

# Government-to-Government Consultations with Native Peoples: From the Rhetoric of Respect to Real Results

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*[Ed. note: Dr. Dorough addressed the plenary session of the conference on Tuesday, March 15.]*

I WANT TO DRAW YOUR ATTENTION TO THE WORDS OF THE 1996 STATEMENT OF THE CHITIMACHA Nation, which I found on the internet when preparing my remarks today. This 1996 statement reflects many of the shared values of indigenous peoples around the globe. The statement provides that “[w]e must preserve and protect our natural resources, our people, and all Native Americans” and that “[w]e must always exist as a Nation by preserving our cultural heritage.” When I read these words, I immediately thought of how the whole of the Americas are the shared cultural heritage of our people. We have a huge responsibility, and hopefully through our words today, we can begin to share that responsibility with each of you.

We have been asked to address the “importance of consultation as well as help to explain the very different legal situations in Canada and the USA,” and to highlight actual “consultation techniques.” Clearly in the time designated to do so, we won’t be able to exhaust the matter. However, I trust that we’ll be able to draw your attention to some of the essential principles.

For a range of reasons, I would like to share with you the importance of the international human rights standards established in 2007, with the General Assembly’s adoption of the United Nations Declaration on the Rights of Indigenous Peoples (the declaration). This international human rights instrument reflects 25 years of dialogue, debate, and negotiation between indigenous peoples and nation-state representatives from across the globe. The document establishes the minimum standards necessary to promote and protect the basic human rights and fundamental freedoms of indigenous peoples worldwide. The declaration may be regarded by some as a non-legally binding document. However, it must be noted that it includes a number of important provisions which *have* been accepted as customary international law. It is safe to say that the declaration is one of a kind, and it is the first international instrument to be created on the basis of a constructive and reciprocal relationship between UN member states and indigenous peoples directly.

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As some of you may know, 144 countries approved the declaration on the floor of the UN General Assembly; 11 countries abstained from voting, while four countries voted against. Those four countries were the United States, Canada, New Zealand, and Australia. However, within a few short years, Australia endorsed the declaration, then New Zealand, followed by Canada. Most recently, on December 16, 2010, President Obama affirmed the U.S. government's support for the declaration. We have now entered a new era, where this document has an undisputed, universal legitimacy.

I want to quote a very important sentence from President Obama's speech expressing US government support for the declaration, one that I wholeheartedly agree with. President Obama stated: "I want to be clear: what matters far more than words—what matters far more than any resolution or declaration—are actions to match those words." Therefore, in relation to the theme of this panel, it will be the future actions of all those responsible for parks, parklands, and place-based conservation and management that will be the measuring stick for going beyond rhetoric and engaging in genuine consultation with indigenous peoples.

Before addressing the declaration standards on consultation and consent, I want to underscore the significant characteristics of human rights that are crucial to taking any actions "to match" the words of the declaration. The first element is the fact that human rights are indivisible, interdependent, and interrelated. This means that one right cannot be exercised and enjoyed without all other rights being recognized and respected. In addition, human rights are universal, and apply to all individuals and all peoples equally, no matter what their status, condition, race, creed, or color happens to be. And, finally, consistent with the distinct cultural context of indigenous peoples, the declaration makes explicit reference to a broad range of collective or group rights, as well as their individual human rights.

Now let me turn to the main clusters of declaration articles addressing consultation and consent that are relevant to the theme of this panel. First of all, there are a number of provisions within the declaration that provide the framework for good governance in decision-making processes, and the necessary partnerships between leaders, our citizens, and others, including non-indigenous governments, and other third parties. The first cluster addresses the right of self-determination and the right of self-government. In particular, article 3 of the declaration states the following:

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.

