[135] In fact, early proposed routes show plans for a route through Bismarck, North Dakota as early as May 2014, five months before the route through Lake Oahe was submitted.[136] The pipeline was redirected towards Indian tribal land when residents of Bismarck were concerned about the effect the pipeline could have on their water supply.[137] The route that affected Bismarck, which was ten miles north of the city, was determined to be a high consequence area, meaning that the water supply of Bismarck was highly likely to be significantly affected by an oil pipeline.[138]

The Standing Rock Sioux have confronted the DAPL route for over two years.[139] In September 2014, ETP announced its plan to cross the Missouri River under Lake Oahe at the confluence[140] of the Missouri and Cannonball River.[141] This location is a half-mile north of the Standing Rock Sioux Reservation.[142] The DAPL crosses dozens of rivers and water crossings along its nearly 1200 mile route.[143] In December 2014, ETP submitted its proposed route to the Army Corps of Engineers for

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century, tribal land is affected in ways that could not have been conceived in the nineteenth century, namely that water resources could be polluted by an underground oil pipeline. Part III will contend that a new treaty system, based on the historical principles of past treaties, should adopt a similar approach in a twenty-first century context.

[133] *See generally* Fort Laramie Treaty, Sioux-U.S. .

[134] *Id.* at arts. 4, 8, 10-11.

[135] *See* Amy Dalrymple, *Pipeline Route Plan First Called for Crossing North of Bismarck*, BISMARCK TRIBUNE, (Aug. 18, 2017), http://bismarcktribune.com/news/state-and-regional/pipeline-route-plan-first-called-for-crossing-north-of-bismarck/article_64d053e4-8a1a-5198-a1dd-498d386c933c.html.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4, 13 (D.D.C. 2016). For more detailed information on the permitting process and a breakdown of the consultation efforts behind the proposed pipeline route. *See id.* at 12-24.

[140] A confluence is "the place of meeting of two streams." *Confluence*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/confluence (last visited Mar. 8, 2018).

[141] *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 14.

[142] *Id.* at 13.

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

consideration.[144] The Army Corps then authorized the construction of the pipeline through a standard permit, which allows for construction through federally regulated waters.[145]

Federal permitting was a small part of the DAPL and its construction proceeded without significant federal oversight.[146] With the exception of the crossing at Lake Oahe that came close to the Standing Rock Sioux Reservation, ninety-nine percent of the pipeline traversed private land.[147] Therefore, as long as ETP obtained the consent and permission of private landowners for easements through its respective properties, the DAPL was nearly guaranteed to become a reality.[148] The only places that required permitting were along Lake Oahe and the confluence of the Missouri and Cannonball rivers, which are federally regulated waterways.[149]

In March 2016, Iowa was the last state to approve the DAPL.[150] Just a month later, protesters gathered in North Dakota to protest the DAPL.[151] The Army Corps of Engineers granted over 200 permits to cross through federally regulated waterways in July 2016, paving the way for the DAPL.[152]

The Army Corps of Engineers arrived late to the negotiation process between ETP and the affected tribes, including the Standing Rock Sioux.[153] The Army Corps had little involvement with the early pipeline route negotiations and took a more extensive role almost a year after the initial discussions and inspections of the land.[154]

The Standing Rock Sioux sought a temporary restraining order to block the pipeline in the Federal District Court for the District of Columbia under the National Historic Preservation Act.[155] Protests were ongoing and several interests groups supported the Standing Rock Sioux Tribe and its fight against the pipeline.[156] The lawsuit had many causes of ac-

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[144] James Hill & Dean Schabner, *Timeline of Dakota Access Pipeline Development,* ABC NEWS (Feb. 12, 2017, 12:57 AM), http://abcnews.go.com/US/standing-rock-sioux-court-halt-dakota-access-pipeline/story?id=45432998.

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

[146] *Id.*

[147] *Id*.

[148] *Id.*

[149] *Id.*

[150] Hill & Schabner, *supra* note 144.

