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Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)
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Re: Submission by the Tribal Justice Clinic at the University of Arizona College of Law[1], for EMRIP's Study on "Laws, legislation, policies, constitutions, judicial decisions and other mechanisms in which States had taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration"

Esteemed Experts:

Thank you for the opportunity to provide input on the current EMRIP Study. This submission will analyze the extent to which select United States domestic laws and policies are consistent with Article 38 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[2] focusing mainly on (1) the United States Government's general Tribal Consultation Policies and the United States' Advisory Council on Historic Preservation's (USACHP) draft policy statement on Indigenous Knowledge and Historic Preservation; and (2) current U.S. water policy and measures taken in relation to the health of Indigenous Peoples, improvement of their economic and social conditions, as well as just and fair redress to mitigate adverse environmental, social and cultural impacts as set out in Articles 8(2)(b), 26(3), and 32(2)-(3) of the UNDRIP.

Introduction and Background

The United States was one of four countries that initially voted against adoption of the UNDRIP in the United Nations General Assembly in 2007. In 2011, the United States reversed its position, issuing a Statement detailing its initiatives to promote the government-to-government relationship between Tribal Nations[3] and the United States government and to improve the lives of Indigenous Peoples. The Statement expresses that the United States, as a matter of general policy, seeks consistency with the UNDRIP within its existing laws, and also aspires to improve laws and policies "where appropriate."[4] The statement also expresses the United States' position that the UNDRIP is neither legally binding nor a statement of current international law.[5] Ultimately, the United States' purported attempts at compliance with UNDRIP fall short: "the United States recognizes the significance of the Declaration's provisions on free, prior and informed

[1] The Tribal Justice Clinic is a clinical legal education program housed at the University of Arizona James E. Rogers College of Law. This submission was prepared by Tribal Justice Clinic Director Heather Whiteman Runs Him, Esq. with the assistance of Zoë Wise, Sol Resnick Water Resources Fellow, Arizona Law (J.D. Class of 2025).
[2] Article 38 of the UNDRIP provides, "States, in consultation and cooperation with Indig-enous Peoples, shall take the appropriate mea-sures to achieve the ends of this Declaration."
[3] The terms "Indian Tribe" and "Tribal Nation" refer generally to Indigenous Peoples who have legal status as federally recognized Indian Tribes in the United States. Accordingly, the term "Indian" refers to Indigenous Peoples.
[4] *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples,* U.S. DEP'T ST. 1 (Jan. 12, 2011), https://2009-2017.state.gov/s/srgia/154553.htm.
[5] *Id.*

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."[6] The understanding expressed by the United States in its 2011 Statement is inconsistent with any coherent application of free, prior and informed consent (FPIC) through the various articles of the UNDRIP.

A. The United States' Current Consultation Policy Does Not Fulfill UNDRIP's Requirements Because it Fails to Meet Standards for FPIC.

Federal agencies within the United States government, through its Executive Branch, have adopted policies requiring and defining consultation and coordination with Tribal Nations when federal government actions impact the interests of Tribal Nations in the United States.[7] Several federal statutory laws establish consultation, but the requirement is not consistent.[8] Consultation under the United States legal framework is not consistent with FPIC.[9] FPIC as expressed in the UNDRIP assures that Indigenous Peoples have meaningful and substantial control over projects affecting their territories and resources, including water, and that their customs and traditions are fully protected and accommodated in the course of such projects. When Tribal Nations are deprived of FPIC in projects affecting their resources, decision-making power is withheld by the federal government other entities delegated its authority, in direct contravention of Articles 26(3) and 32(2). While FPIC is indeed possible through consultation, consultation alone is insufficient to satisfy FPIC. FPIC's protections extend beyond mere participation in information gathering processes and studies, as well as beyond setting terms and conditions of such projects; FPIC also requires the autonomy of final provision or withholding of consent when Indigenous Peoples' resources and/or interests are impacted. So long as the federal government retains final approval authority over projects affecting Indigenous Peoples and their resources, FPIC standards cannot be satisfied within the framework of the United States' current Consultation Policy.