The right of self-determination is regarded as the prerequisite for the exercise and enjoyment of all other human rights, and it is a fundamental right for all peoples, including indigenous peoples. Further, article 4 provides the following:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

This language dramatically contrasts with the notion of being merely "participants of conservation initiatives," especially when read in relation to all of the other declaration articles and in particular, article 29, paragraph one:

Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall estab-

lish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

The second cluster deals with indigenous peoples and their profound relationship to their environment and their right to lands, territories, and resources. In regard to rights to lands, territories, and resources, actual land ownership and substantively addressing outstanding such claims, the declaration articles 25, 26, 27, 28, 29 (again), and 32 focus upon these critical collective indigenous human rights. When one takes into consideration the interrelated nature of human rights, the intersection of the right of self-determination and rights to lands, territories, and resources essentially leads us to the third cluster of articles: the need for dialogue and consultation with Indigenous peoples to ensure their free, prior, and informed consent, which have been addressed in articles 18 and 19 of the declaration:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The concept of free, prior, and informed consent (or FPIC) is an essential dimension of our right to self-determination. Too often, consent is replaced with free, prior, and informed *consultation*. FPIC is about the right to give consent or to not give consent. For a broad range of reasons and not solely on the basis of the past history of indigenous/non-indigenous relations, our peoples should never be disenfranchised of this element of the right to self-determination. Specifically in relation to consultation, consent, and the indigenous right of self-determination within the context of parks, parklands, and place-based conservation, the following matters of are all relevant for inclusion and consideration throughout consultation processes:

- Subsistence hunting, fishing, and gathering rights (article 20),
- Indigenous knowledge and medicinal plants, etc. (articles 24, 31),
- Human remains, sacred sites, and repatriation (articles 11, 12, 34 spiritual practices),
- Treaties, agreements, and other constructive arrangements, including those concluded between states and inter-governmental organizations (preamble paragraphs, and article 37),
- The accurate reflection of indigenous histories (article 15),
- Our right to establish our own priorities for development (article 23),
- Transnational borders, including international parks and protected areas (article 36),
- Access to technical and financial resources (article 39),
- Partnerships (preamble and article 46), and
- Research and transfer of knowledge.

The remaining articles that I want to specifically refer to are articles 27 and 32. Article 27:

States shall establish and implement ... a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, [and] customs

... to recognize and adjudicate the rights of indigenous people pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used....

Article 32, paragraph two:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of minerals, water or other resources.

These articles are central to any and all decision-making and consultation processes. Even in Alaska, the examples of indigenous/non-indigenous consultation range from non-existent to woefully inadequate. It is difficult to generalize, and even more difficult to provide an exhaustive list of case studies. In relation to the ANILCA, direct consultation with Alaska Native people should have taken place to ensure that our distinct rights and interests were actually being protected, especially in regard to subsistence hunting, fishing, and gathering rights. Even more difficult to resolve are the perennial issues surrounding the Arctic National Wildlife Refuge and the rights and interests of Alaska's first peoples, and those of the conservation and development stakeholders. This represents an extraordinary array of conflicting world perspectives. However, it is clear that effective processes are ones that are designed to be proactive, open, and understandable to the people on the ground. They must be inclusive of the perspectives, customs, practices, opinions, worries, and visions of indigenous peoples. And, they must respect the rights and interests of the indigenous peoples concerned.

In regard to taking the action that President Obama stressed, the future challenges of implementation of the declaration, either in the context of place based conservation or any other subject matter, are great to be sure. However, partnerships, consultation, and the actual accommodation of the basic human rights of indigenous peoples are all at the heart of any successful consultation process. This is where the rubber hits the road. Each of you has the opportunity to educate yourselves about the declaration and to utilize the human rights standards embraced by this unique document as guidelines for your work. In this way, the implementation of the declaration can begin in the specific context of place-based conservation initiatives and throughout the parks, reserves, and lands that each of you identify yourselves with. You can begin to make a difference out there and on the ground. Along with indigenous peoples you can begin to breathe life into the worlds of the declaration.

Only through constructive partnerships, that allow us to openly and respectfully discuss our differences, can we reach open and fair consultation processes. Only through respect for our diverse values, and through the mutual exchange of knowledge about these values, can we build a solid foundation for future consultation, which will ultimately foster lasting and good relations. And, I believe that the UN declaration is a central, substantive, and comprehensive starting place for understanding, and for the realization of those good relations.