[151] *Id.*

[152] *Id.*

[153] *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 4, 14 (D.D.C. 2016). The factual basis behind the National Historic Preservation Act and the permitting timeline is beyond the scope of this article. However, *see generally id.* at 8-10, 12-26 (providing an extensive discussion of the permitting timeline in the Factual findings of the opinion).

[154] *Id.* at 14-15.

[155] *Id.* at 25-26.

[156] Hill & Schabner, *supra* note 144.

tion, including claims under the National Environmental Policy Act, Clean Water Act and the National Historic Preservation Act.[157] The order was denied by the District of Columbia District Court on September 9, 2016.[158]

After the court's decision, President Obama urged ETP to cease construction efforts voluntarily for the DAPL while the Army Corps considered alternative routes and consulted with the Standing Rock Sioux and other affected tribes.[159] In January of 2017, the Army Corps decided it would implement an environmental impact study ("EIS") and was allowed to proceed with this study after a federal judge denied a motion to stop this EIS.[160] On January 24, 2017, President Trump signed an executive order that rescinded this study and began construction of the pipeline.[161] In February 2017, the Army Corps pulled its EIS and granted the final easement for the DAPL.[162] Then, on February 9, 2017, the Cheyenne River Sioux, with support from the Standing Rock Sioux, filed suit to challenge this final easement.[163] The federal district court denied the Cheyenne River Sioux's suit.[164] As of June 9, 2017, oil is now flowing through the DAPL.[165]

III. SOLUTION: TWENTY-FIRST CENTURY TREATY SYSTEM

The current statutory system that regulates U.S.-Tribal relations is inadequate to protect Indian tribal rights in the twenty-first century.[166] Our current system allows both the executive branch and legislative branch to act on their own initiative and does not incentivize either branch to consult or negotiate with Indian tribes.[167] The executive branch can sign executive orders without input from Indian tribes and Congress

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[157] *See Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 7-12.

[158] Hill & Schabner, *supra* note 144.

[159] Enzinna, *supra* note 5.

[160] Hill & Schabner, *supra* note 144.

[161] *Id.*

[162] *Id.*

[163] *Id.*; Blake Nicholson, *Judge Combines 4 Tribal Suits Over Dakota Access Pipeline*, DESERET NEWS (Mar. 17, 2017, 12:00 AM), http://www.deseretnews.com/article/765693349/Judge-combines-4-tribal-suits-over-Dakota-Access-pipeline.html.

[164] *U.S. Judge Denies Tribe's Request to Stop Oil Flow in Dakota Access Pipeline*, REUTERS (Mar. 14, 2017, 4:34 PM), https://www.reuters.com/article/us-north-dakota-pipeline/u-s-judge-denies-tribes-request-to-stop-oil-flow-in-dakota-access-pipeline-idUSKBN16L2U0.

[165] Robinson Meyer, *Oil is Flowing Through the Dakota Access Pipeline,* THE ATLANTIC, (Jan. 9, 2017), https://www.theatlantic.com/science/archive/2017/06/oil-is-flowing-through-the-dakota-access-pipeline/529707/.

[166] *See generally* Babcock, *supra* note 13, at 462-464; LAWSON, *supra* note 21.

[167] LAWSON, *supra* note 21.

can enact legislation without tribal consultation.[168] This leaves no incentive for tribal consultation and harms tribal sovereignty over land and other resources.[169]

A treaty-based system encourages negotiation and consultation with Indian tribes. The executive branch has power over foreign affairs.[170] By negotiating a treaty, the executive branch must negotiate with the Indian tribe and come to an agreement.[171] Then, the executive branch must elicit support from Congress to ratify the negotiated treaty.[172] Ultimately, under the historic canons of treaty interpretation, Congress would need to consider the interests of a tribe before abrogating a treaty provision that was negotiated by the President.[173]

A treaty-based system protects Indian tribes and does not hinder the federal government's ability to act.[174] This system fosters separation of powers amongst all branches of government, cooperation amongst the executive and legislative branches and promotes Indian tribes as domestic dependent sovereigns that retain certain sovereign rights.[175]