The USACHP, an independent federal agency tasked with the preservation of the United States' historic resources, is a recent positive example of movement towards consistency with FPIC standards and Articles 26(3) and 32(2) of the UNDRIP.[10] The USACHP recently adopted a policy statement moving towards compliance with standards for FPIC.[11] Additionally, the current USACHP draft policy statement

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[6] *Id.* at 5 (emphasis added).

[7] *See*, *e.g.*, Executive Order No. 13175: Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (Nov. 9, 2000); *Department of the Interior Policy on Consultation with Indian Tribes*, DEP'T INTERIOR 1-2 (Nov. 11, 2022), https://www.bia.gov/sites/default/files/dup/tcinfo/512-dm-4-final_508.pdf.; Secretarial Order No. 3342, Sally Jewell, Secretary, U.S. Dep't of Interior, "Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources", October 21, 2016, https://www.doi.gov/sites/doi.gov/files/uploads/so3342_partnerships.pdf

[8] *See*, e.g., National Historic Preservation Act, 54 U.S.C. 300101et seq.; Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 et seq.; American Indian Religious Freedom Act, 14 U.S.C. 1996 et seq.

[9] U.S. Dept. of Interior et al., Final Report, Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions (2017), https://www.bia.gov/sites/via.gov/files/assets/asia/pdf/idc2-060030.pdf.

[10] The USACHP referred favorably to the UNDRIP in its 2021 Handbook on Consultation with Indian Tribes. achp.gov/sites/default/files/2021-06/ConsultationwithIndianTribesHandbok6-11-21Final_0.pdf.

[11] The USACHP March 1, 2023 Policy Statement on Burial Sites, Human Remains, and Funerary Objects emphasizes that "consensus in decision making" and "providing deference to [Indigenous Peoples'] practices, protocols, and preferences, where feasible" are needed. achp.gov/sites/default/files/policies/2023-07/PolicyStatementonBurialSitesHumanRemainsandFuneraryObjects30June2023.pdf.

on Indigenous Knowledge and Historic Preservation details a consultation policy utilizing FPIC when integrating Indigenous Knowledge into its process for preserving historic properties and protecting the United States' cultural heritage.[12] This policy will encourage deference to Tribal Nations and Native Hawaiian Organizations (NHO) in projects potentially adversely affecting them. The policy notes that there is "no limit to what constitutes appropriate mitigation," and prioritizes the preferences of the Tribal Nation or NHO.[13] In this case, FPIC standards are satisfied because the consent of the community requires a clear and full agreement of the proposed activity prior to action.

B. Indigenous Peoples' Right to Water is Recognized in UNDRIP but not Realized Under U.S. Laws and Policies.

Water is a precondition for all biological life, and one of the world's most precious natural resources. For Indigenous Peoples it is not simply a commodity, rather, it is a requirement for health, economic, and social well-being.[14] In addition, for many Indigenous Peoples, water has significant cultural and spiritual value: traditional knowledge, laws, and ways of life teach a responsibility for water.[15] Water, then, is necessary for Indigenous Peoples' self-determination, through which Indigenous Peoples can freely pursue their economic, social, spiritual, and cultural development.[16] The adverse health impacts of water insecurity are also significant and disproportionately impact Indigenous Peoples.[17]

Indigenous Peoples' right to water is an international norm reflected throughout the UNDRIP. Article 26(1) of the UNDRIP acknowledges that Indigenous Peoples have the rights to lands, territories, and resources that have traditionally been owned, occupied or otherwise used. This includes water. States' reciprocal obligation to Indigenous Peoples with regards to water is further addressed in Articles 8(2)(b), 26(3), and 32(2)-(3). Thus, under the UNDRIP, Indigenous Peoples have a right to water resources and water sovereignty.

