



# USET

SOVEREIGNTY PROTECTION FUND

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Transmitted via email to:  
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March 11, 2022

The Honorable Raul Grijalva  
Chairman  
House Natural Resources Committee  
1324 Longworth House Office Building  
Washington, DC 20515

Dear Chairman Grijalva,

We write on behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) in response to a March 7<sup>th</sup> Tribal briefing regarding revisions to H.R. 3587, the Requirements, Expectations, and Standard Procedures for Effective Consultation with Tribes (RESPECT) Act. The RESPECT Act would codify Tribal consultation requirements for all federal agencies, including independent agencies. As we have previously indicated, USET SPF strongly supports the spirit and intent of the RESPECT Act, including its application to independent agencies. However, we continue to believe that the bill requires additional refinement before it can receive further consideration.

USET SPF is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.<sup>1</sup> USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

### **Introduction - Need to Codify Tribal Consultation**

An essential aspect of the federal trust responsibility and obligations to Tribal Nations is the duty to consult on the development of federal policies and actions that have Tribal implications. This requirement is borne out of the sacred relationship between the federal government and Tribal Nations, as well as numerous treaties, court cases, laws, and executive actions. It is a recognition of our inherent sovereignty and self-determination.

However, the duty to consult, despite existing policies and agreements, including Executive Order (E.O.) 13175, is not consistently undertaken or applied, nor is it codified in law. As a result, Tribal Nations continue to

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<sup>1</sup> USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

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experience inconsistencies in consultation policies, the violation of consultation policies, and mere notification of federal action as opposed to a solicitation of input. Letters are not consultation. Teleconferences are not consultation. Providing the opportunity for Tribal Nations to offer guidance and then failing to honor that guidance is not consultation.

USET SPF has long called for a move beyond the requirement for Tribal consultation via Executive Order to a strengthened model achieved via statute. We are pleased that Chairman Grijalva continues to prioritize the achievement of this objective via the RESPECT Act, including ongoing efforts to hone and sharpen the bill's language and provisions. We recognize that this is a significant undertaking, with a need to satisfy the diverse circumstances and interests of Tribal Nations across the country. As the Chairman works closely with Indian Country to draft a meaningful bill inclusive of our diversity, we offer the following opportunities for improvement:

### **Support for Consensus Reaching Language**

USET SPF has consistently maintained that Tribal consent for federal action is most emblematic of our diplomatic relationship and required to truly fulfill federal trust and treaty obligations. We view the inclusion of language in the bill directing that federal officials make good faith efforts to reach consensus with Tribal Nations as a significant advancement toward that goal. In order to strengthen this provision, we recommend the addition of language directing federal agencies to develop consensus-seeking methodologies and procedures in consultation with Tribal Nations.

### **Tribal Intervention - Protection Against Incorrect Findings of No Tribal Impact**

USET SPF understands that the RESPECT Act, in part, seeks to ensure federal agencies more fully deliver upon their responsibilities to consult with Tribal Nations on covered actions, including by making them accountable for understanding impacts to Tribal Nations via a Tribal Impact Statement. This is an important goal, as many federal agencies do not take the time to adequately study Tribal impacts. However, we also note that it is not uncommon for federal agencies to incorrectly conclude that their actions have no Tribal impact. As currently written, the RESPECT Act provides Tribal Nations with the opportunity to seek judicial review when federal agencies fail to properly consult on actions affecting Tribal interests. However, legal action may only be possible **after** the agency action has already taken place. By this time, in the case of cultural resources in particular, irreparable damage may already be done. While legal action would certainly be appropriate, it cannot ever replace damaged or destroyed cultural resources. In order to avoid adverse impacts following an agency finding of no impact, there must be an opportunity for Tribal Nations to appeal a finding of no Tribal impact or intervene prior to agency action.

### **Role of Tribal Organizations**

While we maintain that only Tribal Nations and the United States share in the sacred and unique government-to-government, sovereign-to-sovereign trust relationship, we do not believe the critical role of Tribal organizations is appropriately reflected in the most recent version of the RESPECT Act. Tribal organizations do play a unique, valuable, and complimentary role in Tribal consultation in support of our membership, including advocating the consensus positions of Tribal Nations from a particular region or across the country. We would like to have additional conversations with your office around the inclusion of Tribal organizations to ensure that they are part of the process.

### **Inappropriate Status for ANCs**

Similarly, while the bill does take steps to reinforce that for-profit Alaska Native Corporations (ANCs) are not Tribal governments, it also places them on equal footing during the consultation process. While we do not dispute that ANC's play a critical role that is also complimentary to Tribal

Nations that reside within the borders of Alaska, we feel as though this direct inclusion undermines the government-to-government relationship between Tribal Nations and the United States and dilutes consultation as a diplomatic tool.

#### **Use of Non-Tribal Entities to Obtain Cultural Information**

We are pleased to see the inclusion of language around compensation for Tribal Nations that conduct documentation work at the request of a federal agency. However, it is important to note that federal agencies regularly utilize non-Tribal entities for this purpose, as well. Often, these non-Tribal entities provide inaccurate information to federal agencies regarding Tribal history and culture. This allows federal agencies to erroneously find that an action has no Tribal impact. We suggest that the RESPECT Act seek to limit this practice and ensure that Tribal Nations, as the rightful keepers of our culture and history, are the final arbiters of this information.

#### **Protection of Sensitive Information**

We are similarly supportive of the inclusion of provisions aimed at the protection of sensitive information related to the location of cultural or sacred sites and cultural or religious practices. We appreciate the requirement for federal agencies to consult before sharing information, as well as the prohibition against publication. In order to further strengthen this provision, we ask that federal agencies also be explicitly prohibited from sharing this information under a Freedom of Information Act request without the express consent of the affected Tribal Nation(s).

#### **Conclusion**

The time is long overdue for the U.S. work to reform the Tribal consultation process, as conducted by agencies across the federal government. USET SPF strongly supports the codification of consultation requirements for all federal agencies and departments. This is consistent with our efforts to modernize the federal trust relationship, including ensuring that Tribal Nations are full and equal participants in the shaping of federal Indian policy. We extend our appreciation to the Chairman and his staff for your continued efforts to hone and shape the RESPECT Act in a way that honors trust and treaty obligations, as well as Tribal Nation guidance, and results in a more diplomatic, respectful, and just Nation-to-Nation relationship. We look forward to the opportunity to further refine the bill with a goal of seeing enacted in the near future. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at [LMalerba@usetinc.org](mailto:LMalerba@usetinc.org) or 615-838-5906.

Sincerely,



Kirk Francis  
President



Kitcki A. Carroll  
Executive Director