Without a treaty-based system, the historic separation of powers between the executive branch and legislative branch has been eradicated.[176] By ending the treaty system, Congress took away the historic power of the executive branch to negotiate foreign affairs.[177] This gives Congress plenary power to enact legislation and, consequently, diminishes the sovereignty of Indian tribes and the protections and rights they had under negotiated treaties.[178]

Treaties provide lasting protections for tribal sovereignty and tribal rights.[179] Even today, Indian tribes receive considerable protection from treaties[180] and the judicial branch has consistently shown deference to treaties and tribal rights, such as water diversion rights.[181] However,

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[168] *See generally* Babcock, *supra* note 13, at 462-463; *see generally* South Dakota v. Bourland, 508 U.S. 679 (1993).

[169] *See generally* Babcock, supra note 13, at 463; *see generally Bourland*, 508 U.S. 679.

[170] U.S. CONST. art. 2, § 2, cl. 1-2.

[171] Saikrishna Prakash, *Against Tribal Fungibility*, 89 Cornell L. Rev. 1069, 1100 (2004).

[172] U.S. CONST. art. 2, § 2, cl. 1-2.

[173] *See* United States v. Dion, 476 U.S. 734, 738-40 (1986).

[174] Babcock, *supra* note 13, at 459-60.

[175] *Id.* at 463.

[176] *See* Prakash, *supra* note 171, at 1097 (concluding that a treaty-based system gave certain powers to the President and certain powers to Congress where each did not have unlimited or plenary power over federal Indian relations).

[177] *Id.* at 1101.

[178] *Id.* at 1099.

[179] *See generally* Winters v. United States, 207 U.S. 574 (1908); *see generally* Menominee Tribe v. United States 391 U.S. 404 (1968).

[180] *See* U.S. DEP'T. OF INDIAN AFFAIRS, https://www.bia.gov/ (last visited Feb. 1, 2018).

[181] *See generally Winters*, 207 U.S. 574.

these protections are outdated and do not address the current situation of Indian tribes in the twenty-first century, such as underground pipelines and large private domestic oil projects. Treaties, such as the Fort Laramie Treaty, do not address these new developments, specifically the potential environmental hazards of underground pipelines, because they were not in these past agreements and cannot be inferred since they were not a part of nineteenth century America.

A new treaty with the Indian tribes will benefit the tribes and not harm the United States. A new treaty and the process behind its negotiation would provide a much-needed dialogue regarding twenty-first century Indian relations and confront the new problems facing Indian tribes today. The treaty will provide an opportunity to expand Indian tribal rights that will protect Indian tribes in the twenty-first century. Further, a treaty system will not significantly affect the federal government. Adopting a treaty system will require clear deliberation in treaty abrogation and will allow the United States to modify treaties as necessary. By consulting with tribes and negotiating a new treaty, the federal government will create a better relationship with Indian tribes and create a consistent policy towards Indian tribes for the twenty-first century.

A treaty system will bring all three branches of government together and will bring cohesion and consistency to tribal relations. The executive branch and its agencies would be able to negotiate treaties with Indian tribes, based on the particularized concerns and needs of each tribe. The legislative branch would implement and ratify the treaty negotiated by the executive branch. This would provide oversight of the President's negotiations and would provide a framework for the legislative branch to codify in law, if necessary. Finally, the judicial branch would protect Indian tribes from encroachment by the legislative and executive branches. It would interpret treaties broadly and resolve disputes in a light most favorable to Indian tribes and determine whether Congress did its due diligence and considered the Indian tribes before abrogating a specific treaty provision. Again, abrogation could be accomplished through the express language of a statute or the legislative history and discussions behind a given statute.

A. UNITED NATIONS: AN EXAMPLE OF A TWENTY-FIRST CENTURY TREATY

While a treaty-based system has not been revisited in the United States for centuries, the United Nations has done considerable work in

drafting and executing treaties over the past decades.[182] The United Nations has provided a framework and examples of how a twenty-first century treaty might be drafted and what would be important in such a document. Specifically, the United Nations Declaration of Rights of Indigenous People ("UNDRIP")[183] provides key principles that should be considered in the drafting of a new treaty.