Under the United States Department of Interior (USDOI) policy, Tribes are invited to consult on department actions when their interests are implicated.[18] By prioritizing consultation rather than free, prior, and informed consent (FPIC), the USDOI policy is substantially inconsistent with Articles 26(3) and 32(2). Implication of Tribal interests includes actions that have a direct effect on land, culture, treaties, resources, government, and Tribes' relationship status with the United States.[19] The USDOI's policy is to utilize a consensus-seeking model, under which consensus is prioritized. If consensus is not reached, however, it is the head of the bureau or office who has the final decision-making authority.[20] In the United States, Indigenous Peoples' right to access and control water is limited, and the USDOI's consultation policy hinders conflict resolution.

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[12] *[Draft] Policy Statement on Indigenous Knowledge and Historic Preservation,* ADVISORY COUNCIL ON HIST. PRES. 4-5 (Jan. 11, 2024).
[13] *Id.*
[14] Garma International Indigenous Water Declaration 1 (2008).
[15] Indigenous Peoples Kyoto Water Declaration ¶ 2-3 (2003).
[16] *Id.* at ¶ 9-14.
[17] Catarina de Albuquerque, Special Rapporteur on the human right to safe drinking water and sanitation, "*Statement to the Permanent Forum on Indigenous Issues*" May 24, 2011, http://www2.ohchr.org/english/issues/.
[18] *Department of the Interior Policy on Consultation with Indian Tribes*, DEP'T INTERIOR 1-2 (Nov. 11, 2022), https://www.bia.gov/sites/default/files/dup/tcinfo/512-dm-4-final_508.pdf.
[19] *Id*.
[20] *Id.* at 8.

1. Existing Laws and Legal Mechanisms in the United States Regarding Indigenous Peoples' Rights Associated with Water Resources Attempt to Achieve the Ends of the UNDRIP, but Fall Short.

Two interrelated legal rulings establish Tribal Nations' rights to water in the United States: the U.S. Supreme Court's opinions in *U.S. v. Winans*[21] and *U.S. v. Winters*.[22] As a result of policies in the late 19th Century, many federally recognized Tribal Nations' land bases are confined to reservations. The agreements or laws setting aside lands for Indians often did not explicitly address the water rights of the tribes. In 1905 and 1908 respectively, the U.S. Supreme Court issued key decisions recognizing Tribal Nations' rights to protect subsistence practices and resources reserved by them through treaties and agreements with the United States, and to water sufficient to fulfill the purposes of their reservations.[23] These rulings have been applied and upheld by subsequent United States Supreme Court decisions as well as numerous other federal and state appellate courts.

Under Article 26(3) of the UNDRIP, Indigenous Peoples have a right to legal recognition of their water resources. The *Winans* and *Winters* doctrines, within U.S. jurisprudence, recognize Tribal Nations' right to water, however, subsequent decisions established that the preferred method for quantification requires calculating the amount of water needed to irrigate all practicably irrigable acreage (PIA) within the reservation.[24] Both the *Winters* doctrine and the PIA standard are based on an agricultural land uses. The assimilation-era policy in place at the time most Indian reservations were created sought to anglicize Indigenous Peoples and coerce their conversion to a pastoral lifestyle.[25]

Water, however, has significance for Indigenous Peoples beyond agriculture, and quantification for irrigation purposes is inconsistent with Article 26(3)'s definition of a legal right, which requires recognition of and respect for the customs, traditions and land tenure systems of the Indigenous Peoples concerned. To achieve consistency with UNDRIP, laws and policies must recognize the diverse range Indigenous Peoples' relationships with and uses for water, and should prioritize protection of water uses associated with the spiritual beliefs and religious practices, customs and traditions of each individual Tribal Nation.

2. United States' Laws and Judicial Decisions With Regards to Water Rights Fail to Hold the United States Government Accountable and Do Not Achieve the Ends of the UNDRIP.

Article 32(3) of the UNDRIP promotes accountability by directing States to provide effective mechanisms for just and fair redress for projects affecting Indigenous People's water resources, and to take appropriate measures to mitigate adverse impacts. Moreover, Article 8(2)(b) directs States to provide effective mechanisms for actions with the effect of dispossessing Indigenous Peoples of their water. Despite the United States' position that existing systems for legal redress in the United States are consistent with the UNDRIP,[26] in reality existing systems are not just, fair, nor effective.

Demonstrating the United States' failure to provide effective redress for projects impacting Indigenous Peoples' water resources following its support of the UNDRIP, and demonstrating how United States' mechanisms for conflict resolution continue to fail Indigenous Peoples, the recent *Arizona v. Navajo*

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[21] *United States v. Winans*, 198 U.S. 371 (1905).
[22] *United States v. Winters*, 207 U.S. 564, 575-77 (1908).
[23] *Id.* and *infra* n. 20.
[24] *Arizona v. California*, 373 U.S. 546 (1963).
[25] See, e.g., *U.S. v. Adair* [*Adair I*], 723 F.2d 1394 (9th Cir. 1983.)
[26] *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. DEP'T ST. 8 (Jan. 12, 2011), https://2009-2017.state.gov/s/srgia/154553.htm.

Nation ruling held that the USDOI had no duty to take affirmative steps to establish or protect the water rights of the Navajo Nation from use and diminishment by competing water development.[27] With expansive lands along the Colorado River and several of its tributaries, the Navajo Reservation was set aside as a permanent home for the Tribe in an 1868 Treaty with the United States. The Navajo Nation was consistently excluded from federal projects allocating the water flow, resulting in a state of water insecurity for its members and unsettled water rights between the Navajo Nation and the State of Arizona.[28]

The Navajo Nation filed suit against the U.S. Government, attempting to compel the United States to assess water needs of their lands along the Colorado River and formulate a plan to meet those needs. The U.S. Supreme Court held that the 1868 Treaty did not require the United States to take affirmative steps to assess water rights, water needs associated with the establishment of the Navajo Reservation, or to develop water infrastructure or plans for the water that it acknowledged the U.S. Government held in trust for the Nation. In short, the Court affirmed that the Navajo Nation has water rights, acknowledged that the United States held those rights in trust for the tribe, but denied that the U.S. Government was required to do anything about it. As a result, the Navajo Nation indeed has a water right, but no path forward for resolving ongoing water insecurity.

Arizona v. Navajo demonstrates how the United States evades accountability for its ongoing transgressions against Indigenous Peoples, and that litigation is an ineffective way to resolve unquantified water rights. Despite the mandate of Articles 32(3) and 8(2)(b), mechanisms for establishing and protecting water rights, as well as for providing just and fair redress from projects that have affected Indigenous Peoples water resources, are ineffective. To securely access their water, Indigenous Peoples in the United States must enter into settlements – where they are often required to make concessions to provide funding for critical infrastructure to bring the water to the reservation – or brave the courts, where they will lose time, money, and ultimately may come out with no result at all. Moreover, because only Congress can appropriate funds to put towards building the infrastructure needed for bringing water to the reservations, Tribes that are successful in the courts will end up with only "paper water" rather than "wet water" – rights to the water, but without funding, no way to access it.

Indigenous Peoples must be involved in decisions implicating their water resources, as well as exercising authority over projects that impact their rights. The USDOI's consultation policy must be strengthened to conform with the UNDRIP's mandate of free, prior, and informed consent when projects implicate the interests of Indigenous Peoples and their relationships to vital resources such as water.

U.S. domestic laws and policies should enable Indigenous Peoples to establish and protect water rights and exercise water governance consistent with their unique values and economic, social, and cultural needs. To better comply with the mandate of the UNDRIP, Indigenous Peoples' right to water under United States laws and policies should encompass at a minimum what the UNDRIP calls for: comprehensive autonomy and authority in their diverse relationships to and uses of water. Such laws should be tailored to tribes' needs to allow for diversified and responsive water uses and livelihoods conducive to their reservations and the evolving climate of the earth, and should be drafted to achieve consistency with Indigenous Peoples' right to self-determination, as provided in Article 3 of the UNDRIP.[29]

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[27] *Arizona v. Navajo Nation*, 599 U.S. 555 (2023).

[28] For a more complete history, see *Arizona v. Navajo*, 599 U.S. 555, 574 (2023) (Gorsuch, J., dissenting).

[29] "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."