The UNDRIP outlines the importance of recognizing the culture of indigenous people and the right to certain basic rights, including rights to sustainable living, to be free from harassment and other protections for natural resources.[184] Currently, there are 144 signatories with only four countries, Australia, the United States, Canada and New Zealand, rejecting this agreement.[185] In fact, the countries that reject the UNDRIP have significant indigenous populations, more so than the countries who are signatories to the agreement.[186]

An overarching principle of UNDRIP is the free, prior and informed consent of indigenous people before taking action against indigenous resources and lands.[187] Several articles of UNDRIP mention free, prior and informed consent in the context of land, natural resources and environmental protections.[188] Furthermore, UNDRIP gives a right to redress for just, fair and equitable compensation for resources that are used or damaged without free prior informed consent.[189] This provides an important safe guard for indigenous people should there be no fair, prior and informed consultation.[190]

The UNDRIP sheds light on the meaning of free, prior and informed consent.[191] UNDRIP encourages states to implement obligations to consult and cooperate with indigenous people.[192] The UNDRIP sees consultation and cooperation as essential elements to improved relations with indigenous people.[193] Furthermore, UNDRIP recognizes treaties and agreements with indigenous people and hopes to strengthen partnerships

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[182] *See* G.A. Res. 61/295, annex, U.N. Declaration on the Rights of Indigenous People (Sept. 13, 2007), http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

[183] *Id.*

[184] *Id.*

[185] U.N. Declaration on the Rights of Indigenous Peoples, DIV. FOR SOC. POLICY AND DEV.: INDIGENOUS PEOPLES, https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.

[186] *See generally The Indigenous World*, INT'L WORK GROUP FOR INDIGENOUS AFFAIRS, https://www.iwgia.org/en/indigenous-world.

[187] G.A. Res. 61/295, *supra* note 182, at art. 10.

[188] *Id.* at arts. 10, 11, 19, 28, 29.

[189] *Id.* at arts. 8(2), 11(2), 20(2), 28, 32(3).

[190] G.A. Res. 61/295, *supra* note 182, at art. 37.

[191] G.A. Res. 61/295, *supra* note 182.

[192] *Id*.

[193] *Id.*

with them and allow indigenous people to practice their own self-determination.[194] In short, nations should not take action that affects an indigenous people without adequate consultation or their free, prior and informed consent.

B. What Would a Twenty-First Century Treaty in the U.S. Look Like?

A treaty between the United States and Indian tribes would be complex and specific to each tribe. However, any treaty should have two overarching principles and provisions: (1) free, prior and informed consent and (2) just compensation.

Free, prior and informed consent establishes a basis for improved consultation with Indian tribes. Free means that Indian tribes are not forced into negotiating or compelled to accept a particular agreement or project.[195] Prior means that the consultation occurs before a project is undertaken.[196] Informed means that the tribes understand all of the relevant facts and circumstances and are able to make a reasoned conclusion.[197] Admittedly, free, prior and informed consent does not guarantee a beneficial outcome for Indian Tribes. In fact, by negotiating a new Indian treaty, both sides will not get everything that they might want out of it.[198] That being said, both would leave with assurances and benefits from the negotiated treaty. For example, consider the following treaty provision:

> *The protection of Tribal water resources is of utmost importance to tribal self-sufficiency. In order to protect these rights and the health of Indian tribes, any action that threatens to harm tribal water resources will not take place without the free, prior and informed consent of the Indian tribes. Should termination or re-route of potential projects not be feasible, just compensation will be provided to the Indian tribes, such that they are adequately compensated for harms that might occur in the future as a result of those projects.*

The above stated provision exemplifies free, prior, and informed consent, or meaningful consultation with Indian tribes. It urges parties to negotiate in good faith and each seek benefits for themselves. Only through cooperation and meaningful dialogue can the United States gov-

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[194] *Id.*

[195] *See id.*, at art. 2.

[196] *See id.*, at art. 30.

[197] *See id.*, at art. 28.

[198] *See id.*, at art. 38.

ernment and Indian tribes establish relationships that give both protections to Indian tribes and flexibility to the United States to act in its own interest.[199]

In addition, just compensation should be a part of a new treaty system. As discussed above, the Fort Laramie Treaty allowed for just compensation, which guaranteed compensation for activity that affected Sioux Reservation land.[200] Not only does just compensation provide a benefit to the Indian tribes, it also exemplifies free, prior and informed consent.[201] Just compensation implies a prior agreement that was freely negotiated by the Indian tribes. Also, just compensation is informed because both parties provide evidence as to the amount of compensation that would be justified in a particular instance.

Current treaties are inadequate to provide just compensation for Indian tribes in the twenty-first century. Unlike the negotiation of the Fort Laramie Treaty, the economy has changed and the effect that certain activities have on reservations has changed.[202] Unlike a train that cuts through reservation land and physically alters the land, underground pipelines can affect the water supply of Indian reservations, even though they might not actually be built on or under reservation land or cross its land holding.

Just compensation is essential to providing some benefits to Indian tribes that are affected by potential environmental hazards. Just compensation could come in many forms, such as a direct payment to the Indian tribe when a construction project would affect the reservation, a government sponsored or a privately executed insurance policy, or a trust fund to be used in case of catastrophic harm to reservation land. For instance, if an Indian tribe finds that an oil pipeline might harm its water supply, it could negotiate direct compensation for this potential hardship or an insurance policy that protects the tribe from future pollution. The insurance policy would guarantee that should a pipeline adversely harm a tribal water source, the policy would pay cover certain costs, namely clean-up costs, compensation for displacement or other harms suffered by the tribe, with limited and narrowly focused litigation, if any.

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[199] *See* United States v. Dion, 476 U.S. 734, 740 (1986).

[200] *See* Fort Laramie Treaty, Sioux-U.S., art. 2, Apr. 29, 1868, 15 Stat. 636; U.S. CONST., amend. V.

[201] *See* G.A. Res. 61/295, *supra* note 182, at art. 28; *see also* U.S. CONST., amend. V.

[202] See G.A. Res. 61/295, *supra* note 182, at annex.

CONCLUSION

A treaty-based system would provide the protection that Indian tribes need in the twenty-first century. Developments in technology, such as oil pipelines, bring new concerns and potential harms to Indian tribes. By reinstituting a treaty-based system, the United States government, through its three branches, would work in concert and ensure transparency and consistency in their relations with Indian tribes. Furthermore, tribes will be protected and the United States will not be impeded from enacting legislation by a treaty-based system. This new system will make the United States stronger and ensure the protection of Indian tribes in the twenty-first century.

Relations with Indian tribes have a checkered past and some tribal rights have been eroded over time.[203] The DAPL issue has brought this situation into the national spotlight and demonstrates how there are significant problems that Indian tribes face in the twenty-first century. Tribal sovereignty will continue to be eroded until meaningful negotiations are undertaken and a new treaty-based system is implemented. The judicial branch and the interpretation of treaty rights is the only meaningful and consistent protection that Indian tribes can count on. Furthermore, the historic canons of treaty interpretation provide a balance that is essential to the protection of Indian tribes and the effective action of the United States government. Only by revisiting a treaty-based system can Indian tribes hope to reclaim historic protections that they once held. While the DAPL is a reality and oil will continue to flow through it, the issue and its national spotlight provides a significant opportunity for Indian tribes and the United States to revisit U.S.- Indian relations. We must seize the attention given to this issue and use it to bring meaningful protections to Indian tribes. We must not forget. Mni Waconi. Water is life.

[203] *See* United States v. Dion, 476 U.S. 734, 736, 740-41 (1986); South Dakota v. Bourland, 508 U.S. 679, 687, 694, 696 (1993).